The Office of the United Nations High Commissioner for Human Rights

Business and Human Rights: 'The Accountability and Remedy Project'

BACKGROUND PAPER

Background paper accompanying draft guidance prepared by OHCHR for the purposes of inclusion in its final report to the Human Rights Council pursuant to A/HRC/Res/22/26, para. 7

This paper accompanies the CONSULTATION DRAFT containing the draft guidance in relation to the OHCHR Accountability and Remedy Project. This paper has been prepared to provide stakeholders with additional information and context to the components of the Accountability and Remedy Project.

The Consultation Draft is available via:

ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

Executive summary

Ensuring access to effective remedy for those impacted by business-related human rights abuses is one of the three pillars of the United Nations *Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework* ('the UN Guiding Principles') and the right to a remedy is a core tenet of the international human rights system. However, access to effective remedy for business-related human rights abuses is not yet a reality for many affected stakeholders on the ground and perpetrators are in many cases not held to account.

To help address this situation, the Office of the High Commissioner for Human Rights (OHCHR) launched the "Accountability and Remedy Project" (ARP) in November 2014, following up on previous OHCHR research in this area and pursuant to mandate from the Human Rights Council (HRC resolution 26/22). The aim of the ARP was to build upon the guidance in the UN Guiding Principles by providing recommendations for practical action by States to enhance accountability and access to remedy, adaptable to respond to different legal structures, traditions, economic conditions and stages of development.

This paper explains the background, scope and methodology of the ARP, and provides an overview of key findings in relation to its six Project Components (or work streams). It is intended as a companion to the 'Consultation Draft'[1] which sets out draft guidance to States to enhance corporate accountability and access to remedy in cases of business involvement in human rights abuses, with particular focus on severe cases of abuse.

The 'Consultation Draft' provides guidance to States as to future action to enhance accountability and access to remedy in cases of business involvement with human rights abuses. The guidance builds on more than one year of research and multi-stakeholder consultations undertaken for the Accountability and Remedy Project. To better understand realities on the ground and help ensure that the guidance is both fit-for-purpose and capable of being implemented, OHCHR undertook a large-scale global consultation process coupled with more targeted, detailed research. The focus of the ARP research has been on gathering data on how domestic systems currently function when companies are involved in severe human rights abuses.

The ARP has focused on access to remedy through judicial mechanisms, which should form the backbone of a broader system of remedy, including also non-judicial and operational-level grievance mechanisms. The project addresses specific issues that research has confirmed may present barriers to accessing remedy in cases of business involvement in human rights abuses, and where further clarification and guidance to States was needed.

Separately and together, the guidance is intended to provide purpose-built solutions that are rooted in reality and adaptable to many different legal traditions, systems and cultures. The intention has been to provide a basis against which States can systematically evaluate the effectiveness of their own legal systems with respect to tests for corporate liability, funding options for legal claims, civil remedies, criminal sanctions as well as specific enforcement issues and challenges. They can be used to identify gaps and problem areas in domestic legal systems, including areas where technical assistance or capacity building may be necessary.

[1] The Consultation Draft is available via:
ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

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A. Background

Ensuring access to effective remedy for those impacted by business-related human rights abuses is one of the three pillars of the United Nations *Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework*[2] ('the UN Guiding Principles'), endorsed by the United Nations Human Rights Council in June 2011.[3] The central role of access to effective remedy in the UN Guiding Principles reflects the fact that right to a remedy is a core tenet of the international human rights system. However, access to effective remedy for business-related human rights abuses is not yet a reality for many affected stakeholders on the ground, and perpetrators are in many cases not held to account.

To address this problem, the Office of the High Commissioner for Human Rights (OHCHR), as part of its mandate to advance the protection and promotion of human rights globally, in 2013 commissioned a study into the effectiveness of domestic judicial mechanisms in cases of alleged business involvement in gross human rights abuses.[4] The study found that victims of such abuses face considerable legal, financial, practical and procedural barriers to accessing judicial remedies, which in many cases can prove insurmountable. Furthermore, variations between national jurisdictions may exacerbate inequalities and create legal uncertainty for companies and affected persons. The study concluded that the present system of domestic law remedies for these kinds of cases is "patchy, unpredictable, often ineffective and fragile"[5] and outlined a number of areas where further clarification of policy and principle were necessary.

At its June 2014 session, in recognition of the need for greater international focus on the issue of access to remedy and of the need for additional guidance on implementation of the Access to Remedy Pillar of the UN Guiding Principles, the Human Rights Council requested the High Commissioner to:

> "*continue work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group, to organize consultations with experts, States and other relevant stakeholders to facilitate mutual understanding and greater consensus among different views, and to publish a progress report thereon before the twenty-ninth session of the Human Rights Council, and the final report to be considered by the Council at its thirty-second session".*[6]

In November 2014, and pursuant to this mandate from the Human Rights Council, OHCHR launched the "Accountability and Remedy Project". This background paper accompanies the "Consultation Draft,"[7] which sets out draft guidance to enhance corporate accountability and access to remedy in cases of business involvement in human rights abuses, with particular focus on severe cases of abuse. This draft guidance is the culmination of over one year of research and consultations.

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[2] A/HRC/17/31.
[3] HRC/Res/17/4.
[4] Zerk, J.A., 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies', prepared for OHCHR, February 2014. Available at: http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx. See pp. 28-29.
[5] Zerk, J.A, Ibid., p.7.
[6] A/HRC/Res/26/22, para. 7.
[7] See: ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

B. Aims of the Accountability and Remedy Project

The UN Guiding Principles on Business and Human Rights confirm that:

> *As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy* (Guiding Principle 25).

Moreover:

> *States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy* (Guiding Principle 26).

The Accountability and Remedy Project was initiated by OHCHR to help States identify practical ways to improve their implementation of the UN Guiding Principles, particularly in respect of the "Third Pillar", which relates to access to remedy in cases of business related human rights abuses. The aim was to build upon the guidance in the UN Guiding Principles by providing further guidance for practical action by States, which are sufficiently adaptable to respond to different legal structures, traditions, economic conditions and stages of development.

C. Scope of the Accountability and Remedy Project

The range of issues covered by the "Third Pillar" of the UN Guiding Principles, and the sheer diversity of legal responses and challenges in different jurisdictions around the world, has meant that some prioritisation of issues and resources has been needed to deliver the project aims in the required timeframe.

The initial study commissioned by OHCHR[8] outlined a number of areas where more clarification and consultation would contribute to enhancing accountability and access to remedy. It also suggested a particular focus on the work of domestic prosecution bodies, given the apparently very low levels of activity by such bodies in prosecuting business enterprises for involvement in gross human rights abuses. Based on the findings of this initial study, and in consultation with experts, OHCHR chose six distinct, yet interrelated areas of focus that would together contribute to significantly enhancing corporate accountability and access to remedy in the short-to medium term:

1. Domestic law tests for corporate legal liability
2. Roles and responsibilities of interested States in cross-border cases
3. Overcoming financial obstacles to legal claims
4. Good practices in criminal law sanctions
5. Good practices in civil law remedies
6. Improving the effectiveness of domestic prosecution bodies

[8] Zerk, J.A., note 2 above.

Focus on substantive and practical aspects

The six project components were chosen following preparatory work, and in consultation with experts, as issues that urgently required either (a) clarification (i.e. as a precursor to necessary legal development) or (b) action by States to make their existing domestic legal systems work more effectively for victims of business-related human rights abuses in the short to medium term.

