

OHCHR Consultation: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability

Concept Note

Palais des Nations, Room XXIII
5-6 October 2017

I. Introduction

Ensuring access to effective remedy for those impacted by business-related human rights abuses is one of the three pillars of the United Nations Guiding Principles on Business and Human Rights (UNGPs). In 2014, the Office of the United Nations High Commissioner for Human Rights (OHCHR) launched an initiative, called the Accountability and Remedy Project (ARP I), aimed at enhancing the implementation of this pillar, specifically with respect to judicial mechanisms. In resolution 26/22 (2014), the Human Rights Council (HRC) requested the United Nations High Commissioner to continue work on this issue and to submit a final report to the Council at its thirty-second session.

In June 2016, OHCHR submitted its ARP I report to the HRC.¹ The report recognized the urgent need for action by States to ensure that victims of human rights harms connected to business activities have access to effective remedy. Additionally, the report restates the position in the UNGPs that effective judicial mechanisms are at the core of ensuring access to remedy,² while noting that other mechanisms, such as State-based non-judicial mechanisms, should complement judicial remedies.³ The High Commissioner's final report to the HRC contains a series of resources which States can draw upon with a view to progressively and systematically improving their implementation of Pillar III of the UNGPs, including (i) a model terms of reference that can be used to review the effectiveness of domestic legal systems, (ii) an annex setting out the key findings of ARP I research activities in the form of a list of possible actions for States to consider, grouped under a series of policy objectives relating to both procedural and substantive aspects of access to remedy, and (iii) an addendum explaining key legal concepts and the main findings emerging from ARP I in further detail.⁴

¹ A/HRC/32/19 and A/HRC/32/19/Add.1.

² UN Guiding Principle 26 and Commentary.

³ See UN Guiding Principle 27. OHCHR is currently undertaking a second phase of the ARP project which is exploring how access to remedy can be strengthened by improving the effectiveness of State-based non-judicial mechanisms (ARP II). In addition to the follow-up work requested by the HRC in relation to ARP I, it is hoped that the consultation described in this concept note will provide useful insights for the ARP II study, as well as other initiatives focusing on the legal liability of companies, such as the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

⁴ The OHCHR also released a paper providing illustrative examples of what was said in the report.

The HRC, in its resolution 32/10, noted with appreciation the ARP I report and requested the OHCHR to convene two multi-stakeholder consultations, drawing, as appropriate, upon the report.

This concept note covers the topic for the first consultation and provides a brief overview of the sessions that will occur during this two-day event. This consultation will take place at the Palais des Nations in room XXIII during 5-6 October 2017.

II. The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability

The first consultation will explore the relationship between human rights due diligence (as defined by the UNGPs) and determinations of corporate liability under national law for adverse human rights impacts arising from or connected with business activities.

Under the UNGPs, “human rights due diligence” refers to the processes and activities by which businesses reasonably identify, prevent, mitigate, and account for how they address their adverse human rights impacts. The UNGPs discuss how business enterprises must seek to prevent or mitigate their adverse human rights impacts as part of their responsibility to respect human rights; further, the Guiding Principles provide standards for how human rights due diligence should be conducted (see “Pillar II” of the UNGPs).

However, the work carried out in the course of ARP I identified a need for greater clarity about the different ways in which the exercise of human rights due diligence and corporate legal liability may interrelate,⁵ and how to ensure greater policy coherence from States in their approaches to access to remedy (“Pillar III”) and human rights due diligence (“Pillar II”).⁶ While the key requirements and legal relevance of human rights due diligence have been clarified in some domestic corporate liability regimes, in many jurisdictions there remains considerable confusion about these matters. The ARP I report highlights the need for human rights due diligence concepts to be appropriately integrated into relevant domestic law regimes and for relevant State agencies and judicial bodies to have access to, and take regulatory and enforcement decisions by reference to, robust and credible guidance and standards.⁷

Difficult questions arise when thinking about how human rights due diligence and liability interact. Many domestic legal regimes provide for the possibility of legal liability where

⁵ The commentary to Guiding Principle 12 recognizes that the responsibility of business enterprises to respect human rights (of which human rights due diligence is a crucial part) is “distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”

⁶ An annex to this note contains relevant excerpts from the ARP I report discussing human rights due diligence.

