Improving Accountability and Access to Remedy for Business and Human Rights Abuses: A submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Second Revised Draft of the legally binding instrument (LBI) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

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1. Introduction

The purpose of this note is to draw attention to OHCHR's work on accountability and access to remedy which might usefully be considered by members of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) in the context of the negotiations to take place at its Sixth Session.

Since 2014, OHCHR has received multiple mandates from the Human Rights Council (Resolutions 26/22, 32/10, 38/13 & 44/15) to strengthen the implementation of the "Access to Remedy" Pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) and thus improve the prospects for corporate accountability and remedy in business and human rights cases.

In furtherance of these mandates, OHCHR's Accountability and Remedy Project (ARP) has delivered credible and workable recommended actions to enhance the effectiveness of different remedial mechanisms (both judicial and non-judicial) in cases involving business-related human rights abuse.

The Accountability and Remedy Project has thus far completed three substantive phases, corresponding to the first three mandates from the Human Rights Council.

- The first phase of the Project (**ARP I, 2014-2016**) focussed on the role of **judicial mechanisms** (e.g. domestic courts). OHCHR's findings and recommended actions in relation to **judicial mechanisms** can be found in the annex of its **2016 report to the Human Rights Council**, with further explanation found in that report's **explanatory addendum**.
- The second phase of the Project (**ARP II, 2016-2018**) was concerned with the role of **State-based non-judicial grievance mechanisms** (e.g. regulators, ombudsmen, national human rights institutions, national contact points under the OECD Guidelines for Multinational Enterprises, etc.). OHCHR's findings and recommended actions at the conclusion of that phase of work are set out in the annex of its **2018 report**, as well as its **explanatory addendum**.
- The third phase of the Project (**ARP III, 2018-2020**) concerned the role of **non-State-based grievance mechanisms** (i.e. private mechanisms through which grievances concerning business-related human rights abuse can be raised, and remedy can be sought). OHCHR's findings and recommended actions were reported to the Human Rights Council through its **2020 report** and **explanatory addendum**.

At the conclusion of each stage completed, the Human Rights Council has by consensus, welcomed OHCHR's work on improving accountability and access to remedy for victims of business-related human rights abuse, noted "with appreciation" the relevant report and requested OHCHR to continue its work in this area. (See Resolution 32/10 in relation to ARP I, Resolution 38/13 in relation to ARP II, and Resolution 44/15 in relation to ARP III).

OHCHR's findings have been distilled into a series of "policy objectives," supported by "elements" intended to demonstrate the different ways that those objectives can be achieved in practice. This deliberately flexible format was chosen to be implementable in a wide range of legal systems and contexts, while also being practical, forward-looking and reflective of international standards on access to remedy.

Beyond the main reports for each phase of ARP, OHCHR has produced several documents following up on our work on accountability and remedy. Of particular relevance to the IGWG is a report submitted to the Human Rights Council in 2018 (in response to a separate mandate in Resolution 32/10) on the relationship between human rights due diligence (as described in the UNGPs) and determinations of corporate liability under national law for adverse human rights impacts arising from or connected with business activities (HRDD/Legal Liability Report). Building further on this report, OHCHR released a technical issues paper in 2020 which aims to unpack some of the main choices that policy-makers will be confronted with (and the (dis)advantages of each) when considering whether and how to establish mandatory human rights due diligence regimes.

OHCHR's findings and recommended actions arising from ARP can be incorporated into any relevant standard-setting process. Taken together, these project outputs provide a robust, accessible, adaptable and evidence-based resource for States seeking to improve the effectiveness of their legal and policy responses to business and human rights challenges, whether at the domestic level (e.g. through National Action Plans on Business and Human Rights and domestic law reform) or through international institutions and law-making initiatives.

2. Insights from OHCHR's work on accountability and remedy relevant to the Second Revised Draft LBI

OHCHR's work on accountability and remedy (in particular, ARP) and the treaty process share a common goal: increasing access to effective remedy for victims of corporate abuses and ensuring accountability for such abuses.

This note focuses on those articles of the Second Revised Draft LBI that address mandatory human rights due diligence, mutual legal assistance, international cooperation, and protection from retaliation, as these are areas where there is significant overlap with OHCHR's recent work on accountability and remedy for business-related human rights cases.

a. Mandatory Human Rights Due Diligence (Articles 6 and 8)

Article 6 of the Second Revised Draft LBI obliges States parties to adopt measures needed to ensure that human rights due diligence activities are undertaken by business enterprises, and sets out the key components of such activities. Parts of Article 8 elaborate on how the exercise of human rights due diligence would affect the legal liability of legal or natural persons conducting business activities.

