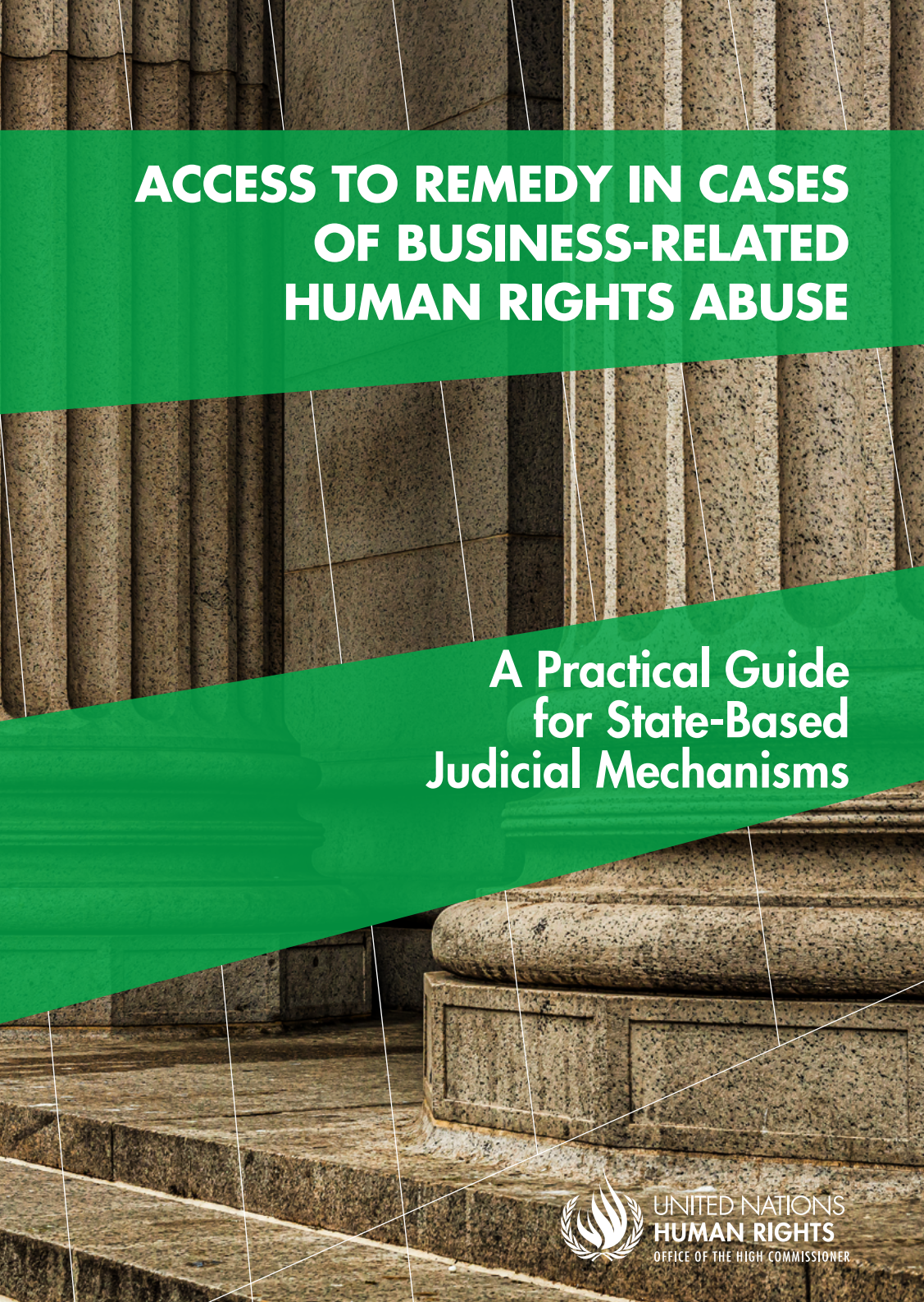

ACCESS TO REMEDY IN CASES OF BUSINESS-RELATED HUMAN RIGHTS ABUSE

A Practical Guide for State-Based Judicial Mechanisms

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

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UNITED NATIONS
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INTRODUCTION

BACKGROUND

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the Guiding Principles on Business and Human Rights.

Since 2013, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has had a dedicated focus on the Access to Remedy Pillar of the Guiding Principles. In response to a series of mandates given by the Human Rights Council, OHCHR has led the Accountability and Remedy Project (ARP) to help strengthen the implementation of that pillar.[1]

To promote the lessons learned from the Accountability and Remedy Project, OHCHR has developed a set of publications on access to remedy. The Interpretive Guide on Access to Remedy provides an overview of the Access to Remedy Pillar, and some key issues and misconceptions about it. The guide is complemented by a set of compilations of guidance from the Accountability and Remedy Project, which provide recommended actions for enhancing the effectiveness of the different types of remedial mechanisms relevant to cases relating to business and human rights.

WHAT IS THE ACCOUNTABILITY AND REMEDY PROJECT?

The Accountability and Remedy Project was launched by OHCHR to strengthen accountability and access to remedy in cases of business-related human rights abuse. The Access to Remedy pillar of the Guiding Principles on Business and Human Rights refers to three categories of grievance mechanisms for accountability and remedy in such cases, and the Accountability and Remedy Project has focused on each one:

[1] See Human Rights Council resolutions 26/22, 32/10, 38/13 and 44/15. For more information on the Accountability and Remedy Project, see www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

- ARP I: Judicial mechanisms
- ARP II: State-based non-judicial grievance mechanisms
- ARP III: Non-State-based grievance mechanisms

The methodology adopted throughout these parts of the project involved an inclusive, multi-stakeholder, evidence-based process to identify good practices for improving rights holders' access to remedy through the relevant grievance mechanism in cases relating to business and human rights.

At the end of each part of the project, a report and addendum were submitted to the Human Rights Council, containing:

- General observations regarding the mechanism
- Guidance for enhancing the effectiveness of the mechanism, drawing upon good practices identified during the project
- Explanatory notes for the guidance
- A model set of terms of reference that States can use as a basis for reviewing the effectiveness of their remedial system

WHAT IS THIS GUIDE?

The present guide compiles the guidance and explanatory notes from the first part of the project (ARP I), which focused on enhancing the effectiveness of State-based judicial mechanisms.[2] This information can be found in the report and the addendum thereto submitted to the Human Rights Council in 2016.[3]

FOR WHOM IS THIS GUIDE INTENDED?

This guide is aimed primarily at State agencies and judicial bodies concerned with the development, administration and enforcement of domestic legal regimes that regulate respect for human rights by business enterprises.

[2] For documents and information on ARP I, see www.ohchr.org/EN/Issues/Business/Pages/ARP_I.aspx.
[3] A/HRC/32/19, annex and Add.1.

The information in the guide will also be relevant to policymakers and practitioners, prosecutors and other law enforcement officials, national human rights institutions, international bodies with mandates relevant to business and human rights, business enterprises and other stakeholders, such as civil society organizations and trade unions.[4]

HOW TO USE THIS GUIDE

The guidance reproduced below contains:

- **A series of policy objectives** for States
- **Elements** that demonstrate different ways in which the policy objectives can be reached[5]

Informed by the various information-gathering activities during ARP I, these policy objectives and supporting elements are intended to capture lessons from "good practices" with regard to the design and operation of State-based judicial mechanisms, and relevant legal and policy issues.[6] To ensure global relevance and applicability, the recommended action is designed to be readily adaptable to different legal systems and contexts while also being practical, forward-looking and reflective of international standards on access to remedy.

Following each policy objective and corresponding set of elements, explanatory notes provide relevant definitions, examples and added context.

