



# The OHCHR Accountability and Remedy Project

Illustrative examples for guidance to improve corporate  
accountability and access to judicial remedy for  
business-related human rights abuse

Companion document to A/HRC/32/19  
and A/HRC/32/19/Add.1

5 July 2016

## IMPORTANT NOTES ABOUT THIS DOCUMENT:

1. This document supplements the guidance set out in the Annex to the report of the United Nations High Commissioner for Human Rights in A/HRC/32/19 as further elaborated in A/HRC/32/19/Add.1 The guidance constitutes the outcome of the OHCHR Accountability and Remedy Project to enhance accountability and access to judicial remedy for victims of business-related human rights abuse.
2. The aim of this document is to support implementation of the guidance by providing examples of methods that States have used and steps that States have taken in practice that are relevant to different elements of the guidance and which have the potential to improve access to remedy in cases of business-related human rights abuses.
3. The document provides an indication of a range of possible State responses to the guidance. The illustrative examples are based on information and data about actual State practice collected in the course of the Accountability and Remedy Project. **The examples are intended to be illustrative only. They are not intended to be prescriptive and they are certainly not exhaustive.**
4. There are likely to be many different ways that States can respond to different elements of the guidance in practice which need to take account of local structures, traditions, and economic conditions. However, constraints of time and resources have meant that a thorough investigation of approaches taken in different jurisdictions has not been possible. Therefore there are likely to be many other possible ways of responding to access to remedy challenges, and implementing the recommendations in the guidance, which are being used or are being contemplated by States, but which are not reflected in this document.
5. Although the illustrative examples set out in this document have been derived from actual examples of State practice collected in the course of the Accountability and Remedy Project they may not be suitable for all jurisdictions and all conditions. They are presented here as methods, initiatives and steps that States could consider (if they are not implemented already), and for which there are possible models and precedents in other jurisdictions.
6. In many cases, the illustrative examples set out in this document may not be effective in isolation. To be effective, they may require additional supporting reforms to provide the necessary legal context or conditions. Some may work best as part of a package of reforms. Where possible, linkages between different elements and illustrative examples are noted in this document.
7. The illustrative examples have been chosen on the basis of their potential to improve access to justice for business-related human rights abuses. The number or proportion of States which have adopted similar approaches, methods or steps was not a factor in the selection of illustrative examples. However, this is not to imply that, where these have been implemented by States, such approaches, methods or steps are necessarily effective in every case. **Neither should this be taken to imply OHCHR endorsement of such approaches, methods or steps in specific contexts.**
8. Illustrative examples have not been provided for all of the guidance elements. However, the absence of illustrative examples for certain elements should not be taken to imply that there is no relevant and useful State practice to draw upon. In some cases, illustrative examples have not been provided because the elements themselves are self-explanatory, or because implementation is likely to be highly context specific.
9. It is the intention of OHCHR to update the document on an on-going basis as and when new illustrative examples come to our attention.

## I. Enforcement of public law offences

### Principles for assessing corporate legal liability

**Policy objective 1: Domestic public law regimes that are relevant to the respect by businesses of human rights (“domestic public law regimes”) are sufficiently detailed and robust to ensure that there is 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.**

#### **Illustrative examples: 1.1**

A. Ways to achieve greater coverage of legal regimes with respect to business-related human rights abuses;

- amendments to domestic public law regimes to expand the range of public law offences for which companies can be liable, especially in jurisdictions where there is no general presumption or principle of, or provision for, corporate legal liability for public law offences;
- amendments to domestic public law regimes to expand (or introduce greater flexibility into) the categories of business organisation that may be subject to domestic public law regimes.

B. Ways to evaluate the coverage and effectiveness of legislative regimes and to ensure the development of legislative, regulatory and policy measures appropriate to the type, nature and severity of the impacts;

- annual reports by regulatory bodies;
- parliamentary select committees;
- Law Commissions;
- Commissions of Inquiry;
- public consultations on future policy and/or legislative proposals;
- other research.

**Note:** see further 1.9 below.

C. The methods used to clarify whether, and the extent to which, domestic legal regimes impose legal obligations on companies will depend on the State’s general approach to questions of corporate legal liability (i.e. whether the default position in that jurisdiction is a presumption in favour or, or a presumption against, a general rule of corporate legal liability) and may involve;

- general provisions in the Criminal Code EITHER;
  - a. confirming the possibility of corporate legal liability, except in cases of (explicitly named) offences that can only physically be committed by natural persons; OR
  - b. listing the categories of crimes and the types of offences for which a corporate entity may be liable;
- explicit provisions in relevant domestic public law regimes setting out the extent to which the relevant regime imposes legal requirements on corporate entities as well as natural persons and the circumstances in which such liability will be imposed;

- for jurisdictions that make no provision for corporate legal liability for public law offences, clear provisions setting out the extent to which administrative sanctions can be levied against a company and the circumstances in which such sanctions may be levied (e.g. where there is a demonstrable connection between the commission of the offence and the activities or commercial interests of the relevant company).

**Note:** On sanctions and remedies, see further 11.1-11.5 below).

## **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.**

### **Illustrative examples: 1.2**

A. There is no universally accepted definition of “severe human rights abuses”. Moreover, domestic public law regimes may not be explicitly framed in terms of breaches of human rights.

B. Nevertheless, categories of severe human rights abuses that carry the possibility of corporate liability under domestic public law regimes in many jurisdictions include;

- participation in acts amounting to international crimes,
- murder;
- kidnapping;
- severe physical assault;
- use of forced labour; slavery like practices (e.g. human trafficking);
- use of child labour;
- serious breaches of workplace health and safety laws;
- serious breaches of consumer safety standards; and
- serious and/or large scale environmental damage.

C. State implementation of international treaties (e.g. treaties relating to the rights of children, worst forms of child labour, forced labour, and human trafficking) have led to the creation of new criminal offences which may be extended to corporate entities as well as individual offenders.

**Note:** On ensuring sufficient coverage and effectiveness of domestic public law regimes, see 1.1 above.

**Note:** On ensuring suitable sanctions in such cases, see further 11.1-11.5 below.

## **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.**

### **Illustrative examples: 1.3**

A. Ways to achieve greater conceptual separation between concepts of individual and corporate liability include;

- clarifying the legal position, for instance by explicitly stating in the relevant legal regimes that corporate liability for a public law offence can exist irrespective of the guilt or otherwise of individual directors, officers or other representatives, and whether or not the relevant individuals can be identified or individually indicted;
- issuing guidance (for instance by way of statutory guidance) as to how to distinguish “individual” acts from “corporate” acts;
- in jurisdictions which do not recognise the concept of corporate criminal liability, making express provision for the imposition of administrative or regulatory sanctions on a corporate

entity, (or “protective measures”) even where the individual wrongdoer(s) cannot be identified.

B. Note, however, it may still be appropriate in some circumstances to prosecute a corporate entity and specific individuals at the same time; simultaneously as co-defendants, or in parallel proceedings.

**Note:** On questions of secondary (or “complicity”) corporate liability under domestic public law regimes see 2.1-2.3 below.