A number of important insights – relating particularly to the interplay between the matters covered in Article 6 (Prevention) and Article 8 (Legal Liability) – have emerged from the ARP I phase of work, and subsequent follow-up activities undertaken by OHCHR.

The ARP I report calls on States to align principles for assessing corporate liability with the responsibility of companies to exercise human rights due diligence across their operations (ARP I Annex, Policy Objectives 3 and 14). Further, the report recommends that sanctions and private law remedies reflect the degree of culpability of the relevant company, which should take into account the extent to which human rights due diligence was exercised (ARP I Annex, 11.2 and 19.2).

These and other relevant findings from ARP I were explored in more depth during a multi-stakeholder expert consultation in 2017 on the relationship between human rights due diligence (as described in the UNGPs) and determinations of corporate liability, which fed into OHCHR's HRDD/Legal Liability Report. That report explores a number of topics of relevance to the IGWG negotiations, including

- mandatory human rights due diligence (paras. 14-18), and
- the relationships between human rights due diligence and
    - negligence (paras. 19-24),
    - defences to liability (paras. 25-29),
    - secondary liability (paras. 30-31), and
    - determinations of sanctions and remedies (paras. 32-34).

Following up on this report, OHCHR produced a technical issues paper in June 2020 to help policy-makers unpack the different policy choices that could arise when designing mandatory human rights due diligence regimes. The paper covers a number of different questions that policy-makers should keep in mind, and begins to explore the pros, cons, and trade-offs involved with different approaches (the annex attached below reproduces the section of that paper discussing some key points to explore and take into account). Some of these questions include:

- **Who should be the duty-bearer?** (e.g., which natural or legal persons, with which connections to the jurisdiction) (pp. 10-11)
- **What kinds of relationships and activities might give rise to legal liability?** (e.g., what business relationships / entities will be covered) (p. 12)
- **What kinds of legal obligations are imposed?** (e.g., requiring companies to prevent harm vs. requiring companies to carry out human rights due diligence vs. providing other incentives to carry out human rights due diligence) (pp. 12-16)
- **Should the regime be comprehensive or issues-based?** (e.g., covering all internationally recognized human rights vs. specific areas of human rights) (pp. 16-17)
- **Should the regime seek to apply to all business activity or be sector-based?** (p. 17)
- **What should be the consequences of non-compliance?** (e.g., different forms of liability, issues of standing, etc.) (pp. 17-19)
- **What supporting regulatory institutions and arrangements may be needed?** (e.g., supervisory institutions to support implementation and compliance) (pp. 19-20)

All of these resources are highly relevant to the substance of both Article 6 (Prevention) and Article 8 (Legal Liability) of the Second Revised Draft LBI. They highlight the importance of viewing issues of prevention and liability holistically, rather than necessarily as separate policy items, and provide insights into the different ways in which effective national procedures may be deployed to ensure compliance with the obligations laid down in Article 6 of the LBI.

b. Mutual Legal Assistance and International Cooperation (Articles 12 and 13)

Article 12 of the Second Revised Draft LBI creates an obligation to provide legal assistance and international judicial cooperation in relation to claims covered by the LBI, and sets out the modalities by which this assistance will take place. Article 13 recognizes the importance of international cooperation more generally and calls on States to undertake specific measures to enhance their ability to provide access to remedy.

Each phase of the Accountability and Remedy Project has had a focus on cross-border cases and explored good practices regarding, and opportunities for enhancing, mutual legal assistance and international cooperation.

With respect to judicial mechanisms, the ARP I report calls for both State bodies and private claimants to be able to readily and rapidly seek legal assistance from relevant State agencies and judicial bodies

in other States regarding specific cases (ARP I Annex, Policy Objectives 9 and 17). The report and the ARP I explanatory addendum (see paras. 36-38, 65-68) highlight practical challenges hampering effective cooperation, and suggests numerous ways of responding to those challenges, for instance, through:

- ensuring necessary international arrangements are in place (ARP I Annex, 9.2 and 17.2);
- enabling investigations through joint investigation teams (ARP I Annex, 9.3);
- ensuring State agencies and judicial bodies have access to information, support, training and resources to enable personnel to effectively cooperate (ARP I Annex, 9.4 and 17.3);
- facilitating information exchange, for instance through information repositories (ARP I Annex, 9.5 and 17.4); and
- promoting awareness and facilitating networking between law enforcement practitioners and their counterparts in other States (ARP I Annex, 9.6 and 17.5).