[4] See A/HRC/32/19, para. 19.
[5] "Elements" are the numbered paragraphs directly following each policy objective. For instance, a reference in this document to "1.1" is a reference to the first element under policy objective 1.
[6] OHCHR produced a paper containing illustrative examples of methods that States have used and steps they have taken that are relevant to ARP I recommended actions; see OHCHR, "Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse", 2016, available at www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.pdf.

GUIDANCE TO IMPROVE CORPORATE ACCOUNTABILITY AND ACCESS TO JUDICIAL REMEDY FOR BUSINESS-RELATED HUMAN RIGHTS ABUSE

A. ENFORCEMENT OF PUBLIC LAW OFFENCES

1. PRINCIPLES FOR ASSESSING CORPORATE LEGAL LIABILITY

POLICY OBJECTIVE 1: Domestic public law regimes that are relevant to the respect by business enterprises of human rights ("domestic public law regimes") are sufficiently detailed and robust to ensure that there are both effective deterrence from and effective remedy in the event of business-related human rights abuses.

1.1 Domestic public law regimes (a) provide the necessary coverage with respect to business-related human rights abuses; (b) adopt legislative, regulatory and policy measures appropriate to the type, nature and severity of different business-related human rights impacts; and (c) are clear as to whether, and the extent to which, they impose legal obligations on companies.

1.2 Domestic public law regimes make appropriate provisions for corporate criminal liability, or its functional equivalent, in cases where business-related human rights impacts are severe.

1.3 Corporate legal liability under domestic public law regimes does not depend, in law or in practice, on a prior successful conviction of an individual offender.

1.4 Domestic public law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

1.5 Domestic public law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take appropriate account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

1.6 Domestic public law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention and mitigation of any human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies practices or operations.

1.7 In the distribution of evidential burdens of proof between an enforcement agency and a defendant company, domestic public law regimes strike an appropriate balance between considerations of access to remedy and fairness to all parties.

1.8 Domestic public law regimes are clear as to their geographic scope.

1.9 The State regularly reviews whether its domestic public law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and the State's obligations under international human rights treaties, and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach.[7]

[7] See A/HRC/32/19.Add.1, para. 5.

EXPLANATORY NOTES

KEY CONCEPTS

"Criminal law" is concerned with protection of the public from conduct deemed to be harmful or antisocial, and regulates the conduct of private actors with a view to preventing, punishing and deterring such behaviour. "Administrative" (sometimes called "regulatory" or "quasi-criminal") regimes regulate conduct that is deemed harmful or antisocial, or that is required (e.g., for reasons of public safety) to meet certain regulatory standards; however, the requirements that must be satisfied to establish such offences may be different (e.g., not as stringent) as those required to establish a criminal offence. In the guidance, criminal and administrative regimes are referred to as "domestic public law regimes" and the offences created under such regimes as "public law offences" or simply "offences"

Part I of the guidance is concerned with enforcement by "public authorities" (or "relevant enforcement agencies"). Enforcement of legal standards by private individuals is the subject of part II.

The term "primary liability" refers to the legal liability of the main perpetrator of an offence. "Secondary liability" may exist where the defendant has caused or contributed to offences committed by another party (i.e., the "main perpetrator"). Common bases in domestic public law regimes for secondary liability include "inciting", "instigating" or "encouraging" an offence or "aiding and abetting" the commission of an offence. Secondary liability is sometimes referred to as "complicity liability".

"Human rights due diligence" refers to the processes and activities undertaken by business enterprises to identify, prevent and mitigate their adverse human rights impacts (see principles 17–21 and commentary of the Guiding Principles).

Offences of "absolute liability" do not require proof that the defendant intended the relevant acts or harm or was negligent in order to establish legal liability; rather, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence. The relevant domestic public law regime may, however, permit the company to raise a defence on the basis of its use of "due diligence" to prevent the prohibited event. Where this is the case, the offence may be described as one of "strict liability" (rather than absolute liability).

Types of legal liability under public law regimes

Most jurisdictions recognize the possibility of corporate legal liability for public law offences, although there are differences from jurisdiction to jurisdiction in the kinds of offences for which a company can be liable and the types of legal liability that a company can attract. In some jurisdictions, companies may attract criminal liability as well as administrative liability. However, in other jurisdictions, criminal liability may only attach to individuals as "natural persons". In jurisdictions where corporate criminal liability is not possible, other kinds of public law regimes and sanctions (e.g., "regulatory", "administrative" or "quasi-criminal") play a vital role.

For these reasons, the guidance is not confined to criminal offences, but potentially encompasses a variety of sources of public law liability applicable to companies, including regulatory, administrative and quasi-criminal liability.

Companies, business enterprises, group business enterprises and supply chains

The challenges in terms of accountability and access to remedy posed by the structural and managerial complexity of many business enterprises are outlined in the report.[8] Domestic public law regimes determine the legal responsibilities of parent companies (and other companies within a group business enterprise) in varying ways and to varying degrees, depending on regulatory contexts and needs. However, in many domestic public law regimes relevant to respect by business enterprises of human rights, there is lack of clarity as to the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the activities of other constituent companies. This is particularly so with regard to parent companies (as regards the management and supervision of subsidiaries) and business enterprises that make use of complex supply chains.

For these reasons, the guidance highlights the need for clearer articulation, through domestic public law regimes, of legal standards of management and supervision with respect to the identification, prevention and mitigation of adverse human rights impacts, particularly with respect to parent companies (1.5) and business enterprises that make use of supply chains (1.6). Furthermore, the guidance recommends regular review of domestic public law regimes to ensure that they

[8] A/HRC/32/19, paras. 21–23.

continue to provide the necessary coverage and adopt appropriate approaches in the light of evolving circumstances and international obligations (1.9).

Attributing legal liability to a company: primary liability

Establishing corporate legal liability entails showing, to the requisite standard of proof,[9] that all the elements of the offence are satisfied. In criminal cases, these elements are likely to involve both "mental" and "physical" elements. The "mental" elements refer to the knowledge and intentions of the alleged offender. The "physical" elements refer to the offender's acts, and whether they were the cause of the relevant harm.

Because companies are a legal construction, the application of tests for establishing liability for public law offences can be problematic. This is a particular problem in relation to criminal offences that require proof that the company intended the harm or intended to commit the acts that caused the harm. Under some domestic law tests, proving corporate "intent" will require the identification of individuals working for or on behalf of the company who themselves intended the relevant harm and whose intentions can be attributed to the company. This is referred to as the "identification" approach to corporate criminal liability.

The "identification" approach has been criticized for its limitations, in some contexts, with respect to systemic problems that may exist within companies, such as poor management and supervision.

A further, widely applied principle for assessing corporate legal liability is "vicarious liability", whereby companies may be liable for acts of certain employees or agents on the basis that the company "acts through" those individuals. While tests for vicarious liability vary from jurisdiction to jurisdiction, common limitations on this type of liability are that the employee or agent must have either been operating within the scope of his or her employment responsibilities and/or for the benefit of the company.

Alternative tests applied in some jurisdictions include those that focus on the quality of a company's management rather than the actions and intentions of specific individuals, such as tests based on "corporate culture" to determine whether there has been "corporate fault"; or a "collective fault" approach, whereby knowledge, intentions and actions of a group of individuals can be aggregated.

[9] In serious criminal cases, the requisite standard of proof is likely to be "beyond reasonable doubt" (or its equivalent). However, "administrative" or "regulatory" offences may adopt a less stringent approach.