#### **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.**

##### **Illustrative examples: 1.4**

A. Ways that actions, omissions and intentions of individual officers or employees can be relevant to corporate legal liability under domestic public law regimes include;

- attribution to the company of acts, omissions and intentions of those who can be said to represent the company’s “directing mind and will”;
- attribution to the company of acts, omissions and intentions of a company’s “legal representatives”;
- attribution to the company of acts, omissions and intentions of those exercising certain functions;
- attribution to the company of acts, omissions and intentions of those exercising “decisive influence” over the management of that company;
- attribution to company of acts, omissions and intentions of certain employees or agents under theories of “vicarious liability”;
- attribution to company of acts, omissions and intentions of certain other contractors under theories of “vicarious liability”;
- attribution to company of acts, omissions and intentions of certain other natural or legal persons that, from surrounding circumstances, the corporate entity appears to have “accepted” or “ratified” as its own.

B. Ways that the quality of corporate management can be relevant to corporate legal liability under domestic public law regimes include:

- treating collective decisions as “corporate acts”;
- aggregating the knowledge and intentions and actions of a group of individuals (e.g. senior managers or certain employees). (**Note:** This approach is referred to as “collective fault” approach. Under such regimes it is not necessary for a single person to have committed the entire wrongful act for a company to be liable);
- making negligent management, defective organization, poor internal control systems, or a poor “corporate culture” part of the elements of a primary offence;
- providing for sound management, good organisation, good internal control systems and good systems for supervision of employees to be used as a basis of a defence to an allegation that the company has committed public law offence.

**Note:** In practice, domestic public law regimes do not use one or other approach exclusively. Instead, different methods may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.

**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.**

**Illustrative examples: 1.5**

A. Ways to communicate 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 include;

- legislative provisions regarding corporate management requirements, compliance with which may provide the basis of a complete or partial defence to a public law offence. These may include requirements as to management and risk control systems, training of personnel, internal communication systems, periodic effectiveness and performance reviews, and systems to identify and implement appropriate corrections to deficient systems. (**Note:** On the relevance of human rights due diligence to corporate legal liability, see further 3.1 below);
- statutory duties of care which clarify the nature and extent of the management and supervisory responsibilities of companies and their management in specific business contexts.
- legislative provisions regarding the extent to which companies may be liable for the acts or omissions of contractors (e.g. where instructions to a contractor were not sufficiently clear, or where supervisory arrangements were not sufficiently robust). **Note:** On the relevance of human rights due diligence as a possible defence to corporate legal liability, see further 3.1 below;
- inclusion in the Criminal Code of provisions setting out the circumstances in which companies with the ability to exercise control or influence over other companies (e.g. on the basis of a shareholding) or companies which take part in the management of other companies or which provide finance to the activities of other companies can be liable for the actions of those other companies, including the meaning of “control” in different contexts;
- for business activities that require a licence, inclusion of provisions as to the licensee’s managerial responsibilities (including responsibilities for activities that are “contracted out”) as express licence terms;
- for business activities that require a licence, inclusion of provisions regarding the submission and maintenance of suitable risk management plans as a pre-condition for grant of a licence, compliance with which then becomes either a statutory requirement or is incorporated into licence terms;
- inclusion of requirements in domestic public law regimes to publicly report on measures taken to identify, prevent and mitigate social, environmental and human rights risks within group business enterprises).

**Note:** Theories of secondary liability are also potentially relevant to the allocation of legal liability among members of group business enterprises. See further 2.1-2.3 below.

**Note:** *In practice, domestic public law regimes do not use one or other approach exclusively. Instead, different methods may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

**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.**

**Illustrative examples: 1.6**

A. Ways to communicate 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 include;

- statutory duties of care which clarify the nature and extent of the management and supervisory responsibilities of companies and their management in specific business contexts.
- legislative provisions regarding the extent to which companies may be liable for the acts or omissions of suppliers and/or contractors (e.g. where instructions to a contractor were not sufficiently clear, or where supervisory arrangements were not sufficiently robust). **Note:** On the relevance of human rights due diligence as a possible defence to corporate legal liability, see further 3.1 below.
- for business activities that require a licence, inclusion of provisions as to the licensee's managerial responsibilities (including responsibilities for activities that are "contracted out") as express licence terms.
- for business activities that require a licence, inclusion of provisions regarding the submission and maintenance of suitable risk management plans as a pre-condition for grant of a licence, compliance with which then becomes either a statutory requirement or is incorporated into licence terms.
- inclusion of requirements in domestic public law regimes to publicly report on measures taken to identify, prevent and mitigate social, environmental and human rights risks within supply chains.

**Note:** Theories of secondary liability are also potentially relevant to the liability of business enterprises for human rights abuses taking place within a supply chain. See further 2.1 below

**Note:** *In practice, domestic public law regimes do not use one or other approach exclusively. Instead, different methods may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

**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.**

**Illustrative examples: 1.7**

A. Ways to strike an appropriate balance between considerations of access to remedy and fairness to all parties;

- adjustments to standards of proof for certain types of offences, For instance, whereas in criminal cases, the standard of proof is likely to be an onerous one (e.g. "beyond reasonable doubt") to protect the rights of the defendant, in the case of quasi-criminal, administrative or regulatory offences, the burden of proof may be a lesser one (e.g. "balance of probabilities");
- adjustments to burdens of proof for certain types of offences or in certain cases. For instance, some domestic public law regimes dispense with the need for enforcement agencies to prove matters such as intent and/or causation, or reverse traditional burdens of proof such that, instead of enforcement agencies needing to prove all elements of a public law offence, the onus is placed on the defendant company to prove that it was not responsible for the occurrence of a harmful event, and/or should not be held accountable in the circumstances. These types of offences are often referred to as offences of "strict" or "absolute" liability. (See further A/HRC/32/19/Add.1, Box 1).

**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.**

**Illustrative example: 1.9**

See A/HRC/32/19/Add.1, pp. 5-6 for model terms of reference.

**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.**

**Illustrative examples: 2.1**

A. Modes of contribution to harm that may give rise to corporate legal liability under domestic public law regimes on the basis of secondary (or "complicity") liability include;

- "aiding and abetting" an offence;
- "inciting" or "encouraging" an offence;
- "instigating" an offence;
- being an "accessory" or an "accomplice" (i.e. providing assistance to an offender) either before or after the offence;
- "conspiring" to commit an offence;
- being party to a "joint criminal enterprise";
- subsequent "authorisation" or "approval" or "ratification" of an offence.

B. Degrees of contribution to harm that may give rise to corporate legal liability under domestic public law regimes on the basis of secondary (or "complicity") liability (i.e. the physical aspects of the offence);

- "material" assistance (e.g. offence would not have happened but for the contribution of the secondary party);
- "substantial" assistance.

C. Degrees of culpability that may give rise to corporate legal liability under domestic public law regimes on the basis of secondary ("complicity") liability (i.e. the mental aspects of the offence):

- "intentional" assistance (i.e. the secondary party and the main perpetrator share a common purpose);
- "knowing" assistance;
- "negligent" or "reckless" assistance.

***Note: In practice, domestic public law regimes do not use one or other approach exclusively. Instead, different tests for secondary (or "complicity") liability may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.***



**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.**

**Illustrative example: 2.2**

Refer to 1.4 above for examples of the different methods used to attribute knowledge, intentions, actions and omissions to companies for the purposes of assessing corporate legal liability under domestic public law regimes.