The ARP's focus on substantive and practical aspects is not to diminish the importance of procedural reforms. Domestic legal systems presently contain many procedural obstacles to remedy. Because of the influence of procedural issues on legal costs, the guidance related to overcoming financial obstacles to legal claims contains a number of recommendations as to procedural matters.

Focus on domestic judicial mechanisms

Consistent with the scope of the initial study, the focus of the Accountability and Remedy Project has been on *judicial* mechanisms. The decision to focus on judicial mechanisms for this project was made in recognition of the fact that the extent to which there is access to remedy in any jurisdiction, including through non-judicial remedial mechanisms, depends ultimately on the existence of effective domestic judicial mechanisms. The presence of effective domestic judicial mechanisms in the background can greatly enhance the effectiveness of non-judicial mechanisms by providing appropriate incentives to parties to participate fully and in good faith, by offering potential means of enforcement of agreements and settlements, and by offering an avenue for authoritative resolution of a claim in cases where a non-judicial mechanism does not result in an acceptable outcome for one or both parties to a case. As is stated in the UN Guiding Principles, "[e]ffective judicial mechanisms are at the core of ensuring access to remedy".[9]

The UN Guiding Principles makes clear that State-based and operational-level grievance mechanisms should be part of a system of remedy. [10]The guidance resulting from the Accountability and Remedy Project recognises the potential contribution of non-judicial mechanisms, for instance as a way of helping to reduce the financial obstacles to remedy faced by adversely affected individuals and groups and as one area where further international cooperation and coordination may be needed (see the Consultation Draft, sections 2, 3 and 6).

Focus on severe human rights abuses in information gathering and research

For the purposes of its information gathering and research activities, OHCHR has focussed its data-gathering efforts on a set of abuses that may be classified as 'severe human rights abuses.' This choice was made for several reasons. First, in view of the tight timetable for research and reporting under Human Rights Council resolution 26/22, a decision was taken to prioritise for study and action those abuses which are most egregious in nature and which carry the severest consequences for victims. Second, severe human rights abuses often take place in a context that makes obstacles to access to remedy and accountability particularly challenging and therefore warrant particular attention. Third, the selection of a discrete set of abuses for research purposes enabled meaningful comparative analysis and meaningful conclusions to be drawn about the effectiveness of different approaches and strategies under different domestic legal regimes.

[9] A/HRC/17/31, Guiding Principle 26, Commentary.
[10] Ibid., Guiding Principle 25, Commentary.

A list of the categories of offences, abuses and harms for which data was collected for the purposes of the Accountability and Remedy Project appears below. **However, this list is intended to be illustrative only.** It is not intended as a definitive or exhaustive list of the categories of abuses that may be regarded as severe human rights abuses. Nor should it be taken to suggest the existence of any special categories of human rights or human rights abuses.

Box 1: Categories of offences, abuses and harms for which data was collected

- murder
- serious physical assault
- torture and other forms of cruel, inhuman or degrading treatment
- war crimes
- crimes against humanity
- genocide
- summary or arbitrary executions
- enforced disappearances
- arbitrary and prolonged detention
- slavery
- slavery like practices, including forced labour and human trafficking
- worst forms of child labour
- grave and systematic abuses of labour rights
- serious violations of workplace health and safety standards resulting in widespread loss of life or serious injury
- large-scale environmental pollution or damage
- other (a) grave or (b) large scale abuses of economic, social or cultural rights

Business enterprises can have an impact on virtually the entire spectrum of internationally-recognised human rights.[11] Furthermore, the issues that OHCHR's research uncovered, and which the guidance is designed to address, are in most cases not limited to 'severe' human rights abuses only. In many cases, it will also be inappropriate or impractical to carve out special regimes for a specific set of abuses. Thus, the guidance that is set out in the Consultation Draft is generally not limited to 'severe' human rights abuses, and is not intended to be specific to the abuses that appear in the above illustrative list. Nevertheless, while the guidance as a whole is not limited to severe human rights abuses, in some contexts (including e.g. some cross-border contexts and situations relating to domestic prosecution of business-related human rights abuses), prioritizing 'severe' abuses is warranted, and thus the guidance notes this distinction.

The Accountability and Remedy Project against the background of wider challenges

Weak domestic legal systems have many causes. As stated in the Commentary to the UN Guiding Principles on Business and Human Rights, the effectiveness of judicial systems can be undermined by political problems, such as corruption of judicial processes, or a lack of independence from economic or political pressures from other State agents or from business actors. Even where appropriate legal regimes exist on paper, lack of resources can seriously undermine the ability of domestic prosecutors, regulators and individual complainants to enforce the law in practice. Domestic legal regimes can be

[11] See Guiding Principle 12, Commentary.

further weakened in practice by insufficient protections from reprisals for victims and human rights defenders.

These wider political, practical, procedural and economic challenges to rule of law are beyond the scope of the Accountability and Remedy Project. The aim of the Accountability and Remedy Project is to contribute to State efforts to more effectively ensure accountability and access to remedy by providing States with (a) guidance in respect of specific policy themes, (b) a series of "elements" to guide more effectiveness and coherency of their own regimes and, (c) to the extent that gaps and problems are found, a menu of reform options to consider. In other words, implementing the guidance set out in this report is not a guarantee that a State is fulfilling its "Duty to Protect" as set out in the UN Guiding Principles. Rather, the guidance in this report is a tool to help States towards ensuring comprehensive protection of human rights and accountability for business-related human rights abuses, as part of a broader strategy to strengthen rule of law and access to justice in the different domestic law jurisdictions.

E. Accountability and Remedy Project methodology

To better understand the challenges that exist at domestic level, OHCHR has gathered information from a wide range of jurisdictions about the functioning of domestic legal systems in practice in business-related human rights cases.[12]

Between 1 May and 1 August 2015, OHCHR sought multi-stakeholder inputs through the 'Open Process', a global online consultation where respondents were invited to provide information on how domestic law systems function in practice in cases of allegations of business involvement in severe human rights abuses. Respondents were invited to answer a series of questions relating to tests for corporate legal liability applied in criminal, quasi-criminal and civil/private law regimes (project component 1), the financial risks of civil litigation and ways to help overcome these (project component 3), current practices with respect to criminal law sanctions (project component 4) and civil law remedies (project component 5). OHCHR received approximately 130 responses from 60 different jurisdictions, representing a diversity of legal systems and a balance between different regional groups. The Detailed Comparative Process has sought more in-depth, comparative information from legal experts and victims' representatives in relation to 20+ focus jurisdictions from UN different regions, a diversity of legal traditions and different levels of economic development.

This comparative research has been complemented by reviews of existing studies and literature, interviews with prosecutors, targeted research projects relating to international cooperation in business and human rights cases, multi-stakeholder consultative meetings with experts, an interactive workshop with representatives of States, and consultative processes at key milestones which have involved both face-to-face meetings and opportunities to submit written comments.

The intention behind gathering information on how different jurisdictions function when business enterprises are involved in human rights abuses has been to better understand in practice what guidance would be 'fit for purpose' but also realistic given the diversity

[12] Some legal terms may have different meanings between different legal systems. For a 'glossary' of how OHCHR has applied different legal terms in the context of the ARP, see: www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

of legal traditions and approaches. The intention has not been to compare and contrast strengths and weaknesses of specific jurisdictions, but rather to draw out generalized lessons and findings that yield insights into what issues need attention in most, if not all, jurisdictions.