Building upon these recommended actions, the Working Group on Business and Human Rights published a report in 2017 on best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement. That report provides further information on challenges regarding cross-border cooperation and regulatory and policy options for overcoming those challenges.

Additionally, the ARP II report reminds States not to overlook the role of State-based *non-judicial* grievance mechanisms in cross-border cases, and recommends that such mechanisms be given the ability to request and provide assistance with relevant authorities and practitioners in other countries (ARP II Annex, Policy Objective 13; ARP II explanatory addendum, paras. 58-64).

With regard to international cooperation more generally, recommendations resulting from the Accountability and Remedy Project include encouraging States to participate in relevant bilateral and multilateral initiatives to strengthen domestic legal responses, improve information exchange, and promote peer learning (ARP I Annex, Policy Objectives 10 and 18; ARP II Annex, Policy Objective 13; ARP III Annex, Policy Objective 5).

c. Protection from Retaliation

The Second Revised Draft LBI includes several provisions related to the protection of people from retaliation, such as in Article 4(2) (in particular, subsections (a), (b) and (e)), Article 5 and Article 12(3)(a)(ix).

Retaliation and fears of retaliation (whether by State or non-State actors) pose serious barriers to remedy in practice. The Accountability and Remedy Project has therefore prioritised this issue for study at each phase of the project, noting that this risk is not confined to any one type of mechanism, but can seriously undermine the effectiveness of all categories of mechanisms relevant to remedying business-related human rights harms (i.e., State-based or non-State-based, judicial or non-judicial). Retaliation can take many forms, and can result in many different types of harm (e.g., physical, psychological or economic), the effects of which can be exacerbated for certain groups (e.g., women) as a result of entrenched social attitudes and discrimination. It is important for those responsible for developing and operating grievance mechanisms to be aware, through proper risk assessment processes, of the various risks that rights holders may face, and particularly those at heightened risk of vulnerability or marginalisation. Further, it is important to keep in mind that those potentially at risk of retaliation may go beyond people seeking remedies directly and include:

- **people associated with rights holders**: which may include, depending on the context, family members, friends, colleagues, trade union and other representatives, human rights defenders, or any other person connected with a rights holder who may be a target for retaliation as a result of the rights holder's actual or potential use of a grievance mechanism; and

- **people who contribute to the effective functioning of grievance mechanisms**: which may include, depending on the context, mechanism personnel, those providing services to a mechanism in a professional capacity (e.g., mediators, case workers, and interpreters), and others who may be called upon for assistance or information (e.g., expert witnesses).

The main provisions regarding retaliation in the Second Revised Draft LBI refer to "victims, their representatives, families and witnesses," and thus do not encompass the full range of people at risk of retaliation in business-related human rights abuse cases. The IGWG should consider expanding upon the scope of persons referred to in these provisions; language from the latest reports of the Accountability and Remedy Project could be helpful in this regard (see ARP III Annex, Policy Objective 2; ARP III explanatory addendum, p. 5 (Box 3: Key concepts) and paras. 15-21).[1]

Additionally, those consulted for the Accountability and Remedy Project have highlighted numerous areas where greater vigilance as regards protection against retaliation may be warranted, including:

- The collection and storage of evidence / testimony (ARP I explanatory addendum, para. 30);
- The exchange of information, and other forms of cooperation, between different mechanisms, agencies or actors (ARP II Annex, 2.4; ARP III explanatory addendum, paras. 51 and 67);
- The referral or transfer of allegations or cases to different mechanisms (ARP II Annex, 3.3 and 7.12);
- The publication of information relating to allegations or cases (ARP II Annex, 8.2; ARP III Annex, 9.5 and 11.2);
- Where confidentiality has been requested, or the circumstances of a case would otherwise make it necessary or appropriate to protect someone's identity (ARP II Annex, 7.10; ARP III explanatory addendum, para. 48);
- The work of human rights defenders, such as trade union representatives (ARP III explanatory addendum, para. 19); and
- Strategic lawsuits against public participation (ARP III explanatory addendum, para. 18).

The IGWG should make sure that the LBI includes robust protections from retaliation and that those provisions in the LBI that cover these activities (e.g., Article 12(5)) do not increase risks to rights holders, people who are associated with them and people who contribute to the effective functioning of grievance mechanisms.

3. Conclusion

OHCHR's Accountability and Remedy Project has uncovered information and insights of relevance to a number of areas addressed in the Second Revised Draft LBI. OHCHR encourages the IGWG to consider this work (which was informed by a global, evidence-based, consultative process, and which was mandated and welcomed by the Human Rights Council) during its negotiations of the Second Revised Draft LBI, and draw upon ARP findings to develop and strengthen the LBI's provisions.