**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.**

**Illustrative examples: 2.3**

A. Ways to ensure legal and conceptual separation between primary and secondary liability;

- inclusion in domestic criminal codes of a discrete set of provisions setting out the elements of secondary liability;
- clarifying in domestic criminal regimes that the crimes of “instigating a criminal offence” or “aiding and abetting” or “conspiracy” are treated as a crimes in their own right, with a specific set of requirements (e.g. with respect to the defendant’s knowledge and/or intentions, and the degree of causation between the defendant’s actions and the occurrence of the offence) that must be proved in order to establish liability.

B. Ways to ensure that offences based on theories of secondary liability are treated with sufficient seriousness include;

- Clarification by way of domestic public law regimes and/or sentencing policies that individuals and companies found to be accessories or “complicit” in the commission of an offence will potentially be subject to the same or similar sanctions and remedies as those that would be imposed on that company if it were the main perpetrator. **Note:** On sanctions and remedies generally, see 11.1-11.5 below.

**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.**

**Illustrative examples: 3.1**

A. Ways to encourage effective measures by companies to identify, prevent and mitigate various kinds of risk (e.g. risks of non-compliance with legal standards, risks of harm to people, risks of harm to the environment) include;

- making the exercise of due diligence to avoid certain prohibited outcomes (e.g.

environmental damage, use of child labour) an explicit legal requirement (and/or, conversely, making the lack of due diligence a key element of a public law offence);

- providing guidance (e.g. by way of statutory provisions or supplementary statutory guidance) as to the required components of management and internal control systems in specific operational contexts, including provisions with respect to scope, training and implementation, internal communication, and internal sanctions for non-compliance;
- providing for a complete or partial defense to corporate legal liability (for instance under “strict liability” domestic public law regimes) if a defendant company is able to show that the commission of the offence was not the result of any defective risk management or internal control systems. **Note:** On “strict” and “absolute” liability, see further 3.3 below;
- application of “objective” standards of proof and principles of “wilful blindness” (see explanatory notes below);
- providing guidance as to the extent to which the use by a company of “human rights due diligence” should be taken into account in sentencing. **Note:** on sanctions and other remedies for breaches of standards under domestic public law regimes see 11.2 below.

**Note:** *In practice, domestic public law regimes do not use one or other approach exclusively. Instead, different tests for secondary (or “complicity”) liability may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

**Explanatory notes:**

**(i) Use of “objective” standards of proof.** Lack of knowledge about the nature and extent of human rights risks may not be exculpatory under domestic law regimes which apply “objective” rather than “subjective” standards to the determination of whether a defendant had made adequate enquiries into possible sources of risk and had responded appropriately to those risks. Under such regimes, the questions of whether a defendant had made adequate enquiries and had responded adequately to human rights risks would be determined by reference to what a “reasonable person” (or “reasonable company”) would have discovered and done in the circumstances, not by reference to what the company *actually* knew and did. This approach creates incentives to carry out human rights due diligence and to respond appropriately to human rights risks.

**(ii) Use of concepts of “wilful blindness”.** The concept of “wilful blindness” aims to prevent defendants from invoking a defence to a public law offence based on lack of knowledge in circumstances where the relevant knowledge would have been relatively easy to obtain. This means that the defendant cannot avoid criminal liability for failing to make reasonable enquiries, and take appropriate steps, where the risks of a serious crime being committed would have been apparent to a “reasonable person”.

### **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.**

#### **Illustrative examples: 3.2**

A. Ways to encourage companies to use effective measures to supervise officers and employees include;

- use of the doctrine of “vicarious liability” (See A/HRC/32/19/Add.1), whereby a company may

be liable for acts carried out by employees or agents on its behalf, creates incentives to supervise employees and agents to ensure that breaches of the law do not occur. **Note:** see further 1.4 above;

- creation of a complete or partial defense to corporate legal liability for a company to be able to show that the commission of an offence was not the result of a lack of due diligence in the hiring or supervision of employees.

### **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.**

#### **Illustrative example: 3.3**

A. On “strict liability” and “absolute liability” see further A/HRC/32/19/Add.1, Box 1.

B. Potential sources of strict or absolute liability for companies under domestic public law regimes include;

- environmental protection regimes;
- consumer protection regimes;
- regimes relating to the regulation of “ultra-hazardous activities”; and
- doctrines of “vicarious liability” for the actions of certain employees, agents and other contractors. **Note:** on “vicarious liability” of companies for offences under domestic public law regimes see 1.4 above.

### **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.**

#### **Illustrative example: 3.4**

A. Ways to ensure that enforcement agencies judicial bodies take proper account of relevant human rights due diligence standards include;

- provision of suitable guidance and training to prosecutors and judges;
- explicit recognition of specific standards (e.g. such as ISO standards, or accredited environmental management standards) in the relevant regime, or associated guidance, as being relevant to judicial assessments as to whether a company has met the applicable standard of care.

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.**

#### **Illustrative examples: 4.1**

A. “Effective support” can encompass;

- ensuring access to financial and technical resources support (see further 6.1-6.3 below);
- political support for the activities of relevant State agencies;
- ensuring that there is proper consultation with professional bodies with respect to the development of, and changes in, law and policy.

**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 businesses 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.**

**Illustrative example: 4.2**

A. Ways to facilitate more effective working relationships with other relevant domestic bodies;

- development of annotated desk books and policy manuals, standardised as much as possible between different agencies to help ensure consistency of approach;
- development of “regulators’ networks” to facilitate greater coordination between regulatory bodies with responsibilities for the regulation of corporate conduct.

**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.**

**Illustrative examples: 4.3**

A. There are many differences between jurisdictions in terms of;

- the investigative and prosecutorial roles and responsibilities of different State agencies and the inter-relationships between them. For instance, in some jurisdictions, investigation and prosecution are separate functions, in some jurisdictions prosecutors may perform an advisory role in the context of an investigation, whereas in others prosecutors may be directly involved in different investigative steps (e.g. interviews and/or searches)
- the amount of discretion vested in State agencies as to how investigations and prosecutions should be approached. For instance, some States apply a “legality” principle (under which the only consideration in whether or not to prosecute is whether there is sufficient evidence) whereas others have the “opportunity principle” (where there is some discretion as to whether and how to prosecute).

B. Enforcement policies help to guide and provide transparency, consistency and accountability in terms of how public enforcement of laws is approached in the jurisdiction. Under an enforcement policy, a regulator or prosecutor may be directed to take account of a range of factors in deciding whether or how to take enforcement action in respect of allegations against corporate entities, including:

- history of similar conduct;
- whether warnings had been issued and the company’s response;
- seniority of those responsible;
- whether the behaviour was encouraged or facilitated by a poor corporate culture;
- failure of compliance measures;

- lack of due diligence;
- poor communications systems;
- poor reporting systems;
- attitude of company to transparency and self reporting;
- availability of civil remedies;
- length of time that has passed since offending conduct;
- gravity of harm;
- human rights considerations.