F. Structure and underlying rationale for the draft guidance

The contents of the 'Consultation Draft' provide draft guidance to States as to future action to enhance accountability and access to remedy in cases of business involvement with human rights abuses. Separately and together, the guidance provides targeted solutions that are rooted in reality and adaptable to many different legal traditions, systems and cultures.

Structure of guidance and potential application by States

The guidance arising from the six project components of the Accountability and Remedy Project takes the form of a series of "elements of good State practice". In relation to domestic law tests for corporate legal liability (Project Component 1) and roles and responsibilities of interested States in cross-border cases (Project Component 2), these elements of good State practice are arranged according to policy themes or ideas (referred to in the Consultation Draft as "Policy Objectives") which reflect themes, ideas and policy goals that would be recognizable in many, if not most, domestic legal systems.

The elements of good State practice set out in the Consultation Draft are intended as an indication of the kinds of features that would exist in a domestic legal system that has developed effective responses to challenges of business-related human rights abuses in terms of corporate accountability and access to remedy. They provide a basis against which States can systematically evaluate the effectiveness of their own legal systems with respect to tests for corporate liability, funding of legal claims, civil remedies, criminal sanctions and specific enforcement issues and challenges. They can be used to identify gaps and problem areas in domestic legal systems, including areas where technical assistance or capacity building may be necessary. They are designed with a view to encouraging greater innovation, international dialogue and cross-fertilization of ideas between jurisdictions.

The elements of good State practice set out in the Consultation Draft will be complemented by generalized illustrative examples taken from OHCHR's extensive research that can be adapted to specific local needs. However, for the sake of brevity and simplicity and to allow stakeholders to more easily comment on the text of the recommendations, the Consultation Draft is presented without illustrative examples.

Recognizing the diversity of domestic legal systems

There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues that form the subject matter of the ARP. For instance, some legal systems are highly codified, whereas others provide to a greater extent for legal development through case-law. Some domestic legal systems are adversarial, whereas others are inquisitorial, and some contain elements of both. In some jurisdictions, corporate criminal liability is not a recognised legal concept, while in others corporate criminal liability is provided for only

on a limited basis, and in yet others there is a possibility of corporate criminal liability for virtually all crimes.

Differences between jurisdictions are to be expected. However, weak regulation and enforcement in many jurisdictions poses challenges, including to the effective regulation of cross-border business activities, and have contributed to an international remedial system that is "patchy, unpredictable, often ineffective and fragile."[13] Problems of weak regulation and enforcement are not confined to any one State or group of States. **There is scope for improvement in every jurisdiction in terms of access to remedy for business-related human rights abuses.**

The 'elements of good State practice' are thus designed to be flexible and to take account of structural, cultural, and resource differences between jurisdictions. The various elements of the guidance in this report are expressed in a way that renders them readily adaptable to different kinds of domestic legal systems. The elements of good State practice express broad objectives that may be met in different legal systems in different ways, depending on prevailing local structures and conditions. It is hoped that these examples of elements of good State practice, together with further "illustrative examples" will enable States to better evaluate the effectiveness of their own legal systems and provide concrete examples of how to meet policy objectives in ways that respond to their specific legal contexts.

States may implement these recommendations through various national-level processes, for example as part of the development of National Action Plans on business and human rights, through formal legal review processes, as part of a review of human rights protection and access to remedy more generally, or other suitable processes. The guidance may also feed into relevant processes at the sub-regional, regional or international level aimed at strengthening the protection of human rights against adverse impacts by business enterprises or improving coordination between States.[14]

The need for policy coherence

In many cases, legal and policy reforms will have more impact as a package of measures than on their own. Some of the elements of "good State practice" used in this guidance will depend for their effectiveness on other supporting measures and some may be inter-dependent. Awareness of this inter-connectedness is needed to avoid the piece-meal development of legal responses for business and human rights related issues that has thus far hampered the effectiveness of domestic judicial mechanisms in many jurisdictions. As the UN Guiding Principles make clear, States should strive for both vertical and horizontal policy coherence in the development of law and policy that has implications for business and human rights. As an aid to this analysis, the intention is to highlight key linkages between different elements of good practice, and different aspects of this guidance, in the final version of the report to be provided to the Human Rights Council.

In many cases, the best way of **identifying areas for improvement** in the domestic legal response to business-related human rights abuses will be **through a formal legal review**. To assist with this, OHCHR has developed a **model terms of reference** for a formal legal review of the effectiveness of domestic legal regimes in respect of:

[13] See note 4 above.
[14] See further Project Component 2 below.

- Tests for corporate legal liability (project component 1);
- Criminal law sanctions (project component 4); and
- Civil law remedies (project component 5).

The model terms of reference for a formal legal review can be found Annex 1 to this Background paper. A legal review could be a standalone exercise, or it could be incorporated as part of a process to develop or update a National Action Plan or strategy on business and human rights, or as one component in a broader review of access to remedy at the national level. It is anticipated that this model terms of reference will require some adaptation to respond to local challenges and needs, and to fit with existing local structures and traditions. However, States may benefit from sharing experiences with using the legal review template, or may offer technical or other forms of cooperation to other States.

E. Overview of the Accountability and Remedy Project components

This section provides an overview of the aims and high-level findings of each of the six components of the Accountability and Remedy Project. It is intended to provide stakeholders with additional context and background to the draft guidance presented in the Consultation Draft. This section is designed to help stakeholders further understand the rationale for the different elements of good practice, and how these elements would help overcome the challenges and issues that were identified through OHCHR's research and stakeholder consultations.

1. Project Component 1: Domestic law tests for corporate legal liability

The first component of the Accountability and Remedy Project focused on domestic law tests for corporate legal liability for involvement in human rights abuses, with a particular focus on severe abuses. Through its research, OHCHR aimed to clarify how different domestic legal systems attribute and assess corporate legal liability in cases of business-related human rights abuses and, based on these findings, to develop good practice guidance to States on factors to take into account in the judicial determination of legal liability in such cases.

Why is further action by States needed in relation to domestic law tests for corporate legal liability for human rights abuses?

Of the many legal barriers to remedy faced by victims of business-related human rights abuses, the lack of clear and coherent tests for corporate liability in many, if not most, jurisdictions, is one of the most serious and fundamental. Lack of clarity in legal tests, and the resultant lack of predictability as to how they may be applied in specific cases, **seriously undermines the usefulness and effectiveness of domestic legal regimes, both as a form of deterrence and as a means of obtaining redress for victims in cases of business-related human rights abuses**.

This lack of clarity and consistency means that for relevant stakeholders (for instance, victims, victims' legal representatives, prosecutors, regulators and companies), there is

no clear basis for decision-making about appropriate legal action and responses. Lack of clarity and coherence also has the potential to greatly **complicate and draw out legal proceedings**, which adds to the **costs** and **financial risks** of litigation and prosecutions and leads to **further inefficiencies** in the use of publicly funded judicial resources (see discussion of Project Component 3, below). Finally, lack of clarity and coherence in domestic tests for corporate liability in business-related human rights cases **undermines the legal certainty needed for sound investments by companies, efficient corporate management, and sustainable economic growth**.

Empirical research carried out by OHCHR in the course of the Accountability and Remedy Project confirms that while there is considerable diversity or uncertainty in the way different domestic legal systems presently approach questions of corporate legal liability, it is possible to identify common themes in domestic law tests for corporate liability. These domestic law tests are underpinned by policy ideas and principles that transcend different legal systems, structures, cultures and stages of economic development. These policy ideas and principles form the basis of the "policy objectives" used to organise the guidance presented in the Consultation Draft.