In cases where business enterprises have caused or contributed to adverse human rights impacts but where there is no detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures, it can be difficult to identify the company (or companies) that should be legally accountable, and on what basis. Some domestic law regimes seek to alleviate those problems in specific regulatory contexts by allowing the necessary elements of fault to be inferred from the surrounding circumstances (effectively shifting the burden of proof onto the corporation to show why it should not be held legally responsible for a specific case) or in some circumstances by dispensing with the need to prove corporate "knowledge" or "intentions" altogether.[10]

The guidance highlights the need for States to consider methods of attributing legal liability to companies that address systemic fault as well as individual fault (1.4) and to avoid approaches that make corporate legal liability contingent upon the conviction of a responsible individual. In addition, the guidance highlights the need for States to develop approaches to the distribution of evidential burdens of proof that take account of considerations of access to remedy as well as considerations of fairness to all parties (1.7).

POLICY OBJECTIVE 2: Domestic public law regimes are sufficiently robust to ensure that there is both effective deterrence from and remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.

2.1 Domestic public law regimes (a) communicate clearly the different modes and degrees of contribution to harms perpetrated by a third party that will give rise to secondary legal liability; and (b) are clear about the extent to which the principles for assessing secondary liability are applicable to companies.

2.2 Domestic public law regimes are clear as to the principles used to attribute knowledge, intentions, actions and omissions to a company for the purposes of assessing corporate legal liability on the basis of theories of secondary liability.

[10] For a definition of "strict liability" and "absolute liability", see p. 10.

2.3 Domestic public law regimes treat offences based on theories of secondary liability (a) with the same level of seriousness as the relevant primary offence; and (b) as distinct offences, conceptually and procedurally separate from any primary offences committed by the main perpetrator. As such, a finding of secondary liability is not contingent, in law or in practice, on any judicial determination of liability on the part of the main perpetrator.

EXPLANATORY NOTES

Attributing legal liability to a company: secondary liability

An alternate source of corporate legal liability is secondary liability.[11]

There is a considerable variation from jurisdiction to jurisdiction and regime to regime as to the type of knowledge that must be proved to establish secondary liability (e.g., the extent to which there must have been shared intent with the main perpetrator to commit an offence) and the causal relationship between the secondary party's actions and the offence (e.g., whether the secondary party's actions were the direct cause of the offence or merely made it more likely).[12] Domestic legal regimes are not always clear as to the modes and levels of contribution to human rights abuses of a third party that will give rise to corporate legal liability on the basis of secondary liability and the manner of attribution of acts, knowledge and intention to companies.

Further problems emerge from domestic legal regimes where secondary offences are not treated with sufficient seriousness (e.g., compared to the primary offence) or where the liability of a secondary party is contingent upon a successful prosecution of the main perpetrator (which can have serious implications for access to remedy in cases where the main perpetrator cannot be found, is deceased or, in the case of a company, has been dissolved or has made a claim to some form of immunity).

The guidance aims to address common problems relating to the secondary liability of business enterprises, highlighting the need for greater clarity as to the modes

[11] Ibid.
[12] See Jennifer Zerk, Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies, February 2014, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, pp. 37–39.

and levels of contribution that will lead to legal liability (2.1) and the principles for attributing mental elements of offences to companies (2.2). In addition, it recommends that secondary offences be treated with the same seriousness as primary offences and as conceptually distinct from the primary offence, and that liability not be contingent on the liability of the main perpetrator (2.3).

POLICY OBJECTIVE 3: The principles for assessing corporate liability under domestic public law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

3.1 Domestic public law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

3.2 Domestic public law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

3.3 Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

3.4 Enforcement agencies and judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

EXPLANATORY NOTES

Human rights due diligence

The exercise of human rights due diligence by a business enterprise may become relevant to questions of corporate legal liability in several ways. First, the exercise of human rights due diligence can be made an explicit legal requirement. Second, it may be used as evidence that the company was not negligent in a specific case (i.e., where the presence of negligence is an element of an offence). Third, it may be an explicit statutory defence to an offence.

In law, "due diligence" is a standard of care. The Guiding Principles provide a global standard for human rights due diligence.[13] There is scope for better integration of this global standard in many domestic law regimes.

The guidance highlights the need for human rights due diligence concepts to be properly integrated into relevant domestic law regimes (3.1 and 3.2) and for relevant State agencies and judicial bodies to have access to, and take regulatory and enforcement decisions by reference to, robust and credible standards (3.4). However, the guidance also recognizes domestic law regimes that make targeted use of strict or absolute liability (e.g., in environmental or consumer law contexts) as a means of encouraging especially high levels of vigilance, where this is especially needed (3.3).

2. SUPPORTING THE WORK OF STATE AGENCIES RESPONSIBLE FOR INVESTIGATION AND ENFORCEMENT

POLICY OBJECTIVE 4: State agencies responsible for investigating allegations of business-related human rights abuses and enforcement of domestic legal regimes ("enforcement agencies") have a clear mandate and political support.

4.1 The State effectively supports its enforcement agencies in protecting against business-related human rights abuses.

4.2 The State takes the steps necessary to ensure that its enforcement agencies have effective working relationships and communication links and are able to coordinate their activities effectively with other domestic bodies that regulate the respect by business enterprises of human rights, including agencies responsible for the regulation of labour, consumer and environmental standards and agencies responsible for the enforcement of laws relating to bribery and corruption.

[13] See Guiding Principles on Business and Human Rights, principles 17–21 and commentary.

4.3 The use of discretion on the part of enforcement agencies as to whether to investigate and/or take enforcement action ("enforcement discretion") is exercised in accordance with a comprehensive enforcement policy that (a) clearly sets out how decisions are made regarding whether to investigate or commence enforcement action, and the factors that will be taken into account; (b) has been developed wherever possible following appropriate public consultation; and (c) is made available to the public.

4.4 Enforcement agencies ensure that there is policy coherence between (a) policies and procedures that set performance targets for their personnel; (b) financial and other performance incentives for such personnel; and (c) policies relating to the use of enforcement discretion.

EXPLANATORY NOTES

KEY CONCEPTS

The term "enforcement agencies" potentially encompasses prosecutors, police and other regulatory bodies with responsibility for investigating and enforcing standards relating to respect by business enterprises of human rights.

The term "enforcement discretion" refers to the discretion of an enforcement agency as to whether and how to respond to allegations that an offence has been committed. The use of enforcement discretion may be regulated by an "enforcement policy" promulgated by the relevant State authority or some other government or judicial body.

Support for enforcement agencies tasked with investigation and enforcement

Investigations and prosecutions of business enterprises can be resource-intensive and time-consuming, especially where there is a cross-border element or where complex corporate structures are involved. In the face of multiple, sometimes conflicting, demands on limited resources, prosecutors may be reluctant to prioritize a legally challenging, novel or complex case.

The guidance therefore highlights the importance of political support to pursue such cases (4.1). The guidance also includes provisions designed to promote greater policy coherence in the internal functioning of, and between, enforcement agencies (4.2 and 4.4).

POLICY OBJECTIVE 5: There is transparency and accountability with respect to the use of enforcement discretion.

5.1 Decisions by enforcement agencies not to investigate or take enforcement action are, to the extent possible, subject to formal challenge through a fair and transparent process.

5.2 Enforcement agencies take proactive steps to ensure that, in the event where a request to investigate or take enforcement action has been declined, the complainants in the case are informed (a) of any rights they may have formally to challenge such a decision; and (b) of the procedures that will apply in the event the complainants choose to exercise such rights.

EXPLANATORY NOTES

Transparency and accountability with respect to enforcement discretion

Enforcement agencies normally have some level of discretion over whether to take enforcement action against a company, the extent and nature of the charges, and whether, when and on what terms to discontinue or settle legal proceedings. However, where the reasoning behind a decision not to investigate or bring charges is not transparent, it may create a perception that remedy has been arbitrarily denied and leave those affected without a clear understanding as to further options.

The guidance therefore covers issues such as the use of enforcement discretion in accordance with a publicly available enforcement policy (4.3), the rights of formal challenge (5.1) and public access to information (5.2).