**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.**

**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.**

**Illustrative examples: 5.1**

A. As noted above, (See comments at 4.3 above) there are variations from jurisdiction to jurisdiction in the degrees of enforcement discretion vested in different States agencies, which have implications for the appropriate balance to be struck between prosecutorial independence and accountability. However, against that background, the following are illustrative examples of different methods used to ensure that there is accountability with respect to the exercise of investigative and prosecutorial functions;

- recorded consultations with affected persons;
- complaints procedures;
- internal and external protocols;
- oversight units;
- provision for file and office audits;
- legal risk management protocols;
- prosecution inspectorates;
- appearances before senate or parliamentary committees;
- appearances before Commissions of inquiry.

B. Methods of reviewing decisions not to investigate or prosecute allegations of business-related human rights abuses include;

- internal or administrative appeal;
- judicial review;
- appeal to external committee.

C. The submission by enforcement and regulatory agencies of annual reports of activities for

parliamentary and public scrutiny provides an opportunity for further explanation and evaluation of the performance of relevant enforcement agencies more generally.

**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.**

**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.**

**Illustrative examples: 6.1**

A. Ways to improve access to necessary financial resources include;

- proper consultation between government departments and relevant State agencies with respect to enforcement budgets;
- regular institutional efficiency and performance reviews;
- recovery (or part recovery) of prosecution costs through monetary penalties levied following successful prosecutions. **Note:** On the imposition of monetary penalties following a finding of corporate liability see further 11.1-11.7 below.

B. Ways to improve access to necessary technical resources include;

- access to ongoing legal and technical guidance (e.g. via telephone help-lines);
- regular, authoritative legal and procedural updates (e.g. from a central legal body);
- annotated desk books, policy manuals for quick reference and to help ensure consistent responses;
- installation of case management and case tracking systems,
- access to a computerised pool of know-how including legal templates, standard documentation, past pleadings, methodologies, lessons learned;
- ongoing training throughout careers;
- advanced training for specialists.

**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.<sup>1</sup>**

**Illustrative examples: 6.2**

A. Ways to enhance access to specialist expertise in the prosecution of cases;

- establishment of specialist units within prosecution agencies;

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<sup>1</sup> See paras 9.1-9.7 and 10.1 below.

- appointment of dedicated specialists to work with prosecution bodies;
- giving regulators the authority to prosecute regulatory offences in specialised courts (which may offer advantages over judicial mechanisms in terms of speed and efficiency);
- providing opportunities for regulators to work closely with prosecutors in the prosecution of public law offences (e.g. in environmental offences) before regular courts, which may involve giving regulators formal status at judicial hearings, entailing the right to participate directly and present evidence.

**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.**

**Illustrative example: 6.3**

See 6.1 above. **Note:** On the management of cross-border cases, see also 9.4 below.

**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.**

**Illustrative examples: 7.1**

A. Additional resources

- see <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf>;
- see <http://www.un.org/documents/ga/res/40/a40r034.htm>

B. Approaches developed by domestic judicial bodies to protect vulnerable witnesses include;

- the appointment and training of specialists to be responsible for the collection of evidence from children, including the carrying out of interviews to be used as court evidence;
- use of video-recorded or video-linked (rather than in person) testimony in court proceedings;
- requirements that questions be put to certain witnesses by a judge, rather than by prosecution or defence lawyers;
- Where possible, preferring forensic evidence and surveillance as sources of evidence rather than relying on direct testimony;
- relocation of cases to more central areas, or places where witnesses are less at risk of intimidation.

**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.**

**Illustrative example: 7.2**

## A. Additional resources:

- See <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf>;
- See <http://www.un.org/documents/ga/res/40/a40r034.htm>

## B. Opportunities for raising awareness about issues relating to gender, vulnerability and/or marginalization may include;

- professional training programmes;
- mentoring systems;
- networking; interactions with international professional bodies and initiatives;
- interactions with other domestic regulators and State agencies responsible for regulating business respect for human rights;
- annual performance reviews;
- case debriefs;
- legal updates;
- annotated desk books and policy manuals;
- internal know-how systems; templates; precedents; past pleadings.

**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.**

**Illustrative example: 8.1**

A. A number of standards exist at domestic and international level relating to the role, rights and duties of prosecutors, including standards promulgated by national and international professional bodies. See especially <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

**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.**

**Illustrative example: 8.2**

See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

**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.**

**Illustrative example: 9.1**

A. Such a policy expectation can be communicated in various different ways including;

- in policy manuals issued to enforcement agencies;
- through legal and procedural updates to enforcement agencies;
- in national action plans developed for the purposes of implementation of treaty commitments relating to (a) international cooperation in relation to business-related human rights abuses or (b) the provision of mutual legal assistance generally;
- in national action plans developed in relation to the implementation of the UN Guiding Principles on Business and Human Rights.

**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.**

**Illustrative examples: 9.2**

See A/HRC/32/19/Add.1, para. 36.

**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.**

**Illustrative examples: 9.3**

A. States have developed several different frameworks to facilitate greater operational level cooperation between prosecutors and investigators of different jurisdictions in respect of the investigation and prosecution of cross-border cases including;

- regional frameworks;
- treaty-based frameworks;
- case-specific cooperation agreements;
- ad hoc arrangements.

B. Matters that may be covered by an operational level cooperation agreement include;

- scope of investigation;
- staffing and resourcing (e.g. communications equipment, surveillance equipment, translation);
- budget and allocation of costs;
- allocation of leadership and investigative roles;
- operational and decision-making procedures;
- information-sharing;
- investigative standards;
- other terms and undertakings (e.g. relating to sanctions).

**9.4 The State ensures that its enforcement agencies and judicial bodies 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 cross-border cases.**

**Illustrative examples: 9.4**

A. Examples of initiatives taken to assist enforcement agencies in making good use of arrangements with other States for cooperation in cross-border cases include;

- providing guidance for prosecutors and investigators on procedures for initiating requests for, and responding to requests for, mutual legal assistance;
- providing on-line directories and links to internal and sources of information;
- collecting, collating and making available open access corporate information on public record that may be obtained without the need for mutual legal assistance requests;
- developing a library of templates and checklists, accessible by prosecutors and investigators in other jurisdictions;
- use of technologies to improve case management; including case tracking systems, and automatic reminder systems;
- investing in and making available on-line technologies to speed up and simplify the task of formulating mutual legal assistance requests (see further 9.5 below);
- training programmes and networking opportunities.

**9.5 The State is actively involved with relevant bilateral and multilateral initiatives aimed at improving the ease and speed with 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.**

**Illustrative examples: 9.5**

A. Advice for practitioners on overcoming challenges to international cooperation arising from differences in legal structures and standards between jurisdictions can be found in;

- [https://www.unodc.org/documents/organized-crime/Publications/Mutual Legal Assistance Ebook E.pdf](https://www.unodc.org/documents/organized-crime/Publications/Mutual%20Legal%20Assistance%20Ebook%20E.pdf)

B. On-line tools and technologies offer the potential to speed up and simplify the task of formulation of mutual legal assistance requests and responses. See for example;

- <http://www.unodc.org/mla/index.html>

**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.**

**Illustrative example: 9.6**

A. Examples of such initiatives and networks include;

- legal professional bodies and associations; international and regional judicial networks;
- networks of representatives of States agencies designated as “competent authorities” under

mutual legal assistance treaties;

- international networks of regulators;
- various initiatives to facilitate cross-border police cooperation and liaison.