A note on methodology

Stakeholders were invited to submit information on how domestic legal systems currently function when companies are involved in severe human rights abuses through the Open Process online consultation. Stakeholders were asked a number of questions relating to the possibility in theory and practice of corporate liability for severe human rights abuses under criminal and quasi-criminal law and under civil (or "private") law. Further comparative information was sought from Detailed Comparative Process to enable a more granular understanding of approaches and challenges in different domestic legal systems, and to help identify lessons of general application.

Recognising the different functions and purposes of criminal, quasi-criminal and civil regimes, and the interrelationships between these different regimes

The scope of this component of the ARP includes liability under criminal, quasi-criminal and civil (or "private") law. These different legal regimes serve different purposes within a domestic system. Criminal law concerns the protection of the public from conduct deemed to be harmful, and regulates the conduct of private actors with a view to prevent, punish and deter such behaviour. Quasi-criminal regimes regulate conduct that is deemed harmful or which is required (e.g. for reasons of public safety) to meet certain regulatory standards. However, the requirements that must be satisfied to establish a quasi-criminal offence may not be as stringent as those required to establish a criminal offence. Criminal law regimes and quasi-criminal law regimes are often described as "public law" regimes because they are typically enforced by public authorities.

In contrast, private law regimes govern relationships between private actors. A private law claim in the context of corporate human rights abuses provides a mechanism for affected individuals or group to seek a remedy directly from the actor that caused the harm. A successful criminal conviction will typically demand a higher standard of proof than that required for the purposes of a civil law claim.

However, such distinctions are not always clear-cut. Some criminal law regimes provide for compensation to victims, and private law regimes may contain punitive elements. In jurisdictions where criminal liability is not possible for companies (i.e. as "legal" rather than "natural" persons), quasi-criminal regimes play a vital role in enforcing legal standards and sanctioning corporate wrongdoing.

Corporate legal liability: key issues of context

A "corporation" is defined, for the purposes of the Consultation Draft, as an organisation of people recognised in law as a legal entity (or a "legal person"). A corporation (or a "company") has a legal existence that is separate from its owners. This feature of company law regimes is often referred to as "separate legal personality". Corporate legal liability refers to the **legal liability of a corporation as a whole**, as opposed to the legal liability of individual officers and employees.

All jurisdictions recognise the possibility of corporate legal liability for wrongful corporate acts, although there are differences from jurisdiction to jurisdiction in the **type of legal liability that a corporation can attract**. In some jurisdictions this may be criminal liability, quasi-criminal liability[15] and liability under private law[16] (or "civil liability"). However, in some jurisdictions, corporations may only attract quasi-criminal and civil liability, because criminal liability is only applicable to natural persons. In those jurisdictions that do not permit criminal liability for corporations as "legal persons", individual officers in a company may be liable if they have committed or been complicit in a criminal act, but the corporation cannot be convicted under criminal law.

Some jurisdictions which recognise the concept of corporate criminal liability have included general provisions in their criminal codes, introducing the possibility of corporate liability for all criminal offences under the law of the jurisdiction (perhaps with limited exceptions for specific offences). Alternatively, specific domestic criminal law regimes may include specific provisions clarifying the nature and extent of corporate criminal liability under that regime. In recent years, some jurisdictions which have not traditionally recognised the concept of corporate legal liability have made or considered changes to domestic legal regimes to allow for the possibility of corporate criminal liability, if not generally then for a series of explicitly named offences.

Attributing fault to a corporate entity

Because companies are a legal construction, the application of traditional tests for fault, which have been designed for individuals, can be problematic. This is a particular problem in relation to criminal offences and private law sources of liability that require proof that the corporation *intended* the harm or intended to commit the acts that caused the harm. In many jurisdictions, it is only possible to prove that a corporation intended the harm if it is possible to identify individuals (e.g. senior managers) working on behalf of the company who themselves intended the relevant harm. In these circumstances, the intentions of these individuals can be attributed to the company to supply the necessary element of corporate criminal "intent". This is referred to as **the "identification" approach** to corporate criminal liability.

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[15] Criminal or quasi-criminal regimes depend for their enforcement on public law enforcement authorities and regulatory bodies. For the purposes of this project, the term "quasi-criminal" liability is used interchangeably with "administrative liability" and refers to liability for breaches of legal standards that usually have some, but not all, of the qualities of criminal offences. For instance, it may not be necessary for a successful prosecution of a "quasi-criminal" or "administrative" offence to prove the level of intent or mental blameworthiness that would be necessary to establish that a criminal offence had been committed. Quasi-criminal, or "administrative" offences tend to have a more "regulatory" character than criminal offences.

[16] For the purposes of this document, the term "private law" is used interchangeably with "civil law" for the branch of law that is concerned with relationships between private actors, rather than between the authorities and private actors, and which are enforced by way of private legal action.

However, the "identification" approach has been criticised for its limitations in respect of systemic problems that may exist within companies, such as poor management and supervision. Alternative tests that may be used include tests that focus on the quality of a company's management, rather than the actions and intentions of specific individuals, such as tests based on prevailing '**corporate culture'** to determine whether there has been "corporate fault"; a "**collective fault**" approach whereby knowledge, intentions and actions of a group of individuals can be "aggregated"; and inferring the necessary elements of fault from the surrounding circumstances (effectively shifting the burden of proof onto the corporation to show why it should not be held legally responsible a specific case).[17]

In many jurisdictions, the prosecution of a corporate entity under criminal or quasi-criminal law can take place independently of any prosecution of any individual offenders. However, in some jurisdictions, corporate legal liability (especially under criminal law regimes) is dependent upon a **prior finding of liability on the part of individual offenders** working on behalf of the company. This can create a serious barrier to remedy in cases where the responsible individuals have absconded, cannot be identified, or claim the benefit of some form of immunity from prosecution.

Corporate secondary liability: key issues of context

"Secondary liability", sometimes referred to as **"complicity liability",** refers to the liability of a person for the acts of another person by virtue of the fact that the first person has contributed to, or been complicit in, the acts of the second person in some way.

The UN Guiding Principles on Business and Human Rights note that:

> *"most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms." (Guiding Principle 17, Commentary).*

Tests for corporate legal liability on the basis of theories of secondary or complicity liability may be laid down in a general criminal code, specific criminal statutes, civil codes and commercial codes. In many jurisdictions, general provisions on, or theories of, secondary criminal (or quasi-criminal) liability create the possibility of **secondary legal liability for companies.** However, in some jurisdictions (especially those jurisdictions where secondary liability is separately codified in relation to specific offences), there are gaps and inconsistencies in domestic legal approaches to the question of secondary corporate criminal (or quasi-criminal) liability. Lack of clarity and predictability as to the applicable tests for secondary criminal or quasi-criminal liability may also be the result of inconsistent approaches between different regulatory instruments and areas of law.

Provided there is a recognised legal basis for a private law claim against the principal perpetrator of severe human rights abuses, there may also be the possibility of a claim based on theories of secondary liability against a company that has caused or has contributed to the severe abuse (provided the requisite elements of the applicable legal

[17] See also the further guidance under policy objective 3 which relates specifically to the relationship between tests for corporate criminal and quasi-criminal liability and the management of human rights risks arising from business activities.

tests for secondary liability are satisfied). However, there is a lack of clarity in many jurisdictions, and particularly in common law systems, as to the circumstances in which companies may be liable under private law for business-related human rights abuses on the basis of theories of secondary or complicity liability.