POLICY OBJECTIVE 6: Enforcement agencies have access to the necessary resources, training and expertise.

6.1 Enforcement agencies have access to adequate resources to investigate and take enforcement action with respect to allegations of business-related human rights abuses.

6.2 The State has established specialist units, within enforcement agencies or pursuant to applicable legal regimes, that are responsible for the detection, investigation and prosecution of cases of business involvement in severe human rights abuses, and that have access to expertise relating to the investigation of serious offences involving corporate entities, including in cross-border contexts (see 9.1–9.7 and 10.1 below).

6.3 The State ensures adequate training for enforcement agency employees in the legal and technical aspects of investigating allegations of severe business-related human rights abuses.

EXPLANATORY NOTES

Resources, training and expertise

OHCHR research and consultations confirm that lack of resources, training and expertise to pursue complex business-related human rights cases against companies, especially in a cross-border context (see pp. 21–25), is a serious concern in many jurisdictions.

The guidance identifies a number of ways by which States can improve the resources available to enforcement agencies to enforce legal standards relevant to ensuring respect by business enterprises of human rights (6.1, 6.2 and 6.3).

POLICY OBJECTIVE 7: Enforcement agencies carry out their work in such a way as to ensure the safety of victims, other affected persons, human rights defenders, witnesses, whistle-blowers and their legal representatives ("relevant individuals and groups") and is sensitive to the particular needs of individuals and groups at heightened risk of vulnerability or marginalization.

7.1 Systems are in place to ensure that enforcement agency employees take appropriate steps to ensure the protection of relevant individuals and groups from the risk of intimidation and reprisals, and compliance with those procedures is properly monitored and evaluated.

7.2 Systems are in place to ensure that enforcement agency employees are aware of and take proper account of issues relating to gender, vulnerability and/or marginalization in their dealings with relevant individuals and groups.

EXPLANATORY NOTES

Ensuring the safety of victims, other affected persons, human rights defenders, witnesses, whistle-blowers and their legal representatives

Intimidation and reprisals against victims, witnesses, human rights defenders, whistle-blowers and their legal representatives are serious concerns in some jurisdictions. In addition to placing people at risk of further abuses, such practices may seriously hamper effective investigation and enforcement. However, practical steps can be taken to mitigate these risks, for example, in the methods used to collect and store evidence, or in the means by which testimony is given. In responding to complaints and allegations, practitioners working within enforcement agencies need to be sensitive to the different challenges and risks that may be faced by women and men and the needs and concerns of individuals and groups at heightened risk of marginalization or vulnerability.[14]

[14] See the guidance on the protection of human rights defenders in the context of economic development projects developed by the Special Rapporteur on the situation of human rights defenders (A/68/262).

The guidance highlights the need to take appropriate steps to ensure that relevant individuals are protected from intimidation and reprisals (7.1) and that the particular risks faced by individuals or groups at heightened risk of vulnerability or marginalization are properly taken into account (7.2).

POLICY OBJECTIVE 8: Enforcement agencies are able to take decisions independently, in accordance with publicly available policies, without the risk of political interference in their operations and to high ethical standards.

8.1 Enforcement agencies have the ability and independence, in law and in practice, to commence an investigation into and take enforcement action with respect to allegations of business-related human rights abuses at their own initiative and without the need for a formal complaint by or on behalf of an affected person or group.

8.2 Employees of enforcement agencies are held to high standards of personal and professional conduct and laws, and standards relating to legal ethics, conflicts of interest, bribery and corruption are rigorously enforced.

3. COOPERATION IN CROSS-BORDER CASES

POLICY OBJECTIVE 9: Enforcement agencies and judicial bodies can readily and rapidly seek legal assistance and respond to requests from their counterparts in other States with respect to the detection, investigation, prosecution and enforcement of cross-border cases concerning business involvement in severe human rights abuses.

9.1 The State sets out a clear policy expectation that enforcement agencies and judicial bodies will be appropriately responsive to requests from the relevant agencies of other States in cross-border cases.

9.2 The State ensures that appropriate bilateral and multilateral arrangements are in place to enable enforcement agencies and judicial bodies to request mutual legal assistance from relevant counterparts in other States in cross-border cases.

9.3 The State enables its enforcement agencies, where appropriate, to carry out cross-border investigations and prosecutions through joint investigation teams or other similar arrangements.

9.4 The State ensures that its enforcement agencies and judicial bodies have access to the information, support, training and resources necessary to enable personnel to make the best use of arrangements with other States for cooperation in cross-border cases.

9.5 The State is actively involved with relevant bilateral and multilateral initiatives aimed at improving the ease with which and speed at which (a) requests for mutual legal assistance can be made and responded to; and (b) information can be exchanged between enforcement agencies and/or judicial bodies in cross-border cases, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

9.6 Enforcement agencies and judicial bodies support and encourage the involvement of their personnel in relevant bilateral and multilateral initiatives and networks aimed at (a) facilitating contact and exchange of know-how between counterparts in other States; and (b) promoting awareness of different opportunities and options for international cooperation and the provision of legal assistance in cross-border cases.

9.7 The State keeps under review the scope, adequacy and appropriateness of its arrangements for mutual legal assistance with other States in the light of relevant factors, such as patterns of inward and outward foreign direct investment, and takes relevant steps to add to or improve such arrangements as necessary.

EXPLANATORY NOTES

KEY CONCEPTS

For the purposes of the guidance, a "cross-border" case is one 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.

The term "extraterritorial jurisdiction", in the context of public law regulation and enforcement, refers to the ability of a State, through various legal, regulatory and/or judicial mechanisms, to prescribe and enforce laws with respect to companies and business activities outside its own territory.

"Joint investigation" teams are those comprising investigators and law enforcement practitioners from more than one State (and usually several States) set up for a fixed period and on the basis of an agreement between the participating States and/or relevant State agencies, for a specific investigative purpose.

Lack of clarity at the international level as to the appropriate use of extraterritorial jurisdiction in cross-border business and human rights cases

The use of extraterritorial jurisdiction by States is governed by international law. Under international law, direct assertions of jurisdiction over foreign companies and business activities must be justified according to one or more internationally recognized bases of jurisdiction: territoriality, nationality, the protective principle, passive personality, and universality.[15] In addition, assertions of extraterritorial jurisdiction are generally agreed to be subject to an overarching requirement of "reasonableness" in the way in which it is exercised.[16]

[15] For an explanation of each of these principles, see Jennifer A. Zerk, Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas, Harvard Corporate Responsibility Initiative Working Paper No. 59, June 2010, available at www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf, pp. 18–20.

[16] Ibid., p. 20.

However, while there is international consensus as to when States can exercise extraterritorial jurisdiction in business and human rights cases, there is less clarity as to the circumstances in which they should or must exercise such jurisdiction.[17] Against this background, some international treaty bodies have recommended that home States take steps to prevent and/or punish abuse abroad by business enterprises domiciled within their respective jurisdictions.[18]

The roles and responsibilities of interested States in cross-border cases are clarified for some regulatory contexts in international legal regimes.[19] For instance, some international legal regimes require that participating States carry out direct extraterritorial enforcement with respect to business operations or activities outside their own territory (e.g., by virtue of being the State of domicile of a parent company of a business enterprise) or may require or authorize the use by participating States of extraterritorial jurisdiction over foreign business enterprises or activities on other bases (e.g., on the basis that victims were nationals or residents of the regulating State).

The guidance highlights the need for greater clarity in domestic law regimes as to their intended geographic scope (1.8). Regular reviews of domestic public law regimes are recommended to check whether those regimes provide the necessary coverage and appropriate range of approaches with respect to evolving business-related human rights challenges and in the light of the State's obligations under international human rights treaties (1.9). In addition, the guidance calls for the active participation of States in initiatives aimed at improving domestic legal responses to cross-border business and human rights challenges (10.1).