⁷ See A/HRC/32/19, Annex, Policy Objectives 3 & 14.

harm has arisen which could have been foreseen and prevented with the use of due diligence, but where due diligence had not been exercised in the particular case. However, what if the harm could not have been prevented in any event? What if the company had conducted a robust and comprehensive due diligence process, but the harm still occurred? Are there circumstances in which a company should be held legally liable for failing to carry out human rights due diligence, regardless of whether or not adverse human rights impacts have actually occurred? What particular challenges arise with respect to the allocation of liability amongst members of group enterprises?

Legally speaking, the exercise of human rights due diligence by a business enterprise may become relevant to questions of corporate legal liability in several ways. For instance, human rights due diligence can be:

1. made an explicit legal requirement under national law,
2. part of evidence presented to prove that a company was not negligent,
3. invoked as a statutory defense to an offense, and
4. relevant when determining the appropriate sanction or remedy if legal liability was established.

This consultation aims to unpack and clarify the relationship between human rights due diligence and liability generally, and with respect to specific types of offenses and legal regimes. The focus will not be on technical aspects of how human rights due diligence should be conducted; rather, it will be on the different ways that corporate liability regimes (and the mechanisms that adjudicate on them) can be improved so that there is policy coherence between States' implementation of Pillar III of the UNGPs and their efforts to promote human rights due diligence among business enterprises in accordance with the UNGPs.

The consultation will provide a space for multiple types of stakeholders to share experiences and different ideas with a view to determining how and when a failure to exercise human rights due diligence can give rise to corporate liability and the extent of this liability. Ultimately, this consultation will seek to uncover a range of regulatory options that exist for improving corporate accountability in business and human rights cases, which, in turn, has a bearing on access to effective remedy in individual cases. The outcomes from this consultation should aid legislators, policy-makers, enforcement agencies, judicial bodies, business, and advocates in better understanding how legal liability is connected to the performance of human rights due diligence in different contexts, with a view to strengthening domestic corporate accountability regimes and contributing to better implementation of the UNGPs by both States and business enterprises.

III. Sessions During the Consultation

This consultation will be a two-day event, made up of several different sessions. These sessions will be a mix of multi-stakeholder panels and more interactive formats. Although the specifics are not yet finalized, there will likely be sessions on the following topics:

1. General Review of the Accountability and Remedy Project and Recent Initiatives by Stakeholders

The first session will cover the Accountability and Remedy Project generally in order to situate all participants before broaching the specifics of human rights due diligence. After quickly recapping ARP I and providing updates on ARP II, the floor will be opened to participants so they can share any initiatives undertaken to promote or implement the recommendations of ARP I. States will be particularly encouraged to share any new initiatives, keeping in mind that session three of the consultation covers legal regimes mandating human rights due diligence.

After this general session, the remainder of the consultation will focus on specific, substantive issues involving the relationship between human rights due diligence and legal liability.

2. Deconstructing Human Rights Due Diligence and its Relation to Corporate Liability

This session will break down the relationship between due diligence and legal liability to clarify the nature and scope of this relationship and the different ways that this relationship can be legally expressed. This will be one of the most important sessions to attend, as it will set the stage for all subsequent discussions in the consultation.

Despite the centrality of human rights due diligence in the UNGPs, there remain many different views as to what is entailed and how this intersects with legal liability in law and practice. Legally speaking, the word “due” (in due diligence) translates to “appropriate,” “proper,” or “reasonable.” Thus, “due” diligence requires a substantive process meeting certain standards.