Tests to establish secondary liability

Concepts that frequently appear in legal tests for corporate secondary or complicity liability include knowing instigation of an offence, knowing incitement or encouragement of an offence, aiding and abetting an offender, or providing knowing assistance to an offender after an offence has been committed.

In many jurisdictions a company may be held legally liable on the basis of theories of secondary or complicity liability regardless of whether there has been a finding of primary liability against a primary perpetrator. However, in some jurisdictions, corporate legal liability (especially under criminal law regimes) is indeed dependent upon a prior finding of liability on the part of the primary perpetrator. This potentially poses a serious barrier to remedy in cases where the responsible individuals have absconded, cannot be identified, or claim the benefit of some form of immunity from prosecution.

Where there are uncertainties about how tests for secondary or complicity liability should be interpreted and applied in specific criminal (and quasi-criminal) cases, it may be possible to provide the necessary clarification by way of additional guidance, e.g. guidance from central prosecution authorities to prosecutors, or statutory guidance to regulatory bodies.

Allocating legal responsibility between members of a corporate group

OHCHR's research suggests that is a lack of clarity in virtually every jurisdiction about the way that theories of secondary (or "complicity") liability operate to allocate legal liability among members of corporate groups, and specifically the inter-relationship between theories of secondary legal liability and the company law doctrine of "separate legal personality."[18]

There is also a lack of clarity concerning the operation of theories of secondary or complicity liability in cases concerning supply chains. The application of theories of secondary liability to cases involving corporate groups and supply chains requires further legal development and, to the extent possible within specific domestic regimes, further codification.

The relationship between corporate legal liability and good human rights risk management

Domestic criminal and quasi-criminal law regimes encourage good risk management by companies in a number of different ways. For instance, in the context of specific regimes (e.g. labour or environmental regimes) poor management can be an aspect of a substantive offence (e.g. operating without sufficient care). Alternatively, in some jurisdictions evidence of poor management can be used as a way of proving the necessary

[18] See also the further guidance under policy statement 3 which also has a bearing on the construction of tests for corporate legal liability on the basis of "secondary" or "complicity" liability.

degree of corporate fault under more general offences. Some criminal or quasi-criminal offences may permit a "due diligence" defence, which, if the requisite elements are proved, will absolve the corporation of criminal responsibility.

Statutory duties of care are sometimes used to clarify the nature and extent of the management and supervisory responsibilities of companies and their management. Under such a regime, breach of such statutory duties of care would be a criminal (or quasi-criminal) offence.

However, in many jurisdictions these tests for corporate liability (including the elements of applicable offences) are not sufficiently developed or detailed to ensure that corporate responses to human rights risks are thorough, consistent and coherent. For instance, the reluctance of many domestic criminal regimes to impose liability for omissions means that domestic law tests for corporate criminal (or quasi-criminal) liability often fail to send a clear message as to the extent to which companies must take positive steps to identify and address human rights-related risks arising in the context of their business relationships.

Poor management as a source of primary liability

The "corporate culture" and "collective fault" tests for corporate criminal liability, discussed above, focus directly on the company's quality of governance, supervision and management. In some jurisdictions, the concept of **"wilful blindness"** can be used to overcome the problem of the defendant's lack of knowledge where the defendant really ought, in the circumstances, to have been aware of certain risks. This means that the defendant cannot avoid liability for failing to make reasonable enquiries and take appropriate steps, where the risks of a serious crime being committed should have been apparent.

In many jurisdictions, the fact that a company has carried out human rights due diligence, the quality of that human rights due diligence, and the steps it has taken in response to those due diligence exercises, will be relevant to the question of whether the company had exercised and discharged an appropriate standard of care for the purposes of civil law (or "private law") tests for negligence.

Poor management as a source of secondary or "complicity" liability under private law regimes

In most jurisdictions, to the extent that corporate legal liability can arise from negligent management or supervision of a subsidiary, a supplier, or a contractor or business partner, this is conceptualised as a source of primary rather than secondary liability. However, as with secondary criminal liability, positive encouragement or instigation to carry out human rights abuses could potentially give rise to secondary corporate liability under some domestic private law regimes. This has potential relevance to a number of different commercial contexts including (a) supply chain relationships (b) contractor and supplier relationships (c) relationships between members of a corporate group (such as parent and subsidiary), (d) relationships between joint ventures and (e) relationships with State entities and agencies, including State owned companies.

Companies are increasingly subject to requirements under domestic legal regimes to report on human rights due diligence steps taken in respect of specific business relationships (such as supply chains) or in respect of specific issues (such as modern slavery, or conflict minerals). However, there is a need for greater clarity and coherence

in many jurisdictions as regards (a) the technical requirements of human rights due diligence more generally and (b) the legal consequences of human rights due diligence in both the criminal and private law contexts. Furthermore, where the use of due diligence provides a potential defence to criminal or quasi-criminal offences, or to a claim of negligence under private law, judicial assessments as to whether due diligence in respect of human rights-related risks was in fact exercised should be done by reference to clear, accessible and authoritative standards.

Corporate human rights risk management in high-risk contexts

Where business activities pose particularly serious risks (for instance to the environment or to workplace health and safety) domestic legislatures may create special criminal or quasi-criminal offences to deal with breaches of standards which are strict or absolute in nature. To establish liability under a "strict" or "absolute" criminal (or quasi-criminal) offence, it is not necessary to show that the company intended the severe abuses; only that the severe abuses in fact occurred. Depending on the relevant legislative provisions, it may be possible for a company to raise a defence to specific charges by showing that it had in fact used due diligence. Alternately it may be that liability will automatically follow the occurrence of harm, irrespective of whether or not the company can prove that due diligence was in fact exercised in the specific case.

In most criminal, quasi-criminal and private law cases, prosecutors and private law claimants will have the initial onus of proof, with the burden of proof typically higher in criminal cases than in private law cases, to protect the rights of the defendant. However, in some cases, State agencies may decide that certain considerations of public policy (including considerations such as access to justice and the need for cost effective law enforcement) justify a departure from traditional allocations of burdens of proof. In such circumstances, it may be concluded (usually only in the case of quasi-criminal offences) that regulation of business activities through standards enforced by strict or absolute liability offences offers a better balance between the business and community interests concerned.

2. Project component 2: Roles and responsibilities of interested States in cross-border cases

This component of the Accountability and Remedy Project aimed to explore State practices and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications to consider the different ways in which international cooperation (at both diplomatic and operational levels) can improve the ability of victims to access remedies for business-related human rights abuses in the state where the abuses are alleged to have occurred; and, based on these findings, to develop "good practice" guidance for States in relation the management of cross-border cases and explore possible models of international and bilateral cooperation.

Why is further action from States necessary to clarify the roles and responsibilities of interested States in cross-border cases?

Because trade and investment cross national boundaries, allegations of business involvement in human rights abuses may give rise to legal issues (and hence and the potential for legal liability) under the laws of more than one State. While overlapping legal regimes are inevitable in a globalizing world, they can give rise to jurisdictional conflicts,

as well as disjointed and inconsistent domestic legal responses. Recent years have seen the emergence of a number of new instruments to promote and facilitate international cooperation in cross-border cases in specific areas, such as in the area of human trafficking and the protection of children from exploitation.[19] These have the potential to improve the effectiveness and efficiency of cross-border preventative, investigative and enforcement efforts.