Cooperation and coordination between relevant State agencies in cross-border cases of business involvement in human rights abuses

States have entered into both formal and informal bilateral and multilateral arrangements to facilitate international cooperation with respect to legal assistance and enforcement of judgments in cross-border cases, including cross-border cases

[17] See A/HRC/29/39, paras. 33–37. See also OHCHR, "State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses", working paper, April 2015, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf.

[18] See, for example, Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), paras. 38–46. See also E/C.12/2011/1, para. 5; International Labour Organization recommendation 190, available at www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm, para. 15.

[19] See, for example, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, arts. 3–4; and the United Nations Convention Against Transnational Organized Crime, art. 15.

concerning adverse human rights impacts of business activities.[20] Some international instruments of relevance to cross-border business-related human rights abuses also include provisions designed to facilitate exchange of information and expertise between domestic law enforcement and judicial bodies, for instance, to enable better analysis of the nature and scale of specific risks, as an aid to detect possible crimes and as a way of strengthening cooperation through progressive improvement of the domestic regimes of participating States.[21] In various fields of law enforcement, States have developed a range of cooperative approaches, including participation in "peer review" evaluation of regulatory effectiveness and capacity, capacity-building activities and the provision of technical assistance.

However, regardless of the international arrangements put in place, State agencies can experience a range of practical difficulties that can undermine treaty objectives and hamper effective cooperation.

The guidance responds to those challenges by setting out a range of practical steps that States could consider to enhance the ability of relevant State agencies to seek and obtain assistance from counterparts in other jurisdictions, including ensuring the necessary international arrangements are in place (9.2), enabling investigations through joint investigation teams (9.3), ensuring access to information and training (9.4), developing information repositories (9.5), and promoting awareness and facilitating networking between law enforcement practitioners and their counterparts in other States (9.6).

POLICY OBJECTIVE 10: The State works through relevant bilateral and multilateral forums to strengthen methods, systems and legal regimes relevant to cross-border cases concerning business involvement in human rights abuses.

10.1 The State actively participates in bilateral, regional and multilateral initiatives aimed at strengthening domestic legal responses to cross-border human rights challenges with a business connection.

[20] Some of the treaties are designed to have broad application, such as the European Convention on Mutual Assistance in Criminal Matters, and various bilateral mutual legal assistance treaties. See also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Other international legal regimes have been established to facilitate greater international cooperation with respect to specific kinds of crime. See, for example, the United Nations Convention Against Transnational Organized Crime, which includes provisions relating to mutual legal assistance and the use of joint investigation teams. Note, however, that cooperation may be subject to qualifications, such as a requirement for "double criminality" (i.e., similar recognition by both States of the criminality of the conduct) and requirements regarding respect for the rule of law and due process.

[21] See OHCHR, "Cross-border regulation and cooperation in relation to business and human rights issues: a survey of key provisions and state practice under selected ILO instruments", working paper, April 2015, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/PreliminaryILOtreaties.pdf. See also www.ohchr.org/EN/Issues/Business/Pages/ARP_I.aspx.

4. PUBLIC LAW SANCTIONS AND OTHER REMEDIES

POLICY OBJECTIVE 11: Sanctions and other remedies that may be imposed following a determination of corporate legal liability in cases of business-related human rights abuse offer the prospect of an effective remedy for the relevant loss and/or harm.

11.1 Judicial bodies have the authority and ability, in law and in practice, to impose a range of sanctions following a finding of corporate legal liability in cases of business-related human rights abuse, which may include financial penalties and/or non-financial remedies, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (e.g., public apologies) and guarantees of non-repetition (e.g., cancellation of operating licenses, mandated compliance programmes, education and training).

11.2 In each case, the sanctions imposed on companies (a) are proportional to the gravity of the abuse and the harm suffered; (b) reflect the degree of culpability of the relevant company (e.g., as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company had responded adequately to warnings and other relevant factors); (c) are designed in such a way as to minimize the risks of repetition or continuation of the abuse and/or harm; (d) are sufficiently dissuasive to be a credible deterrent to that company, and others, from engaging in the prohibited behaviour; and (e) take into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

11.3 To the extent possible, victims are appropriately consulted with respect to (a) the design and implementation of sanctions and other remedies; (b) any decision to enter into a deferred prosecution agreement, and the terms of any such agreement; and (c) the terms of any settlement.

Such consultation takes into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

11.4 State agencies and/or judicial bodies monitor the implementation of sanctions and other remedies and ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint regarding and/or seek remedial action with respect to any non-implementation of such sanctions and/or other remedies.

11.5 The domestic legal system does not permit the tax deductibility of amounts paid as financial penalties following a determination of corporate legal liability for business-related human rights abuses.

EXPLANATORY NOTES

KEY CONCEPTS

In cases where the adverse human rights impacts of business enterprises result in corporate legal liability, the most likely sanctions will be "financial penalties" (or "fines"). However, "non-financial remedies", such as restorative, rehabilitative or preventative measures, may also be specified, depending on the powers of the relevant judicial mechanism.

The term "sanction" refers to the aspects of a remedy intended to punish the offender. Another term for such remedies is "punitive remedies". The primary goal of "compensatory remedies", on the other hand, is to compensate a victim for the loss or harm suffered.

Financial penalties ("fines") and other, non-monetary remedies

There are many differences between jurisdictions (and between different regulatory regimes within jurisdictions) regarding how financial penalties are set. Financial penalties for "regulatory" offences (or "administrative" penalties) may be subject to a maximum statutory amount. In some cases, these amounts may not be sufficient to act as a credible deterrent.

While financial penalties appear to be most prevalent in cases involving corporate defendants, they may not, on their own, amount to an effective remedy.[22] From the perspective of victims, public apologies, orders for restitution, measures to assist with rehabilitation of people and/or resources and measures to ensure non-repetition of the abuse may be equally or more beneficial.

The guidance emphasizes the importance of a range of sanctions and remedies for public law offences that can be tailored to suit the particular circumstances of a case and the particular needs of the affected individuals and groups (11.1 and 11.2). It highlights the importance of appropriate consultation with victims to ensure that their needs are adequately taken into account in the design of sanctions and other remedies (11.3). In addition, it highlights the need for appropriate monitoring of implementation of both punitive and compensatory remedies (11.4).

[22] In relation to severe human rights impacts, see the guidance contained in the 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 (General Assembly resolution 60/147, annex).

B. PRIVATE LAW CLAIMS BY AFFECTED INDIVIDUALS AND COMMUNITIES

1. PRINCIPLES FOR ASSESSING CORPORATE LEGAL LIABILITY

POLICY OBJECTIVE 12: Domestic private law regimes that regulate the respect by business enterprises of human rights ("domestic private law regimes") are sufficiently robust to ensure that there is both proper deterrence from and effective remedy in the event of business-related human rights abuses.

12.1 Domestic private law regimes (a) provide the necessary coverage with respect to business-related human rights abuses; (b) ensure that there are causes of action for business-related human rights abuses corresponding appropriately to the varying degrees of severity and the different kinds of harm that can result from such abuse; and (c) are clear as to whether and the extent to which they impose legal obligations on companies.

12.2 Domestic private law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

12.3 Domestic private law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take proper account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

12.4 Domestic private law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention and mitigation of human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies, practices or operations.

12.5 In the distribution of evidential burdens of proof between the claimant and the defendant company, domestic private law regimes strike an appropriate balance between considerations of access to remedy and fairness to all parties.

12.6 Corporate legal liability under domestic private law regimes is not contingent, in law or in practice, upon a prior finding of corporate legal liability under any domestic public law regime (e.g., a finding of corporate criminal liability or its functional equivalent).