Risk management imperatives and legal requirements for “due diligence” in areas such as banking, anti-corruption, and corporate reporting have given rise to some highly sophisticated and formalized inquiry and checking systems. However, concerns have been raised that a lack of understanding of the particular aims of *human rights due diligence* (as opposed to other forms of due diligence) could lead courts and judges to adopt “check box” approaches in practice, whereby a company would be considered to have conducted due diligence simply by going through procedural steps without meaningfully focusing on

outcome. This would be undesirable for several practical and policy reasons. Not only might such “check box” approaches have the effect of denying access to remedy in specific cases, they are unlikely to be of assistance in preventative terms. Work carried out in the course of ARP I suggested that human rights due diligence concepts are not yet well embedded in domestic corporate liability regimes. This session will explore the distinction between the underlying *aims* of human rights due diligence (as used in the UNGPs) and the *formal processes* that have been developed so far to achieve them. Panelists and participants will consider, in this “scene-setting” discussion, the different ways in which both underlying aims and formal processes have been harnessed in corporate liability regimes so far, and the risks and opportunities of different approaches.

3. Legal Regimes Requiring Companies to Carry Out Human Rights Due Diligence

The UNGPs state that business enterprises should carry out human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights,⁸ and States must take “appropriate steps to prevent, investigate, punish and redress . . . abuse through effective policies, legislation, regulations and adjudication.”⁹ Guiding Principle 1 goes on to say that “[w]hile States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.” Several laws have been passed that require companies (whether directly or indirectly; explicitly or by implication) to carry out human rights due diligence activities. These laws vary with respect to issues such as scope (e.g., definitions as to which companies are bound), the harms that must materialize in order to trigger a company’s liability, the penalties for non-compliance, and the methods of enforcement.

For instance, under the French duty of vigilance law, large companies based in France can be subject to civil suits brought by interested parties if the companies fail to publish due diligence reports and if certain harms occur that could have been avoided had the companies exercised due diligence. In contrast, under § 54 of the United Kingdom’s Modern Slavery Act 2015, certain commercial organizations must disclose statements detailing any steps taken to ensure that slavery and human trafficking are not taking place in their supply chains or business. The Secretary of State can enforce this duty by seeking an injunction in a civil proceeding. If passed, the Swiss Responsible Business Initiative would amend the Swiss Constitution such that Swiss companies would be held liable for damages caused by all companies under their control that have violated international human rights or environmental standards, but would provide a defense if the company can show it exercised human rights due diligence and did all that it could to prevent the harm.

⁸ UN Guiding Principle 15 (b).

⁹ UN Guiding Principle 1 Commentary.

This session will explore the range of laws that exist or are currently being proposed, how they work in practice, and the pros and cons of different regimes.

4. **Human Rights Due Diligence and Claims of Negligence**

The concept of “negligence” is an important means of establishing liability in many, if not most, domestic legal regimes. While tests of negligence vary from jurisdiction to jurisdiction and from context to context, they frequently include the following elements: (1) the existence of a legal duty of care towards an affected person (i.e., a legal obligation to act in such a way that others are not harmed by one’s actions or, in some cases, omissions), (2) a breach of the applicable standard of care by the defendant, and (3) a resulting injury to the affected person (4) caused by the breach. In cases involving adverse impacts by businesses on human rights, the existence of “due diligence” will be relevant to the question of whether or not the company met the applicable standard of care.

This session will explore the relationship between human rights due diligence and claims of negligence with a particular focus on the extent to which courts have thus far explicitly referred to or drawn from UNGP guidance on human rights due diligence in their analysis of whether the relevant standard of care was met by the defendant company in question. Panelists and participants will be invited to reflect on what could be done to promote greater awareness of human rights due diligence concepts by courts and judges and how to better “embed” human rights due diligence concepts into domestic negligence regimes.