However, OHCHR research and consultations in the course of the Accountability and Remedy Project have identified two key problems that are presently undermining the ability of domestic legal regimes to respond effectively to cross-border cases concerning business involvement in human rights abuses. The first is a **lack of clarity at international level as to the appropriate use of extraterritorial jurisdiction** such cases. This is a significant source of legal uncertainty for both affected persons and business enterprises. The second, related to the first, is a **lack of cooperation and coordination** between interested States with respect to the investigation, prosecution and enforcement of cross-border cases. This lack of cooperation and coordination has had negative effects on access to remedy in a number of individual cross-border cases, for instance by hampering the ability of prosecutors to act on some complaints, by adding to the costs and procedural complexity of cross-border cases, and by introducing delays that have significantly reduced the likelihood of a successful prosecution.

In addition, lack of coordination between States with respect to the use of domestic measures with extraterritorial implications[20] can undermine the efforts of regulatory and domestic law enforcement bodies with respect to the prevention, detection and investigation of cross-border cases of business involvement in human rights abuses.

A note on methodology

Information from the Open Process and Detailed Comparative Process has been supplemented by several preparatory studies that have reviewed specific questions relating to state approaches and attitudes to the appropriate roles and responsibilities of interested States in cross-border cases. These include: (a) a review of State practice with respect to implementation of two ILO conventions that address severe human rights abuses with a business connection; (b) a review of State attitudes to the exercise of extraterritorial jurisdiction as expressed through amicus curiae briefs filed by State agencies in Alien Tort Statute cases in the US and (c) a review of experiences with the use of Joint Investigation Teams in strengthening cross-border law enforcement and cooperation in criminal cases.[21] The findings from this research has been used to inform consultations with States and other stakeholders. OHCHR has also organized State-only discussion workshops to explore specific questions and experiences with representatives of State agencies in more detail.

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[19] See for instance UN Convention Against Transnational Organized Crime (including the Protocol to that Convention to Prevent, Suppress and Punish the Trafficking of Persons); the ILO Convention on the Worst Forms of Child Labor; the ILO Convention on Forced Labor (including the 2014 Protocol); the Convention on the Rights of the Child (including the Protocol on the Sale of Children, Child Prostitution and Child Pornography).

[20] Domestic measures with extraterritorial implications are defined as measures taken by a State to regulate people, companies or activities within its own territorial boundaries but which have (or are intended to have) implications beyond the territorial boundaries of that State.

[21] See http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

What is different about cross-border cases?

The term "cross-border cases" is used in the Consultation Draft to describe cases where the relevant facts have taken place in, the relevant actors are located in, or the evidence needed to prove a case is located in, more than one State. Such cases can include instances where a company domiciled in one State is accused of causing or contributing to human rights abuses in another State (for instance, through its control relationships with foreign subsidiaries or contractors); and cases concerning cross-border human rights issues arising from business activities (for instance cross-border pollution or public or consumer safety risks).

Use of extraterritorial jurisdiction in practice

Previous research into State practice in other regulatory areas has helped to shed light on the use by States of extraterritorial jurisdiction in practice.[22] In recent years, States have been increasingly prepared to use direct extraterritorial jurisdiction in relation to criminal activity such as corruption, money laundering, grave human rights abuses and sexual offences against children. Looking at these different areas, certain patterns can be identified in relation to the State uses of, and State reactions, to extraterritorial jurisdiction and domestic measures with extraterritorial implications. For instance, these measures are more likely to be viewed by affected States as reasonable if the regulation is authorized under a bilateral or multilateral regime, is designed to deal with an issue of international concern (rather than primarily domestic interests), has been developed in consultation with and takes account of the interests of other States and includes procedures for the resolution of competing jurisdictional claims.

The regulatory roles and responsibilities of interested States (including the use by States of direct extraterritorial jurisdiction in certain cases) have been clarified in some regulatory contexts through international legal regimes. For instance, international legal regimes (including international legal regimes aimed at regulating business respect for human rights) may require that participating States carry out direct extraterritorial enforcement in respect of business operations or activities outside their own territory (for example, by virtue of being the State of domicile of a parent company of a business enterprise). In addition, international legal regimes may require or authorise the use by participating States of extraterritorial jurisdiction over foreign business enterprises or activities on other bases (for example on the basis that victims of human rights abuses were nationals or residents of the regulating State). International legal regimes may also require, authorise or recommend the use of domestic measures with extraterritorial implications.

However, research by OHCHR into State implementation of international regimes concerned with specific categories of severe human rights abuses with a business connection (i.e. forced labour and worst forms of child labour) suggests that the uses by States of direct extraterritorial jurisdiction in relation to these areas, even where authorised under international legal regimes, are rare in practice and, where they do occur, tend to be confined to cases involving individual rather than corporate offenders. In practice, States are more likely to respond to cross-border business-related human

[22] J. Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas", June 2010.
www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.

rights challenges with domestic measures with extraterritorial implications than with direct extraterritorial enforcement.[23]

With respect to private law cases, there remains a lack of clarity and consistency about the appropriate use of extraterritorial jurisdiction in cross-border human rights cases. OHCHR research has highlighted a number of areas of uncertainty and possible differences of approach between States in relation to key issues such as "universal civil jurisdiction", the applicability of a doctrine of "exhaustion of legal remedies", the extent to which a factual nexus is required between the claim and the State in which the dispute is litigated for the courts of the forum State to be able to exercise jurisdiction at all and, finally, the extent to which the nature and severity of the abuse may have a bearing on the way that jurisdictional rules are applied.[24]

International cooperation efforts potentially relevant to cross-border business and human rights cases

States have also entered into a range of international treaties to support, facilitate and enable international cooperation with respect to legal assistance and enforcement of judgements in cross-border cases, including (though not limited to) cross-border cases concerning business involvement in human rights abuses.[25]

Some treaties with potential relevance to cross-border human rights cases also include provisions designed to facilitate greater **cross-border exchange of information between domestic law enforcement and judicial bodies,** for instance to enable better analysis of the nature and scale of specific cross-border human rights-related risks and as an aid to detection of possible crimes.

However, even where relevant laws and international treaty arrangements are in place, State agencies can experience a range of practical difficulties and challenges which can undermine the treaty objectives, including a lack of information about how and where to make a request to State agencies in other interested States, a lack of opportunities and fora for cross-border consultation and coordination, differences of approach with respect to issues of privacy and the protection of sensitive information, a lack of resources needed to process requests in a timely manner, and a lack of awareness of investigative standards in other States.[26]

A further challenge to accessing regulatory information in cross-border cases arises from differences between States in the extent to which different domestic legal regimes create legal rights of public access to regulatory information (including information about the

[23] ohchr.org/Documents/Issues/Business/DomesticLawRemedies/PreliminaryILOtreaties.pdf
[24] See further A/HRC/29/39, pp. 11-12. See also: ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf
[25] Some of these treaties are designed to have broad application, such as the European Convention on Mutual Assistance in Criminal Matters, and various bi-lateral mutual legal assistance treaties. See also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. In the private law context see the Hague Convention on the Taking of Evidence Abroad and the Hague Convention on the Enforcement of Judgments in Civil and Commercial Matters. Other international legal regimes have been established to facilitate greater international cooperation with respect to specific kinds of crime, see e.g. the UN Convention Against Transnational Organised Crime, which includes provisions relating to mutual legal assistance and the use of joint investigation teams. See further Policy Objective 2 below.
[26] See also section 6, below, regarding elements of good State practice to address challenges experienced by domestic prosecution bodies in the context of investigating and prosecuting business involvement in cases of severe human rights abuses.

human rights-related risks and impacts of business activities), and the extent to which exemptions are given for certain classes of information, such as commercially sensitive or confidential information.