12.7 Affected persons are not prevented, in law or in practice, from bringing a claim because of an ongoing public law (e.g., criminal) investigation into the same set of facts as the prospective private law claim.

12.8 Domestic private law regimes are clear as to their geographic scope.

12.9 The State regularly reviews whether its domestic private law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and the State's obligations under international human rights treaties, and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach.[23]

[23] See A/HRC/32/19/Add.1, para. 5 and figure 1.

EXPLANATORY NOTES

KEY CONCEPTS

The term "private law claims" refers to claims for legal remedy that are made, not by public authorities, but by private individuals and groups of individuals (referred to in the guidance as "claimants"). In this context, claimants may be persons directly affected by adverse human rights impacts of business activities or their families or other representatives or organizations, depending on the applicable rules on who has a right to bring a claim. Depending on the rules of the relevant legal system, private law claims may be made individually or joined with others as "collective redress actions".

The term "private law cause of action" refers to the legal basis on which the claim is made. Depending on the laws, structures and legal traditions of the relevant jurisdiction, the cause of action could be based on a statutory provision, general principles of law, legal precedent or some other basis (e.g., custom).

The elements required to prove corporate legal liability based on a private law cause of action will vary among regimes and among jurisdictions. These elements may include "corporate intent" to commit a wrongful act and/or "negligence". Some domestic law regimes make use of concepts of "strict liability" of "absolute liability" (see p. 10).

The elements needed to demonstrate "negligence" vary among regimes and jurisdictions. However, a formulation common to many jurisdictions is (a) the existence of a duty of care towards affected persons; and (b) the breach of the applicable standard of care, which (c) resulted in harm or injury (i.e., causation). The existence of a duty of care, and the relevant standard of care, will often depend on whether the harm was, or should have been, foreseeable to the defendant. "Gross negligence" and "recklessness" are treated in law as more serious variants of negligence on the basis of the high levels of culpability involved.

"Primary liability" for these purposes refers to the legal liability under private law of the individual or legal entity that has caused the harm or loss. "Secondary liability" may exist where the defendant has caused or contributed to harm or loss caused primarily by another party (i.e., the "primary wrongdoer"). Secondary liability is sometimes referred to as "complicity liability".

Problems of gaps in coverage and lack of suitable causes of action

While there are potentially causes of action and theories of liability to cover many eventualities, in some jurisdictions it is not always possible to identify a private law cause of action that adequately covers or adequately describes the gravity of the kinds of business-related human rights abuses or impacts that have occurred.

In some civil law jurisdictions, it is possible to join private law claims for compensation to criminal law processes under the mechanism of *partie civile*. However, making the possibility of a private law claim entirely contingent upon a finding of legal liability under public law processes, or restricting the rights of private claimants to pursue their own claims because of an ongoing public law investigation, amounts to potentially serious barriers to remedy.

The guidance highlights the need for States to ensure that there are possible causes of action referable to different kinds of business-related human rights abuses (12.1). Furthermore, the guidance recommends a regular review of domestic private law regimes to ensure that they provide the necessary coverage and adopt appropriate approaches in the light of evolving circumstances and international obligations (12.9). In addition, the guidance draws attention to the importance of maintaining a conceptual and procedural separation between private law claims and public law enforcement processes (12.6 and 12.7).

Companies, business enterprises, group business enterprises and supply chains

The accountability and access to remedy challenges posed by the structural and managerial complexity of companies and business enterprises, and especially group business enterprises, are outlined in the report.[24]

The guidance highlights the need for clear articulation in domestic private law regimes of legal standards of management and supervision with respect to the identification, prevention and mitigation of adverse human rights impacts, particularly as regards parent companies (see 12.3) and business enterprises that make use of supply chains (see 12.4).

[24] See A/HRC/32/19, paras. 21–23.

Attributing liability to a company: primary liability

Domestic private law regimes adopt a range of approaches to the attribution of legal liability to companies, which may draw from "identification" approaches (i.e., that "identify" the acts of certain individuals as acts of the company) and/or "vicarious liability" approaches (i.e., that attribute liability on the basis that an employee or agent was acting on delegated authority).

However, approaches to attribution of liability that rely on the identification of culpable individuals have limitations as a response to the systemic problems that may exist within companies, such as poor management and supervision.

In business and human rights cases, it can be difficult and costly to identify the company (or companies) that should be held legally accountable and on what basis, without detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures (see pp. 37–40). Some domestic private law regimes contain elements that alleviate those problems to some extent by allowing the necessary elements of fault to be inferred from the surrounding circumstances, or by applying objective standards to determine what would have been "foreseeable" to the corporate defendant (rather than what was subjectively "foreseen" by the defendant), or by dispensing with the need to prove corporate "knowledge" or "intentions" altogether through the use of "strict" or "absolute" liability.

The guidance highlights the need for approaches to private law liability that are capable of addressing systemic fault and individual fault (see 12.2). In addition, the guidance suggests that States consider ways to ensure that the distribution of evidential burdens of proof takes account of considerations of access to remedy and considerations of fairness to all parties (see 12.5).

POLICY OBJECTIVE 13: Private law regimes are sufficiently robust to ensure that there is both effective deterrence from and effective remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.

13.1 Domestic private law regimes (a) communicate clearly the different modes and degrees of contribution to the harms perpetrated by a third party that will give rise to secondary legal liability; and (b) are clear as to the extent to which the principles for assessing secondary liability are applicable to companies.

13.2 Domestic private law regimes are clear as to the principles used to attribute knowledge, intentions, actions and omissions to a company for the purposes of assessing corporate legal liability on the basis of theories of secondary liability.

13.3 Domestic private law regimes treat causes of action based on theories of secondary liability as distinct causes of action, conceptually and procedurally separate from any breaches of law committed by the primary wrongdoer, and such secondary liability is not contingent, in law or in practice, on any judicial finding of liability on the part of the primary wrongdoer.

EXPLANATORY NOTES

Attributing liability to a company: secondary liability

Companies may be legally liable under private law regimes for causing or contributing to human rights abuses of other individuals or entities by virtue of theories of secondary liability. Depending on the relevant domestic law regime, secondary liability under private law regimes may result from instigating or inciting a wrongful act or providing material assistance to the primary wrongdoer. In some jurisdictions, and under some regimes, secondary liability may result from omissions (e.g., failure to prevent wrongdoing) as well as positive acts.[25]

[25] It is not always obvious whether a set of facts is best conceptualized as a case of primary or secondary liability. For instance, the same set of facts may be able to support a cause of action based on both negligence (i.e., "primary liability", on the basis that a company had failed to foresee and/or respond adequately to a danger) and secondary liability (e.g., based on a company's material contributions to a state of affairs that resulted in human rights abuses).

The principles used to determine secondary liability vary from regime to regime and jurisdiction to jurisdiction.

Domestic legal regimes do not always articulate clearly the principles applicable to the assessment of the secondary liability of companies in private law claims arising from business-related human rights abuses. The modes and levels of contribution to such abuses that will give rise to secondary corporate liability require clarification in many domestic law regimes.

It would be a potentially serious barrier to remedy were the liability of a secondary party to be contingent upon a successful private law claim against primary wrongdoer, especially where the primary wrongdoer cannot be found, is deceased or, in the case of a corporate entity, has been dissolved or makes a claim to some form of immunity.

The guidance therefore highlights the need for clarity as to the modes and levels of contribution that will lead to corporate legal liability based on theories of secondary liability under private law regimes (13.1). In addition, the guidance highlights the importance of allowing secondary liability to be determined without first establishing the legal liability of a specific primary wrongdoer (13.3).