**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.**

**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.**

**Illustrative example: 10.1**

A. Steps taken by States pursuant to multilateral initiatives relevant to business respect for human rights (e.g. treaties relating to worst forms of child labour, forced labour, human trafficking) aimed at strengthening domestic legal responses in a cross-border context include;

- information gathering and sharing to aid detection and investigation of crimes;
- technical assistance, capacity building and awareness raising projects;
- bilateral and regional agreements between source, transit and destination countries covering operational matters relating to prevention of human trafficking and protection of migrant workers;
- initiatives to help build awareness among affected persons about their rights and where to get help;
- support for socio-economic development, and especially in the field of education.

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).**

### Illustrative examples: 11.1

A. Sanctions and remedies that have been used or provided for under domestic public law regimes applicable to corporate entities include:

- Punitive measures such as:
  - monetary penalties or “fines”;
  - confiscation of assets (including the objects or apparatus used to commit the offence);
  - disgorgement of profits, confiscation of “proceeds of crime”;
  - temporary or permanent bans from participating in public procurement processes or receiving government contracts;
  - prohibition from carrying out certain activities, closing down certain operating facilities (on a temporary or permanent basis);
  - prohibitions on offering or listing securities;
  - suspension or cancellation of licences;
  - prohibitions or restrictions on advertising certain products;
  - prohibitions on receiving grants or subsidies;
  - public announcements (including publication of judicial findings and sanctions) and apologies;
  - listing on national registers of companies subject to public law sanctions;
  - dissolution.
- Compensatory or restorative measures such as;
  - obligations to pay money into funds for specified purposes (e.g. environmental, social or developmental funds) (**Note:** On the distribution of funds to affected persons see further 19.6 below);
  - “corporate community service” (e.g. performing upkeep of public areas, contributions to public or cultural amenities);
  - compulsory orders regarding funding of environmental projects;
  - compensation to individual victims (especially in cases of child labour and forced labour);
  - orders to reimburse prosecutors’ costs (or a proportion of such costs). **Note:** On ensuring sufficient resources for enforcement agencies, see 6.1 above.
- Preventative measures such as;
  - requirements to undertake audits;
  - imposition of government approved clean up (or remediation) plans;
  - judicial supervision (or corporate “probation”) (see further 11.4 below);
  - orders requiring specific corrective action with respect to management and organisation (including internal disciplinary action and organisational reforms); orders requiring compliance with specified management standards (e.g. environmental management standards) and compliance auditing standards;
  - administrative orders for correction of design flaws (e.g. in industrial processes, set-up);
  - confiscation of assets (including the objects or apparatus used to commit the offence);
  - prohibition from carrying out certain activities, closing down certain operating facilities (on a temporary or permanent basis).

- Interim measures (i.e. measures taken prior to, or pending, or as an alternative to formal enforcement) such as;
  - injunctions requiring specific performance;
  - enforcement notices, requiring companies to rectify certain breaches;
  - or “stop” notices;
  - powers to seek enforceable undertakings from the companies concerned;
  - deferred prosecution agreements (whereby a State agency agrees not to take enforcement action in exchange for certain actions on the part of the relevant company, which may include the payment of monetary penalties, taking certain remedial action to ensure future legal compliance, which may include managerial and/or organisational reforms, and cooperation with investigators and full disclosure). **Note:** On consultation with affected persons about the use of deferred prosecution agreements, see further 11.3 below).

**Note:** On the use of discretion as to the appropriate enforcement strategy, see 4.3, 4.4 and 5.1 above.

**Note:** *The above list of sanctions and remedies potentially applicable to corporate entities is drawn from domestic public law regimes from many different jurisdictions. The list is drawn from domestic legal regimes that regulate corporate behaviour, including (but not limited to) domestic law regimes that regulate respect for human rights directly. However, in practice, domestic public law regimes do not provide for all of these sanctions and remedies. Instead, different sanctions and remedies are used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

**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.

**Illustrative examples: 11.2**

A. The following factors are commonly mentioned in sentencing policies developed for the purposes of domestic public law regimes relating to corporate conduct as matters to be taken into account in the determination of suitable sanctions and remedies in specific cases;

- issues relating to the level of intent, such as degree of planning, pre-mediation;
- seniority of personnel responsible for wrongdoing;
- whether there is a past history of similar conduct;
- whether there was a cultural tolerance of wrongdoing;
- extent and effectiveness of compliance and due diligence procedures, or “corporate integrity” programmes; existence and effectiveness of voluntary auditing programmes. **Note:** On ensuring

that decision-making by State agencies and judicial bodies is taken in light of appropriate due diligence standards, see 3.4, 4.2 and 6.1 above;

- amount of economic advantage obtained from wrongful conduct;
- gravity of harm suffered by victim (or victims);
- extent to which the company has cooperated with enforcement agencies;
- extent to which the company has sought to conceal wrongdoing, or the economic advantage obtained;
- early acknowledgement of guilt;
- speed with which the company self-reported wrongdoing to authorities;
- extent to which company has already taken corrective action and/or ceased the wrongdoing.

B. With respect to the quantum of monetary penalties, additional issues that may be taken account of under different domestic public law regimes may include;

- the company's annual turnover;
- the economic benefit of wrongdoing obtained by the company;
- duration of wrongdoing;
- social and economic consequences;
- public interest considerations

C. Methods for calculating the quantum of monetary penalties include;

- application of a formula to determine suitable financial penalties for corporate entities in respect of offences where the usual punishment would be imprisonment (e.g. based on the number of months of imprisonment);
- application of a formula which links the monetary penalties to the financial benefit derived from the commission of the offence (e.g. by way of a multiplier)
- application of a formula which links the monetary penalties payable by a corporate entity to the monetary penalties that would have been imposed on a natural person (e.g. by way of a multiplier or escalator of the fines that would have been applicable to an individual offender). These calculations may be subject to a cap.

*Note: The above methods of determining sanctions and remedies are drawn from domestic public law regimes from many different jurisdictions. These methods are drawn from domestic legal regimes that regulate corporate behavior, including (but not limited to) domestic law regimes that regulate respect for human rights directly. However, in practice, domestic public law regimes do not necessarily utilize all of these methods. Instead, different methods are used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

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

**Illustrative examples: 11.3**

A. Ways of involving victims in decision-making with respect to the design and implementation of sanctions and other remedies include:

- Reading of victim impact statements in court;
- Providing formal opportunities to victims to express a view to relevant State agencies and judicial bodies as to the appropriate remedies in the circumstances;

B. **Note:** In States that provide for the mechanism of *partie civile*, victims of business-related human rights abuses that have declared themselves a *partie civile* in a criminal proceeding have a right to be represented and to make representations in court as a direct participant, rather than as a witness only.

**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.**

**Illustrative examples: 11.4**

A. Methods used to monitor the implementation of sanctions and remedies include;

- the appointment of independent experts to supervise and report on implementation and give regular progress updates;
- delegation of supervision of implementation to a suitable regulatory body;
- appointment of technical experts (e.g. engineers to advise on remediation and clean up);
- appointment of observers to a company board;
- provision for independent auditing of compliance by reference to specific management quality standards.