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[1] Although ARP III was focused on the effectiveness of non-State-based grievance mechanisms, the findings in relation to retaliation built upon the work done in earlier phases of ARP and are relevant for all types of grievance mechanisms.

ANNEX: Key points to explore and take into account in discussions on mandatory human rights due diligence

The following text is reproduced from section 7 of the UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies. The cross-references in the text have been removed.

The term "mandatory human rights due diligence" potentially covers a range of different regimes, each presenting a number of options as regards their design and implementation. Much of the present discourse around mandatory human rights due diligence glosses over these differences. This creates the risk that different stakeholder groups may be speaking at cross-purposes when they support (or express concerns about) mandatory human rights due diligence. Many of the reservations that are expressed by some stakeholders about mandatory human rights due diligence regimes can be addressed through good and thoughtful design, for instance. This paper has sought to unpack the main issues that will need to be addressed as stakeholders working in different jurisdictions consider, prepare and progress their proposals for mandatory human rights due diligence.

With a view to encouraging a robust, constructive and ultimately productive dialogue between stakeholders, a list of key items to consider and take into account in future engagement on these important issues is set out below.

Item 1. A threshold question to be considered (because it is likely to have many implications for the regime's design, development and implementation) is whether the regime will be general in nature (i.e. would seek to apply to all sectors and all types of human rights abuses) or

- Would be limited to specific (e.g. "high-risk") sectors or business activities; and/or
- Would focus on specific human rights issues and themes, or focus on severity.

Item 2. In order to ensure that legislative proposals are implementable and meet stated policy goals, policy makers and legislators will need to consult widely with stakeholders on a range of issues related to the design of the proposed regime (*taking care to communicate clearly the various trade-offs that may be involved*),[2] and in particular

- The types of companies to which the primary mandatory human rights due diligence legal obligations will apply;
- The nature of the legal obligations to be imposed;
- The extent of the legal obligations to be imposed (i.e. geographical, and also as regards the types and nature of business activities and relationships that the primary duty bearer will be responsible for);
- The manner in which the legal standards will be enforced (including, if civil or criminal enforcement is contemplated, the range of persons who will be accorded "standing" to take legal action);
- The types of sanctions for non-compliance (e.g. criminal, quasi-criminal, declaratory remedies, loss of access to government schemes etc.);
- The "regulatory architecture"; i.e. the structure of the regime, and the supporting institutions, services and arrangements (including supporting regulations, types and format of guidance, etc.) that will be needed, especially with regard to abuse in international supply chains;
- The approach to regulation and enforcement (e.g. proactive or reactive, "risk-based", "light-touch", company response + clearance models, graduated responses, etc.).

[2] E.g. the likely need for greater clarity (and less flexibility) as regards the scope and nature of obligations if the possibility of criminal sanctions is being contemplated, or the need to balance the advantages of the simpler implementation of a "sector-specific" regime against the possible disadvantages of its more limited scope.

Item 3. Policy-makers and legislators should conduct a thorough review of the wider "regulatory ecosystem" in which the mandatory human rights diligence regime will sit, with a view to identifying areas where reforms or amendments to laws may be needed, in order to ensure

- that the mandatory human rights due diligence regime is able to capitalise on opportunities that may be presented by existing regimes (e.g. in the form of leverage or incentives to enhance the commercial or reputational drivers for carrying out human rights due diligence activities to a high standard),
- a smooth interface between the mandatory human rights due diligence regime and other legal regimes,
- that the new regime is capable of meeting its regulatory objectives, that the risks of any negative unintended consequences are identified and addressed, and that businesses are not subjected to any compliance dilemmas (e.g. in the form of conflicting requirements), and
- the general aim of ensuring "policy coherence".

Item 4. While international human rights norms apply in all jurisdictions, the manner in which these will be given effect as a matter of domestic law, including the regulatory techniques and institutions used, can vary greatly. Therefore, where the regime is proposed to have potential extraterritorial reach, careful consultation with affected stakeholders, civil society, businesses and regulatory agencies *in all relevant jurisdictions* will be necessary to ensure that possible areas of inconsistency, duplication, confusion and perhaps even tension, are identified and appropriately addressed.

Item 5. Policy-makers and legislators should consider the different ways in which further training and capacity building could help to facilitate smooth implementation of new mandatory human rights due diligence regimes (e.g. of legal practitioners, regulators and the judiciary as regards the key elements of human rights due diligence and the ways in which it is distinctive from other kinds of due diligence in its focus on risks *to people* rather than legal risks to the company).