POLICY OBJECTIVE 14: The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

14.1 Domestic private law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

14.2 Domestic private law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

14.3 Domestic private law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

14.4 Judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

EXPLANATORY NOTES

Human rights due diligence

In many jurisdictions, a company's human rights due diligence will be relevant to the question of whether the company had discharged the applicable standard of care for the purposes of private law tests for negligence. The Guiding Principles provide a global standard for human rights due diligence.[26] However, OHCHR research raises questions as to whether this standard for human rights due diligence is adequately reflected in domestic law regimes and properly understood by domestic authorities and judicial bodies.

The guidance therefore highlights the need for human rights due diligence concepts to be properly integrated into domestic law due diligence standards (14.1 and 14.2) and that relevant State agencies and judicial bodies have access to, and take regulatory and enforcement decisions by reference to, robust and credible standards (14.4). However, the guidance also recognizes domestic private law regimes that make targeted use of strict or absolute liability (e.g., in environmental or consumer regimes) as a means of encouraging high levels of vigilance, for example, in cases of business activities where the risks of severe human rights impacts are particularly high (14.3).

[26] See Guiding Principles on Business and Human Rights, principles 17–21 and commentary.

2. OVERCOMING FINANCIAL OBSTACLES TO PRIVATE LAW CLAIMS

POLICY OBJECTIVE 15: Claimants in cases arising from business-related human rights abuses have access to diversified sources of litigation funding.

15.1 States prioritize the provision of State funding to claimants who are able to show financial hardship, and ensure that such funding is available on transparent and non-discriminatory terms, taking into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

15.2 The domestic legal system permits and encourages pro bono legal services.

15.3 Rules of civil procedure provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses, the criteria for which are clearly expressed and consistently applied.

15.4 The domestic legal system permits a range of private funding arrangements, such as funding by third party litigation funders, firms of solicitors (e.g., pursuant to contingency fee and/or "success fee" arrangements) and providers of litigation insurance.

15.5 Providers of private funding arrangements are subject to appropriate regulation to ensure proper standards of service and to guard against abuse and conflicts of interest.

15.6 Potential claimants have access to well-publicized and reliable sources of advice on their options with respect to litigation funding and resourcing, in languages and formats that are both accessible and understandable.

EXPLANATORY NOTES

KEY CONCEPTS

The term "State-based legal aid" refers to funding provided from public sources to help people, especially those who are on low incomes, to pay for legal advice and/or the costs of legal proceedings.

The term "costs" refers to the financial amounts incurred by a party to litigation that are associated with either pursuing or defending against that litigation. The term encompasses lawyers' fees and court costs and other expenses, such as transportation, communication, translation and accommodation costs and costs of obtaining expert testimony.

The term "security for costs" refers to an amount of money paid into court or a bond or a guarantee that is provided by a claimant that can be called upon if the claimant becomes liable to pay a defendant's costs and is unable to do so.

Diversifying funding sources

The factors that prevent people from being able to fund their legal claims are not confined to business and human rights cases. Instead, they are frequently the consequences of wider problems, such as policies on public spending, lack of resources for courts or delays in court processes due to the operation of procedural rules. Those wider challenges are beyond the scope of the guidance.

State-based legal aid is an important source of funding for low-income claimants in many jurisdictions. However, in many jurisdictions, it is becoming increasingly difficult to access in practice. Where it is available, it is unlikely to cover the full cost of legal proceedings in complex legal cases.

States have a vital role to play in fostering the conditions needed for diversification of litigation funding options. The guidance highlights various ways in which States can facilitate a more diverse range of options for funding of private law claims (15.1–15.6). While these would not be limited to private law claims arising from allegations of business-related human rights abuses, they are nevertheless included because of their practical significance to access to remedy in such cases.

POLICY OBJECTIVE 16: Costs associated with bringing private law claims in cases arising from business-related human rights abuses (e.g., lawyer's fees and court fees) are reduced, including through better case management and other efficiency measures.

16.1 Court fees (e.g., initial filing fees, fees for obtaining and copying documents, etc.) are reasonable and proportionate, with the likelihood of waivers for claimants showing financial hardship and in cases where there is a public interest in the litigation taking place.

16.2 Court procedures include readily identifiable, realistic and affordable opportunities for early mediation and settlement.

16.3 Systems exist for the identification of and transparency and judicial accountability with respect to court delays.

16.4 Rules on the allocation of court and legal costs at the conclusion of proceedings are designed to encourage reasonableness on the part of litigants, efficient use of legal and other resources in the pursuit of any claim or defence to a claim and, as far as possible, the swift conclusion of legal claims.

16.5 Rules on security for costs strike a proper balance between the needs of a defendant with respect to the management of financial risks associated with litigation and considerations of access to remedy for claimants.

16.6 Domestic law courts make appropriate use of technologies, including information and communications technologies, to operate in an efficient and cost-effective manner.

16.7 There is the possibility of civil enforcement of legal standards by regulators (i.e., acting on behalf of affected individuals or groups) in appropriate cases.

EXPLANATORY NOTES

Court costs and fees

Addressing the high costs of litigation is an essential part of addressing financial obstacles to legal claims in business-related human rights cases.

The guidance identifies a number of steps that States could consider to reduce the financial obstacles faced by claimants in business and human rights cases through reductions to court costs and fees (16.1–16.7). While the implications of these would not be limited to private law claims arising from allegations of business-related human rights abuses, they are nevertheless included because of the significance of court costs as a barrier to remedy in such cases.

3. COOPERATION IN CROSS-BORDER CASES

POLICY OBJECTIVE 17: Claimants in cases arising from business-related human rights abuses are readily and rapidly able to seek legal assistance from relevant State agencies and judicial bodies in other States for the purpose of gathering evidence from foreign individual, corporate and regulatory sources for use in judicial proceedings.

17.1 The State sets out a clear policy expectation that its judicial bodies and other relevant State agencies will be appropriately responsive to requests for legal assistance made for the purposes of obtaining evidence for use in judicial proceedings arising from business-related human rights abuses.

17.2 The State ensures that appropriate bilateral and multilateral agreements are in place to enable its judicial bodies and other relevant State agencies to request legal assistance from relevant counterparts in other States for the purposes of obtaining evidence for use in judicial proceedings arising from business-related human rights abuse.

17.3 The State ensures that its judicial bodies and other relevant State agencies have access to the necessary information, support, training and resources to enable personnel to make the best use of arrangements with other States for cooperation in private law cases.

17.4 The State is actively involved with bilateral and multilateral initiatives aimed at improving the ease with which and speed at which (a) requests for mutual legal assistance can be made and responded to; and (b) information can be exchanged between judicial bodies and other relevant State agencies in private law cases, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

17.5 Judicial bodies and other relevant State agencies support and encourage the involvement of their personnel in relevant bilateral and multilateral initiatives and networks aimed at (a) facilitating contact and exchange of know-how between their personnel and their counterparts in other States; and (b) promoting awareness of different opportunities and options for international cooperation and the provision of legal assistance in private law cases.

EXPLANATORY NOTES

KEY CONCEPTS

"Cross-border" cases are those 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.

The term "forum State" refers to the State in which a private law case is (or is to be) litigated.

The term "extraterritorial jurisdiction", in the context of a private law claim, refers to the ability of State-based judicial mechanisms of the forum State to adjudicate and resolve disputes with respect to private actors and/or activities outside the territory of the forum State. This kind of jurisdiction is sometimes also referred to as extraterritorial "adjudicative jurisdiction".

Lack of clarity as to the appropriate use of extraterritorial jurisdiction in private law cases

While the exercise of extraterritorial jurisdiction in the public law sphere is governed by international law (see pp. 23–24), the use of extraterritorial jurisdiction in private law cases is governed largely by the domestic law of the forum State.[27] Consequently, outside the scope of regional or international regimes to regulate the use of adjudicative jurisdiction,[28] there is not yet evidence of a coherent trend in State practice with respect to the roles and responsibilities of interested States in cross-border private law cases.