**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.**

## II. Private law claims by affected individuals and communities

### Principles for assessing corporate legal liability

**Policy objective 12: Domestic private law regimes that regulate the respect by businesses 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.**

**Illustrative examples: 12.1**

A. Potential sources of private law causes of action with relevance to business-related human rights abuses include;

- general legal regimes (which may be formulated through the operation of common law, customary law or codified regimes). For instance, murder, serious physical assault, torture and other severe human rights abuses may be actionable as intentional torts; arbitrary detention, slavery and slavery-like practices may be actionable as acts amounting to deprivation of liberty, as well as acts amounting to the infliction of physical and mental distress;
- more specialised statutory regimes which provide for private enforcement of internationally -recognised human rights (for example through domestic law regimes relating to protection of the environment, protection of consumers, protection of rights to ownership or use of land or other property, or regimes relating to the prohibition of child labour or the prohibition of forced labour).

**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.**

**Illustrative examples: 12.2**

A. Ways that actions, omission and intentions of individual officers or employees can be relevant to corporate legal liability under domestic private law regimes include:

- attributing to the company the acts, omissions and intentions of those who can be said to represent the company's "directing mind and will";
- attributing to the company the acts, omissions and intentions of a company's "legal representatives";
- attributing to the company the acts, omissions and intentions of certain employees or agents (or in some cases other contractors) under theories of "vicarious liability".
- attributing to the company the acts, omissions or intentions of certain other natural or legal persons that, from surrounding circumstances, the company appears to have "accepted" or "ratified" as its own.

**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.**

**Illustrative example: 12.3**

A. Ways to communicate 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 include;

- the concept of a “duty of care”. (Note, however, that duty of care is not an unlimited one and may be defined by reference to factors such as:
  - the foreseeability of harm (e.g. the harm suffered by the claimant must be a “reasonably foreseeable” consequence of the defendant’s conduct;
  - the “proximity” which exists between the defendant and the claimant;
  - policy considerations of fairness in the circumstances;
  - wider policy considerations relating to future prevention; and
  - wider policy considerations relating to the costs to the community of imposing or not imposing a duty of care in the circumstances).
- clarifying corporate management requirements through statutory provisions, such as requirements as to management and risk control systems, training of personnel, internal communication systems, periodic effectiveness and performance reviews, and systems to identify and implement appropriate corrections to deficient systems. (**Note:** On the relevance of human rights due diligence to corporate legal liability, see further 14.1 and 14.2 below).

**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.**

**Illustrative example: 12.4**

- A. See comments about the scope of a “duty of care” under domestic private law regimes at 12.3 above.
- B. Note that theories of secondary liability are also potentially relevant to legal liability of business enterprises for human rights abuses taking place within a supply chain. (See further 13.1-13.3 below).

**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.**

**Illustrative example: 12.5**

- A. Policy justifications for the use of strict and absolute liability in domestic private law regimes include:
  - the need to avoid placing unfair evidential burdens on affected persons (e.g. injured consumers, or employees);
  - the desirability of avoiding the lengthy and complex trials that would result were claimants required to demonstrate corporate knowledge and/or intent;
  - the need for fair apportionment of risks arising from modern technology (e.g. where manufacturers are in a better position to anticipate and guard against consumer hazards than individual consumers themselves)
  - asymmetry of access to information generally as between corporate defendant and individual plaintiff;
  - differences in bargaining position;
  - availability of insurance in respect of certain consumer and employee risks.

B. Note: for further discussion of the use of “strict” and “absolute” liability in domestic law regimes see A/HRC/32/19/Add.1, Box 1).

**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.**

**Illustrative example: 12.9**

See A/HRC/32/19/Add.1, pp. 5-6 for model terms of reference.

**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.**

**Illustrative examples: 13.1**

A. Where the concept of “secondary” corporate liability for a wrong under private law is legally recognized, modes of contribution that may give rise to corporate legal liability on the basis of secondary (or “complicity” liability) include;

- “aiding and abetting” the wrongdoing of a third party;
- “instigating”, “inciting” or “encouraging” the wrongdoing of a third party;
- being an “accessory” or an “accomplice”;
- “conspiring” to commit an tort;
- subsequent “authorisation” or “approval” or “ratification” of the wrongdoing of a third party.

B. Degrees of contribution to harm that may give rise to corporate legal liability under domestic private law regimes on the basis of secondary (or “complicity”) liability (i.e. the physical aspects of the offence) are;

- “material” assistance (e.g. offence would not have happened but for the contribution of the secondary party);

- “substantial” assistance.

C. Degrees of culpability that may give rise to corporate legal liability under domestic private law regimes on the basis of secondary (“complicity”) liability (i.e. the mental aspects of the offence) include;

- “intentional” assistance (i.e. the secondary party and the main perpetrator share a common purpose);
- “knowing” assistance;
- “negligent” or “reckless” assistance.

*Note: In practice, domestic private law regimes do not use one or other approach exclusively. Instead, different tests for secondary (or “complicity”) liability may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

**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.**

**Illustrative example: 13.2**

See 12.2 above.

**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.**

**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.**

**Illustrative examples: 14.1**

A. Ways to encourage effective measures by companies to identify, prevent and mitigate various kinds of risk include;

- inclusion of poor risk management as a component of tests for corporate legal liability under private law regimes. For instance, under theories of negligence, the fact that a company has carried out human rights due diligence activities, and the scope, quality and effectiveness of those human rights due diligence activities, may be relevant to the question of whether the company had discharged the applicable standard of care;
- inclusion of poor risk management as a component of tests for corporate legal liability on the basis of secondary or “complicity” liability. For instance, if liability can be based on “negligent” or “reckless” contributions to the wrongdoing of a third party, the extent to which a company has taken steps to identify, prevent and mitigate risks of contributing to such adverse human rights

impacts will be material to whether the company has discharged the applicable standard of care;

- Providing for a complete or partial defense to corporate legal liability (for instance under “strict liability” domestic private law regimes) if a defendant company is able to show that the commission of the offence was not the result of any defective risk management or internal control systems (**Note:** On “strict” and “absolute” liability, see further 14.3 below).
- Application of “objective” standards of proof and principles of “wilful blindness” (see explanatory notes below).

**Note:** *In practice, domestic public law regimes do not use one or other approach exclusively. Instead, different tests for secondary (or “complicity”) liability may be used in combination, or in the alternative, depending on the relevant policy objectives and regulatory needs.*

**Explanatory notes:**

**(i) Use of “objective” standards of proof.** Lack of knowledge about the nature and extent of human rights risks may not be exculpatory under domestic law regimes which apply “objective” rather *than* “subjective” standards to the determination of whether a defendant had made adequate enquiries into possible sources of risk and had responded appropriately to those risks. Under such regimes, the questions of whether a defendant had made adequate enquiries and had responded adequately to human rights risks would be determined by reference to what a “reasonable person” (or “reasonable company”) would have discovered and done in the circumstances, not by reference to what the company *actually* knew and did. This approach creates incentives to carry out human rights due diligence and to respond appropriately to human rights risks.