3. Project Component 3: Overcoming financial obstacles to legal claims

The aims of the project component "overcoming financial obstacles to legal claims" were to survey current State practices and various 'packages' of measures that can be used to assist financially disadvantaged claimants in bringing claims relating to business-related human rights abuse and, based on these findings develop 'good practice guidance for States with a view to reducing financial obstacles to remedy in cases of business-related human rights abuses.

Why is further action needed from States with respect to financial obstacles to legal claims in business and human rights cases?

The information collected in the course of the Accountability and Remedy Project confirms that people who are adversely affected by business-related human rights abuses continue to face serious, and sometimes insurmountable, financial barriers to remedy. On the other hand, the problems identified by respondents are not necessarily confined to business and human rights cases. Instead, they are frequently the consequences of wider problems, such as lack of available public funding for legal aid programmes, lack of resources for courts, and inefficiencies in judicial processes, including because of the operation of procedural rules.

A note about methodology

The research methodology used by OHCHR for the purposes of project component 3 has been informed by past and ongoing investigations into the costs of, and funding of, civil litigation at domestic level. Preparatory work included a review of the data and research findings of researchers from the University of Oxford during 2009, following a study of the costs and funding of civil litigation in more than 30 jurisdictions around the world.[27] Supplementary empirical information on litigation costs and funding was collected via the two information-gathering processes devised specifically for OHCHR's Accountability and Remedy Project; the Open Process and the Detailed Comparative Process, and by way of written expert submissions to the OHCHR, and face-to-face consultations with stakeholders at various stages of the project.

Key trends relevant to the availability of funding for legal claims

The recommendations in relation to Project Component 3 in the Consultation Draft are made within the context of a number of trends identified through OHCHR's research that have implications for the financial obstacles and risks faced by litigants.

These include the contraction in the availability of State-based legal aid. In response, there appears to be a growing acceptance of private forms of funding and mechanisms that allow for more flexible arrangements between claimants and their lawyers, which are designed to increase the available funding for private law claimants. For instance, there appears to be growing use of contingency fee structures, including in jurisdictions which have traditionally shown strong cultural resistance to the idea of lawyers being

[27] See C. Hodges, S. Vogenauer and M. Tulibacka, *The Costs and Funding of Civil Litigation: A Comparative Perspective*, (Hart Publishing Limited, 2010).

paid a percentage of civil damages, and growing opportunities for collective forms of redress, including "group" or "class" actions. There is furthermore a growth in markets for third-party litigation funding in some jurisdictions; however, this development appears largely confined to commercial cases and very large class actions.[28]

However, in many jurisdictions, non-governmental organizations (NGOs) remain the most important (and sometimes only viable) source of information, support (including legal support) and funding for victims of alleged business-related human rights abuses.

Financial barriers faced by claimants in business and human rights cases are closely connected with wider economic, developmental, structural, procedural, and resourcing problems that are observed in many jurisdictions. It is beyond the scope of this project to address these wider issues. On the other hand, it is possible to identify a number of features of domestic legal regimes which have the potential to help reduce financial barriers to claimants in such cases. These features form the basis of the "elements of good practice" presented in the Consultation Draft.

4. Project Component 4: Criminal and administrative sanctions

The aims of the project component 'Criminal and administrative sanctions' to survey current and emerging State practice in relation to criminal sanctioning of corporations for business-related human rights abuses (with a particular focus on severe human rights abuses).

Why is further action needed in relation to criminal and administrative sanctioning of corporations?

Effective enforcement of criminal laws is a vital aspect of meeting the State's 'duty to protect' (see Guiding Principle 3). Access to remedy includes the ability to ensure the appropriate application of criminal or quasi-criminal sanctions.[29] Criminal law regimes should provide effective deterrence against business related human rights abuses, and especially against involvement in severe abuses. However, in practice the imposition of individual criminal sanctions in such cases is extremely rare, and the imposition of corporate criminal sanctions rarer still. There are furthermore many differences between jurisdictions (and also between different regulatory regimes within jurisdictions) regarding how financial penalties are set (e.g. in terms of the extent to which judges have discretion in the setting of the amounts payable as fines and the factors that must be taken into account).

A note about methodology

Empirical information on State practice and trends in criminal sanctioning of corporations was collected via the Open Process and the Detailed Comparative Process. Respondents to the Open Process were invited to answer a series of multiple choice questions relating to the criminal and quasi-criminal sanctioning of corporations within their own jurisdictions. More detailed information on criminal and quasi-criminal sanctions was sought from legal practitioners working in different regions through the Detailed Comparative Process. This information was supplemented by further comparative research carried out with a view to clarify current and emerging trends in

[28] See further Hodges, Vogenauer and Tulibacka, ibid, pp. 3-28.
[29] For an explanation of what is meant by "quasi-criminal" offences and "quasi-criminal" liability see note 8 above.

relation to criminal sanctioning of corporations in other regulatory areas, including anti-corruption, money laundering, securities law and other forms of financial crimes.

Key trends relating to current State practice

While financial penalties are the most likely sanctions to be applied, is it not unusual for criminal and quasi-criminal regulatory regimes to also provide for alternative forms of sanctions, including remedial orders, forfeiture of assets, disqualification from public procurement opportunities, disqualification from state support, cancellation of business licences to operate, adverse publicity and, in extreme cases, dissolution.

In addition to the requirements of deterrence and punishment, there appears to be increasing recognition of the importance of future prevention measures (e.g. through remedial orders, or "corporate probation") as part of an effective sanctions regime. Similarly, in specific contexts such as trafficking and child labour cases, criminal sanctioning regimes appear to be increasingly responding to the need to ensure that there is compensation for victims.

In a number of jurisdictions, and under a number of different regimes, the quality of a company's management and compliance efforts, and the extent to which it had used due diligence to identify and prevent human rights abuses, is likely to be taken into account in determining the level of financial penalties.

5. Project Component 5: Civil law remedies

The 'civil law remedies' component of the Accountability and Remedy Project (project component 5) aimed to survey current and emerging State practice in relation to civil law (tort law) damages in cases of business-related human rights abuses (with a particular focus on severe abuses); and to explore the role of domestic judicial mechanisms in relation to supervision and implementation of settlements and awards, with a view to identifying possible 'good practice models' for States, taking into account innovations from other areas of private law.

Why is further action needed from States in relation to civil remedies?

Cases alleging business involvement in severe human rights abuses rarely proceed to judgment. In most cases they are dismissed at procedural stages, although a number have settled out of court. Whether there is a settlement, or a judicial determination of liability, the remedies obtained by claimants rarely (if ever) meet the international standard of "adequate, effective and prompt reparation for harm suffered".[30]

The extreme differences between different jurisdictions in the kinds and amounts of civil remedies that can be awarded contribute to inequalities between different groups of affected individuals and communities in terms of the levels of legal protection they enjoy. This also has serious implications for funding of legal claims and, in turn, access to judicial processes. In addition, problems have been identified with respect to a lack of consultation with affected individuals in some cases as to the types of remedies needed, resulting in inappropriate compensatory arrangements, and a lack of clarity in many

[30] See the UN 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Articles I.2(b) and VII.

jurisdictions as to the appropriate standards that apply in the distribution of damages arising from group claims.