5. **Human Rights Due Diligence and Strict / Absolute Liability**

Criminal responsibility usually requires proof of some kind of blameworthiness or “culpability” on the part of the defendant, for instance because the defendant intended a criminal act to take place, or was reckless as to the consequences of his or her behavior. However, in some jurisdictions, under “strict” and “absolute” liability regimes, a defendant may be held legally liable simply because some prohibited act or harm occurred, regardless of what the defendant may have intended by his or her actions.

“Strict” and “absolute” tests of corporate liability are found in many regulatory and civil liability regimes around the world and are widely used in the fields of environmental protection, consumer protection, and the regulation of ultra-hazardous activities. One policy justification for strict or absolute liability is that, as the company is in the better position to anticipate and guard against risks, the company should be responsible for the harms that are a direct consequence of its activities. Another justification, used in contexts where the company is deriving commercial benefit from particularly hazardous activities, is that the threat of strict or absolute liability is needed to “focus the mind” of the company and its management to ensure that it takes sufficient preventative steps. In other words, strict or absolute liability is the *quid pro quo* for being allowed to undertake the activities

at all. Another justification is that it would be unfair to place burdens on victims to prove things that only the company might have information about.

No defenses are available for absolute liability regimes, whereas strict liability regimes permit certain defenses. Some legal regimes permit a partial or complete defense to strict liability offenses if a company engaged in due diligence to prevent the prohibited event.

This session will discuss when strict and absolute liability is appropriate, as well as what role, if any, human rights due diligence should have in relation to these regimes.

6. The Role of Human Rights Due Diligence in Determinations of Sanctions and Remedies

If there is a determination that a company should be legally liable for some harm or violation, there is still the question of what the proper sanctions for wrongdoing should be. In addition to financial compensation or penalties, a range of other sanctions and remedies could be used, including injunctions, termination or suspension of licenses, dissolution, and orders designed to prevent future harm.

This session will be devoted to how the outcomes of a remedy process should be affected by a company's exercise of due diligence. For instance, should a company failing to exercise due diligence be subject to different or stricter penalties than a company that had engaged in a robust due diligence process, all else being equal? Should the extent to which a company engages in due diligence influence the design of a sanctions regime (e.g., in the formulation of preventative as well as punitive measures)? If so, in what circumstances and how?

7. Reaching out to Enforcement Agencies, Judicial Bodies, and Other Practitioners Regarding the Role of Human Rights Due Diligence in Determinations of Corporate Liability and Attendant Penalties

The ARP I report calls for the principles used to assess corporate liability to be properly aligned with the responsibility of companies to exercise human rights due diligence across their operations. Throughout the course of the consultation, much will be learned about how a company's exercise of human rights due diligence is and should be factored into determinations of legal liability, particularly with respect to claims based on negligence or strict liability, and in the determination of remedies and sanctions. To be useful, this knowledge needs to be appropriately disseminated and promoted to practitioners who confront these concepts each day.

This session will be devoted to figuring out how to best promote what was learned during the consultation to enforcement agencies, judicial bodies, and other practitioners who must decide how the existence of human rights due diligence relates to legal liability. It will be aimed at converting the substantive knowledge gleaned from the earlier sessions, and from the conclusions of ARP I, into practical action.

8. Promoting policy coherence in national, regional, and international initiatives

In addition to promoting what was learned during the consultation to practitioners, the knowledge should also be promoted to policy-makers at the national, regional, and international levels. Consultations carried out in the course of ARP I suggested the need for greater policy coherence between the concepts, approaches, and methodologies developed in response to the UNGPs and legal liability. This session will discuss the current processes and initiatives that could benefit from increased clarity regarding the relationship between human rights due diligence and corporate liability, and explore how to engage with the policy-makers behind these initiatives.

Annex

This annex reproduces sections from the ARP I report (A/HRC/32/19) discussing human rights due diligence.

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

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

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

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

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

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

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

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

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

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