**(ii) Use of concepts of “wilful blindness”.** The concept of “wilful blindness” aims to prevent defendants from invoking a defence to a public law offence based on lack of knowledge in circumstances where the relevant knowledge would have been relatively easy to obtain. This means that the defendant cannot avoid criminal liability for failing to make reasonable enquiries, and take appropriate steps, where the risks of a serious crime being committed would have been apparent to a “reasonable person”.

## **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.**

### **Illustrative example: 14.2**

A. Ways to encourage companies to use effective measures to supervise officers and employees include:

- Use of the doctrine of “vicarious liability” (See A/HRC/32/19/Add.1), whereby a company may be liable for acts carried out by employees or agents on its behalf. This doctrine creates incentives to supervise employees and agents to ensure that breaches of the law do not occur. **Note:** see further 12.2 above;

## **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.**

### **Illustrative examples: 14.3**

A. On “strict liability” and “absolute liability” see further A/HRC/32/19/Add.1, Box 1.

B. Potential sources of strict or absolute liability for companies under domestic public law regimes

include;

- environmental protection regimes;
- consumer protection regimes;
- regimes relating to the regulation of “ultra-hazardous activities”;
- doctrines of “vicarious liability” for the actions of certain employees, agents and other contractors. **Note:** on “vicarious liability” of companies for offences under domestic public law regimes see 12.2 above].

**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.**

**Illustrative example: 14.4**

A. Ways to ensure that enforcement agencies judicial bodies take proper account of relevant human rights due diligence standards include;

- provision of suitable guidance and training to prosecutors and judges;
- explicit recognition of specific standards (e.g. such as ISO standards, or accredited environmental management standards) in the relevant regime, or associated guidance, as being relevant to judicial assessments as to whether a company has met the applicable standard of care.

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.**

**Illustrative examples: 15.1**

A. Modes and types of State financial support for individual litigants include:

- financial grants (e.g. in the form of legal aid);
- financial assistance to cover costs of technical experts;
- direct payment of lawyer’s fees;
- State funded pre-claim advice and support;
- waiving of court fees and;
- dedicated funds for claims arising from specific types of activity, or specific types of damage (e.g. consumer cases, environmental cases, labour cases).

B. Issues taken into account in deciding whether to provide State financial support for individual litigants may include:

- the financial resources available to the claimant (e.g. often referred to as a “means test”);
- the prospects for success of the claimant’s legal action;
- the type of claim (e.g. there may be special provision for specific types of claimants, for instance,

claimants in consumer or labour related cases);

- public interest considerations (e.g. the public interest in resolving an issue or bringing a particular type of claim).

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

### **Illustrative examples: 15.2**

A. Ways to improve availability of and access to pro bono legal services include;

- identification and evaluation of obstacles to pro bono legal services (operation of rules of professional bodies, laws prohibiting lawyers from charging lower amounts than statutory minimums, restrictions on legal advertising, lack of an active local bar association prepared or able to do the necessary outreach, and rules that oblige the charging of tax on legal services, irrespective of the amounts actually charged);
- support for establishment of law clinics through which claimants can get free initial advice about the viability of their claims, likely costs of pursuing the claim, and different potential sources of funding (including through insurance);
- establishment of “clearing house” arrangements whereby details of the claim are confidentially provided to a network of potential advisers which are then invited to bid for the work;
- providing encouragement to lawyers and law firms (including through professional bodies and academic institutions) to commit to carrying out a certain amount of pro bono work per year (for instance, a certain number of hours per lawyer, or a certain percentage of billings) and to report publicly on that provision (e.g. on whether certain targets for pro bono work were met in the previous year).

## **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.**

### **Illustrative examples: 15.3**

A. Collective redress mechanisms can take many forms, including;

- “opt-out” class actions;
- “opt-in” class actions or “group” actions;
- representative actions brought by a State agency (e.g. a regulator) or an association on behalf of a group (e.g. as used in consumer law or competition law);
- regime-specific mechanisms (e.g. under consumer law, competition law or environmental law regimes);
- provisions for consolidation of claims;
- provisions for simultaneous hearings of claims.

## **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.**

**Illustrative examples: 15.5**

A. Ways to ensure proper standards of service by private litigation funders include;

- introduction of robust regulatory regimes to ensure that the client is properly advised, that there is transparency as to how lawyers costs and disbursements will be calculated, that the client receives a reasonable proportion of any damages award and providing for the possibility of independent review of bills and access to independent advice;
- taking steps to bring litigation funders within the ambit of laws relating to financial services providers, and therefore subject to regulatory requirements relating to disclosure, customer service and capital requirements.

**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.**

**Illustrative example: 15.6**

A. Strategies used to help improve access to information and sources of advice include;

- use of community “paralegals” to help claimants with the filing of complaints;
- making information communication technologies and legal information readily accessible in public or community spaces such as town halls, community houses and meeting areas, schools, universities and libraries;
- provision of mobile advisory centres, and mobile “self-help” centres.

B. Other examples of such initiatives include;

- training sessions;
- webinars;
- web-based toolkits providing information on relevant judicial bodies, institutions and procedural matters.

**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.**

**Illustrative examples: 16.1**

A. Steps taken to reduce the financial obstacles posed by court fees include;

- use of fee bands or percentages linked to specific types and/or values of claims;
- application of a tapering element to avoid very large fees for high-value claims;
- providing for reduced fees or a waiver from fees in certain types of cases (e.g. labour disputes of consumer protection cases, or cases that involve enforcement of constitutional rights);

- spreading out court fees, or imposing charges for specific actions (such as the certification of documents or to obtain copied of documentary evidence) to reduce the amounts paid by litigants in court fees upfront;
- providing for a reduction in fees or a waiver of court fees in cases where the claimant is indigent, or where the claimant is a recipient of legal aid;
- permitting courts to depart from usual costs rules where there is a public interest issue (e.g. where the claimant will receive no private financial gain, or where the claim is brought by an association with public interest objects, or where there is significant or widespread public interest in the litigation).

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

### **Illustrative examples: 16.2**

A. Court facilitated mediation services may take the form of;

- court supervised settlement conferences;
- early non-binding claims assessment;
- mini-trials;
- reference to specialist personnel.

B. Ways to encourage early resolution of disputes by mediation and settlement include;

- expanding the scope of court services to include mediation services;
- requiring courts to make available a certain number of hours of free or discounted mediation services to litigants;
- statutory provision for mandatory conciliation;
- providing judges with the discretion to order parties to civil litigation to enter into mediation or some other form of alternative dispute resolution at certain stages of the process (with litigants retaining the ability to return to the relevant court if the mediation or alternative dispute resolution processes are unsuccessful);
- provision of professional guidance to lawyers clarifying their responsibilities to advise claimants of opportunities for, and the potential benefits of, mediation and other forms of alternative dispute resolution, where relevant to their claim.