A note on methodology

Empirical information on State practice and trends in civil law remedies in business and human rights cases was collected via the Open Process and the Detailed Comparative Process. Respondents to the Open Process were invited to answer questions relating to civil law remedies within their own jurisdictions, which included questions on types of remedies that may be granted as a result of civil proceedings and factors taken into account in the calculation of compensatory damages. More detailed information on current practices with respect to civil remedies was sought from legal practitioners working in different jurisdictions through the Detailed Comparative Process.

In addition, further supplementary research has been carried out in relation to the standards that govern the distribution of damages in large class actions in different jurisdictions, with a view to gaining a better understanding of the practical challenges surrounding this specific issue, and the extent to which there is an emerging consensus regarding "good practice".

Key findings relating to current State practice

The most commonly applied form of remedy in civil cases (and the one most likely to be applied in claims arising from alleged business involvement in severe human rights abuses) is **compensatory damages**. In addition, **punitive damages** may be applied in a number of jurisdictions in cases where the damage has been particularly serious, where the degree of negligence or recklessness was particularly great, or where there was intention to cause harm. Punitive damages appear less likely to be a feature of civil law regimes than of common law regimes. Restitution and injunctions are possible civil law remedies in many jurisdictions.

In addition, some further alternative civil remedies may be available in some jurisdictions, including compliance orders, supervisory orders and requirements to publish certain information relating to the claim or to make public apologies. In some jurisdictions, it is possible for regulators to make use of civil processes to enforce certain statutory or regulatory standards, which may result in financial compensation for groups or individuals affected by breaches of standards by corporate entities, or compliance orders.

6. Project Component 6: Domestic prosecution bodies

The aims of this component of the Accountability and Remedy Project were to investigate the reasons behind the apparently very low levels of activity of domestic criminal law enforcement bodies in relation to cases of alleged business involvement in severe human rights abuses; and to identify the specific challenges faced by domestic law prosecutors in such cases, and to develop a set of recommendations for States as to ways to begin addressing those challenges.

Why is further action needed from States in this area?

Effective enforcement of criminal laws is a vital aspect of meeting the State's Duty to Protect. As is stated in the Commentary to Guiding Principle 3, "the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often

a significant legal gap in State practice. Such laws might range from non- discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation".

However, at present, complaints to domestic law enforcement bodies about business involvement in serious human rights abuses are unlikely to result in a formal criminal investigation or prosecution. Research has confirmed that levels of activity by domestic law prosecutors in this area remain very low. While performance varies from jurisdiction to jurisdiction and from regulatory area to regulatory area (with typically higher levels of activity reported in relation to more codified areas of law such as labour and environmental law), domestic law enforcement bodies and practitioners report a range of challenges that inhibit their ability to respond effectively to business and human rights cases.

A note about methodology

Respondents to the Open Process were invited to answer questions relating to status and progress of criminal law cases relating to allegations of business involvement in human rights abuses in their own jurisdiction. Issues raised in the course of stakeholder consultations and expert reviews about the role and capacity of domestic prosecution bodies in respect of business and human rights cases (including cross-border cases)[31] have been explored in more detail through telephone and face-to-face interviews with prosecutors from different countries and regions with a view to gaining a better understanding of (a) the practical challenges faced by prosecutors in particular criminal law cases involving corporate defendants, and (b) the extent to which these challenges vary depending on different legal systems, traditions, geographic regions, and contexts.

Key findings relevant to the prosecution of business-related human rights abuses

Prosecutors face an array of challenges which hamper their ability to respond to cases involving allegations of business involvement in severe human rights abuses. These challenges include lack of resources; lack of the necessary specialist knowledge, expertise and training; difficulties gathering evidence in relation to complex corporate and managerial structures; concerns about intimidation of witnesses and fear of reprisals; lack of political or managerial support; and legal complexity (which can add to the financial and other risks of investigations).

Particular problems have been identified in relation to cross-border cases.[32] Here, prosecutors have highlighted (a) differences between the relevant States in criminal law regimes and in regulatory and investigative standards (b) poor or non-existent systems for gaining assistance from counterparts in other States, and (c) lack of communication and coordination between different State agencies with respect to domestic enforcement strategies.

[31] See further Project Component 2 above.
[32] See also the discussion in section 2 of the Consultation Draft.

Annex 1: Model law review terms of reference

Model Terms of Reference addressed to a Law Commission (or domestic equivalent) to enable a technical review of domestic legal tests for corporate legal liability in cases of business involvement in human rights abuses

1. The [*Law Commission/review body*] is requested to investigate and report on the following matters:

1.1 To what extent may corporate entities be criminally (or quasi-criminally) liable for different categories of human rights abuses under the laws of [*the jurisdiction*], including 'severe' abuses? Are there human rights abuses for which corporate criminal liability (or quasi-criminal liability) is not presently possible? If so, (a) what are the policy reasons for such exceptions or exclusions and (b) are these justified?

1.2 To the extent that corporate criminal (or quasi-criminal) liability is legally possible, what tests for criminal (or quasi-criminal) liability are currently applied in cases of corporate defendants? Are these tests sufficiently clear for the purposes of legal certainty and proper administration of justice? Do they respond adequately to reported cases of alleged business involvement in severe human rights abuses? Do they respond adequately to cases involving allegations against corporate groups? Do they provide sufficient encouragement and incentives to companies to ensure that risks of corporate involvement in human rights abuses are properly identified and prevented or mitigated, and that workers (including temporary workers), subsidiaries, contractors, suppliers and other business relationships are properly managed, supervised and monitored?

1.3 To what extent may corporations be liable under the private law of [*the jurisdiction*] for human rights abuses? Are there human rights abuses for which there would presently be no corporate liability to the victims of such abuses under the laws of [*the jurisdiction*], in particular with respect to 'severe' abuses? If so (a) what are the policy reasons for such exceptions or exclusions and (b) are these justified?

1.4 To the extent that there is corporate legal liability for human rights abuses under the private law of [*the jurisdiction*], are the legal tests for corporate legal liability sufficiently clear for the purposes of legal certainty and proper administration of justice? Do they respond adequately to cases of alleged business involvement in severe human rights abuses? Do they respond adequately to cases involving allegations against corporate groups? Do they provide sufficient encouragement and incentives to companies to ensure that risks of corporate involvement in human rights abuses are properly identified and mitigated, and that employees, subsidiaries, contractors, suppliers and other business relationships are properly managed, supervised and monitored?

2. The [*Law Commission/review body*] is requested to make recommendations that take into account:

2.1 the UN Guiding Principles on Business and Human Rights;
2.2 *[where relevant]* the commitments made by [*the jurisdiction*] in its National Action Plan;
2.3 its findings in relation to the issues described at para. 1 above

3. The [*Law Commission's/review body's*] review process will be open, inclusive and evidence-based and will involve:

3.1 a review structure that will provide adequate opportunities for contribution by key stakeholders;
3.2 proper consultation with legal professionals, criminal justice practitioners, public interest lawyers, members of the judiciary, parliamentarians, academics, representatives of victims' groups, representatives of trade unions, and representatives of businesses;
3.2 an examination of evidence from research, including evidence of experiences in other countries in the development and implementation of reforms of the laws relating to corporate legal liability in cases of alleged business involvement in human rights abuses.