OHCHR research has identified a number of differences of approach with respect 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 forum State 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.[29] At the same time, some international treaty bodies have called on home States to take steps to facilitate greater access to State-based judicial mechanisms by those adversely affected by foreign business-related human rights impacts of business enterprises domiciled in the respective home States.[30]

The guidance highlights the need for clarity in relevant domestic private law regimes as to their intended geographic scope (12.8). In addition, the regular review of domestic private law regimes is recommended to ensure that those regimes provide the necessary coverage and appropriate range of approaches with respect to evolving business-related human rights challenges and in the light of the State's obligations under international human rights treaties (12.9).

[27] This body of domestic law is often referred to as "conflicts of law" or "private international law".
[28] See for instance, within the European Union, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[29] See A/HRC/29/39, paras. 33–37. See also OHCHR, "State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses".
[30] See, for example, Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), para. 44.

Cooperation and coordination between judicial bodies and other State agencies in cross-border cases of business involvement in human rights abuses

States have entered into international treaties to facilitate international cooperation with respect to legal assistance (e.g., regarding the taking of evidence) and enforcement of judgments in private law cases with a cross-border element.[31] However, as in the field of public law (see pp. 24–25), these require effective implementation at a practical level to ensure that mutual legal assistance in private law cases can be quickly and efficiently sought and obtained.

The guidance sets out a range of practical steps that States can consider to enhance the ability of judicial bodies and other relevant State agencies to seek and obtain legal assistance from counterparts in other jurisdictions in private law cases, including ensuring appropriate international arrangements are in place (17.2), developing information repositories (17.4) and promoting awareness and facilitating networking between law enforcement practitioners and their counterparts in other States (17.5).

POLICY OBJECTIVE 18: The State actively engages in relevant forums and initiatives to seek to improve access to information for claimants and their legal representatives in cross-border cases arising from or connected with business-related human rights abuses.

18.1 The State actively engages in bilateral, regional and multilateral initiatives aimed at improving the ease with which and speed at which information can be exchanged between claimants and their legal representatives and the relevant State agencies of other States in cross-border cases.

[31] See for instance the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, or the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

18.2 The State engages in bilateral, regional and multilateral initiatives that relate to cross-border access to information regarding the human rights-related risks and impacts of different business activities, and that aim at achieving greater alignment between different domestic legal regimes with respect to issues such as data protection, protection of victims and their legal representatives, protection of whistle-blowers and legitimate requirements of commercial confidentiality.

EXPLANATORY NOTES

Access to information for claimants and their legal representatives

Claimants may wish to refer to information held by State agencies (for example, licensing bodies, environmental authorities, workplace health and safety agencies, or consumer protection bodies) in order to support their claim that an applicable legal standard relating to respect by business enterprises of human rights has been breached. In addition, there may be other information in the public domain, for instance, relating to regulatory policies with respect to a particular business sector, that may be relevant to legal proceedings. However, in many cases, and particularly in cross-border cases, this information can be difficult and expensive to access.

The guidance highlights the need for States to work bilaterally and multilaterally to increase the speed and ease with which information can be sought and obtained from relevant State agencies in other States for use in judicial proceedings (18.1) and to achieve greater alignment between different jurisdictions with respect to access to information and issues such as data protection, protection of victims and their legal representatives, protection of whistle-blowers and legitimate requirements of commercial confidentiality (18.2).

4. PRIVATE LAW REMEDIES

POLICY OBJECTIVE 19: Private law remedies consequent upon a determination of corporate legal liability offer the prospect of an effective remedy for the relevant abuse and/or harm.

19.1 Judicial bodies have the authority and ability, in law and in practice, to award a range of remedies in private law cases arising from business-related human rights abuses that may include monetary damages and/or non-monetary remedial measures, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (e.g., public apologies) and guarantees of non-repetition (e.g., mandated compliance programmes, education and training).

19.2 In each case, the private law remedies awarded to claimants (a) are proportional and appropriate to the gravity of the abuse and the extent and nature of the loss and/or harm suffered; (b) may, to the extent permitted by the relevant domestic legal system, reflect the degree of culpability of the defendant company (e.g., as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company responded adequately to warnings and other relevant factors); (c) are designed in such a way as to minimize the risks of repetition or continuation of the harm; and (d) take account of issues of gender and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

19.3 Claimants are consulted with respect to the design and implementation of private law remedies and with respect to the terms of any settlement. Such consultation takes account of gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

19.4 Judicial bodies and/or relevant State agencies monitor a company's implementation of private law remedies in an appropriate fashion and ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint regarding and/or seek remedial action with respect to any non-implementation of such remedies.

19.5 The domestic legal system does not permit the tax deductibility of amounts paid as monetary damages following a determination of corporate legal liability in cases arising from business-related human rights abuses.

19.6 The domestic legal system ensures, through appropriate regulation, guidance or professional standards, that monetary damages are distributed among members of affected groups of claimants in a fair, transparent and non-discriminatory way, taking into account gender issues and the needs of individuals or groups at heightened risk or vulnerability or marginalization.

EXPLANATORY NOTES

KEY CONCEPTS

The most likely remedies in private law cases will be "monetary damages". However, "non-monetary remedial measures", such as restorative, rehabilitative and preventative measures may also be awarded, depending on the powers of the relevant judicial body.

In some jurisdictions, the remedies that may be awarded in a private law case may include a "punitive" as well as a compensatory element. Whereas the aim of "compensatory remedies" is to compensate a claimant for the loss or harm suffered, the primary goal of a "punitive remedy" is to punish the wrongdoer and to provide deterrence from future wrongdoing. Punitive remedies may be monetary or non-monetary. Cancellation of a licence to operate is an example of a non-monetary punitive remedy.

Compensatory damages, punitive damages and other non-monetary remedies

Domestic private law regimes differ in terms of the kinds of remedies that can be awarded following a successful private law claim. For instance, monetary damages may be purely compensatory or may have a punitive element. Methodologies for calculating the correct amount of compensatory monetary damages vary from jurisdiction to jurisdiction. Some private law regimes may also provide for non-monetary remedies, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, public apologies and guarantees of non-repetition. In some cases,

appropriate non-monetary remedies may include arrangements for commemorations or to contribute to the preservation of cultural heritage.

Useful guidance as to what constitutes an effective remedy in practice can be found in the 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. Private law regimes should recognize and take account of the different and sometimes unique ways that adverse human rights impacts of business activities can be experienced by different individuals and groups within society and especially by individuals and groups at heightened risk of vulnerability or marginalization.

The guidance highlights the importance of a flexible range of available sanctions and remedies in private law cases that can be tailored to the particular circumstances of a case and the particular needs of the affected persons and their communities (19.1–19.3). In addition, the guidance highlights the need for appropriate monitoring of the implementation of sanctions and remedies (19.4).

Distribution of monetary compensation awarded following a collective redress action

In the course of its research and consultations, OHCHR identified a number of common challenges in relation to the distribution of monetary compensation following a settlement or damages award in a large claim using a collective redress mechanism. These include problems identifying and contacting the correct claimants, lack of transparency with respect to the compensation amounts and distribution methodology, ensuring non-discrimination and challenges arising from the use of third parties to distribute funds.

Further work is needed, both at the domestic level and in relevant regional and international forums, to develop standards to ensure that those entitled to receive monetary compensation following a private law collective (or "group") action are properly and proactively advised of their entitlements to compensation and that they receive appropriate support and follow-up services in a manner that is sensitive to gender issues and the needs and concerns of individuals and groups at heightened risk of marginalization or vulnerability.

The guidance therefore highlights the importance of appropriate regulation, guidance or professional standards to ensure that monetary compensation is distributed among members of affected groups of claimants in a fair, transparent and non-discriminatory way (19.6).

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