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

### **Illustrative examples: 16.3**

A. Measures for avoiding, detecting, and providing for accountability in the event of court delays include;

- case flow management systems;
- mandated “case flow plans”;
- automated case tracking, reminder and notification systems;
- practical advice and guidance to judicial bodies concerning the scheduling of cases, prioritisation, use of statistics and tracking measures to measure performance, and target timeframes for different procedural stages;
- establishing different “tracks” for different types of cases (e.g. small claims track, fast track multi-track”);
- complaints procedures which can be activated by claimants in the event of excessive 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.**

**Illustrative examples: 16.4**

A. There are differences between jurisdictions with respect to approaches to the allocation of court and legal costs at the conclusion of proceedings. However most jurisdictions adopt one of the following approaches, either;

- costs are borne by the losing party (“loser pays”); or
- each party pays its own costs.

B. Reasonableness on the part of litigants may be encouraged by giving judicial bodies the discretion to depart from the normal rules in certain circumstances which may include;

- cases where the litigation is clearly “vexatious” or “oppressive” or “frivolous”;
- cases where a party has acted in bad faith;
- cases where the claim has been exaggerated;
- cases where the litigation has been prolonged by unreasonable, “vexatious” or “oppressive” conduct.

C. Other ways encouraging reasonableness on the part of litigants include;

- providing that a proportion of up front court fees paid by to the court by the claimants may be reimbursed to the claimants if a case is settlement or successfully mediated; permitting litigants to ask for costs to be independently assessed (“taxed”) by the court and reduced; or
- subjecting certain costs to a cap.

**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.**

**Illustrative examples: 16.5**

A. Domestic legal systems that apply the “loser pays” principle (see 16.4 A above), may provide for the possibility of an order for security for costs where the defendant fears that, in the event that the claimant is unsuccessful, it will not be possible to recover its costs from the claimant.

B. Whether or not to make an order for security for costs is usually a discretionary matter for judicial bodies. However guidance may be provided by way of statute or in a court’s procedural rules, in which judges will be directed to take account of various matters such as;

- the financial position of the claimant;
- the claimant’s chances of success;
- whether the claimant is within or outside the jurisdiction (and the enforceability of an order for costs);
- whether the proceedings raise a matter of public importance;
- whether the effect of an order would be to stifle the claimant’s legal action;
- the proportionality of the security sought;

with a view to finding a suitable balance between the rights of the defendant and considerations of access to remedy.

C. Other ways of reducing the financial obstacles posed by an order for security of costs include exempting certain types of claims (e.g. small claims) from such orders.

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

### **Illustrative examples: 16.6**

A. Ways to reduce court costs through the use of information and communications technologies may include;

- greater use of video-conferencing to resolve procedural matters, rather than requiring physical appearances of all parties at all hearings;
- greater use of e-mail and electronic filing systems. (accompanied by measures to deal with specific access challenges, for instance to assist claimants with disabilities, or who live in remote or rural areas, or who lack access to computers, or who lack proficiency in the use of information communications technologies. (**Note:** On access to information regarding court processes and services generally, see further 15.6 above).

## **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.**

### **Illustrative examples: 16.7**

A. Possibilities for civil enforcement of legal standards by regulators can be created;

- through amendments to rules on standing to provide for enforcement by regulators, associations, consumer bodies, groups of citizens of “collective rights” (e.g. with respect to consumer rights, unfair business practices, environmental rights);
- by providing for the possibility of representative actions by regulators on behalf of people who have suffered losses, which can result in enforceable compensatory orders for affected persons.

## 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.**

### **Illustrative example: 17.1**

A. Such a policy expectation can be communicated in various different ways including;

- in policy manuals issued to relevant State agencies;
- through legal and procedural updates to relevant State agencies;
- through legislative provisions creating rights for foreign litigants to request assistance directly

from domestic judicial bodies;

- in national action plans developed for the purposes of implementation of treaty commitments relating to (a) international cooperation in relation to business-related human rights abuses or (b) the provision of mutual legal assistance generally;
- in national action plans developed in relation to the implementation of the UN Guiding Principles on business and human rights.

**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.**

**Illustrative example: 17.2**

A. See Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, copy of text and related materials available via <https://www.hcch.net/en/home>.

**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.**

**Illustrative example: 17.3**

A. See 9.4 above.

B. See also the various materials and projects detailed at <https://www.hcch.net/en/home>.

**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.**

**Illustrative example: 17.4**

A. See in particular:

- <http://www.haguejusticeportal.net/index.php?id=326>;
- <https://www.hcch.net/en/home>; and
- For a regional initiative see the European e-justice portal at [https://e-justice.europa.eu/content\\_cooperation\\_in\\_civil\\_matters-75-en.do](https://e-justice.europa.eu/content_cooperation_in_civil_matters-75-en.do).

**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.**

**Illustrative example: 17.5**

A. Examples of such initiatives and networks include;

- legal professional bodies and associations;
- international and regional judicial networks;
- international networks of regulators.

**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 and speed with which information can be exchanged between claimants and their legal representatives and the relevant State agencies of other States in cross-border cases.**

**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.**

**Illustrative examples: 18.2**

A. States have entered into treaties to enable greater and more timely access to environmental information. The “Aarhus” Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters sets down basic rules to promote the involvement of citizens in environmental matters and improve enforcement of environmental standards and, by applying a non-discrimination principle (i.e. as regards the nationality or citizenship of applicants for information), creates a framework for cross-border access to environmental information;

B. International theme or sector-based networks of regulators provide potential forums for discussion and exchanges of good practices in relation to issues such as data protection, protection of victims and their legal representatives, protection of whistle-blowers and legitimate requirements of commercial confidentiality.

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).**

**Illustrative examples: 19.1**

A. Where remedies are obtained in private law cases these are most likely to be compensatory monetary damages.

B. However, examples of alternative private law remedies include:

- establishment of tailored remediation programmes;
- establishment of a development fund, or “trust fund” for communities;
- establishment of claims facility fund;
- public apologies; admissions of responsibility.

C. For examples as to further alternative private law remedies that may be considered in cases of serious business-related human rights abuses see the *UN 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*, copy available at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

**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.**

**Illustrative example: 19.3**

A. Measures to contribute to the understanding of gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization are likely to include;

- proactive sharing of information and outreach in an appropriate and accessible formats and in appropriate languages;
- prior consultation with relevant local experts and civil society organisations;
- steps to ensure respect for dignity of relevant individuals and communities;
- steps to ensure understanding of relevant decision-making structures;
- steps to identify all relevant representatives (individual and institutional) with authority to negotiate on behalf of communities;
- steps to understand the interests and needs of different groups within the community.

**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.**

**Illustrative examples: 19.6**

A. Matters to cover in regulatory or professional standards include the following:

- appropriate and adequate publicity with respect to the fact of the award or the settlement to all members of the affected class, transmitted in an appropriate and accessible form and in all relevant languages;
- judicial oversight or review of settlement terms for fairness and adequacy, taking account of all the relevant circumstances;
- appointment of suitably qualified and suitably vetted persons to administer process of distribution of funds;
- establishment of consultative committee to develop methodologies and terms for distribution of funds;
- development of an appropriate methodology for distribution, in consultation with representatives of class members, which is then made publicly available;
- public calls for claims against fund, ensuring simplicity of process and accessibility of information (e.g. outreach may include web-site with on-line claim forms, media advertisements, toll free numbers);
- arrangements for provision of independent information and advice, including financial advice, taking steps to ensure that such providers have the trust of affected persons and communities.