Advance Edited Version

Distr.: General
12 May 2016

Original: English

Human Rights Council
Thirty-second session
Agenda items 2 and 3
Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*

Note by the Secretariat

The present document accompanies the report of the United Nations High Commissioner for Human Rights to the Human Rights Council.

It has been prepared as a companion to the guidance presented in the annex to the report, on improving accountability and access to remedy for victims of business-related human rights abuse. It provides additional explanations and context to enhance understanding and to aid implementation of the guidance.

* The present report was submitted after the deadline in order to reflect the most recent developments.

Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance[**]

Contents

[**] Circulated in English, French and Spanish only.

I. Introduction

1. The present document serves as a companion to the guidance presented in the annex to the report of the High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuses (A/HRC/32/19).

2. The guidance presented in that report and the present addendum are complemented by a compilation of illustrative examples of State practices, gathered over the course of the research and consultations conducted by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Those examples, made available online, show how the guidance can be implemented in practice.[1]

A. Focus on the role of State-based judicial mechanisms

3. The guidance focuses on corporate accountability and access to remedy through State-based judicial mechanisms. The extent to which there is access to remedy in any jurisdiction, including through non-judicial remedial mechanisms, depends ultimately on the existence of effective judicial mechanisms.[2] The presence of effective judicial mechanisms can also enhance the effectiveness of non-judicial remedial mechanisms by providing incentives to parties to participate and a means of enforcement of outcomes. Furthermore, there will be cases, especially where the human rights impacts are severe, where reference to non-judicial remedial mechanisms may not be appropriate or in keeping with State duties to protect against business-related human rights abuses. However, the guidance recognizes the important role of State-based non-judicial mechanisms, for instance, as a way of reducing the financial obstacles to access to remedy.[3]

4. The guidance focuses on the legal liability of companies as opposed to the individual liability of officers and employees. While individual legal accountability is important as an appropriate remedy in many cases, and can be a potentially powerful deterrent to wrongdoing, the focus on the legal accountability of companies is important, first, in the light of the drawbacks of individual liability concepts as a response to systemic and managerial fault and, second, from the perspective of ensuring that remedies fulfil compensatory as well as punitive needs.[4]

B. Recognizing the diversity of domestic legal systems

5. There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues covered by the guidance. For instance, some legal systems are highly codified, whereas others place more reliance on legal development through judicial decisions and precedent. Some domestic legal systems are adversarial, whereas others are inquisitorial, and some contain elements of both. Some legal systems are federal, or devolved in nature, whereas others are unitary. Some legal systems provide for corporate criminal liability, and some do not.[5] The guidance is therefore necessarily flexible and anticipates the need for adaptation to local needs and contexts. Identifying areas where improvement is needed in

[1] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.
[2] See A/HRC/17/31, principle 26, commentary.
[3] See A/HRC/32/19, annex, para. 16.2.
[4] See paras. 39-41 and 69-74 below.
[5] See paras. 6 and 7 below.

domestic legal regimes may be a complex task, and in some jurisdictions a formal legal review may be necessary. To assist with this, a model terms of reference for a formal legal review is included in figure 1, below.

Figure 1: Model terms of reference addressed to a law commission (or domestic equivalent) to enable a review of the coverage and effectiveness of laws relevant to business-related human rights abuses

1. The law commission or review body is requested to investigate and report on the following matters:

(a) To what extent may companies be liable under the laws of the jurisdiction for the adverse human rights impacts of their business activities? To what extent, and on what bases, may companies be legally liable for causing or contributing to severe human rights abuses (including severe human rights abuses committed by third parties, e.g. other corporate entities, or State agencies)? What are the policy reasons for any exceptions or exclusions and are these justified?

(b) To what extent does the scope of legal regimes or the principles for determining corporate legal liability differ depending on the mode of enforcement (e.g. whether enforcement is carried out by public authorities or private individuals)? What are the reasons for any differences, and are these justified?

(c) To the extent that corporate legal liability is possible under the laws of the jurisdiction, are the principles for assessing corporate legal liability sufficiently clear for the purposes of legal certainty and proper administration of justice? Do they respond adequately to cases involving allegations against (a) constituent companies of group business enterprises; and (b) business enterprises that make use of supply chains? Do they take account of the need to ensure that risks of adverse human rights impacts of business activities are properly identified, prevented and mitigated, and that workers (including temporary workers) are properly managed and supervised to prevent and mitigate adverse human rights impacts?

(d) Do relevant domestic legal regimes respond adequately to the challenges of investigation and enforcement in cross-border cases? Do domestic legal 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 State obligations under international human rights treaties to which the jurisdiction is party?

(e) What sanctions and other remedies can be ordered following a finding of corporate legal liability for adverse human rights impacts of business activities? Do these meet applicable international standards as regards the components and procedural requirements of an effective remedy? Are they responsive to gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization?

2. The law commission or review body is requested to make recommendations that take into account:

(a) The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework;

(b) Other applicable international standards and guidance relating to corporate legal accountability and access to remedy in cases of business-related human rights abuses;

(c) Where relevant, the commitments made by the jurisdiction in its national action plan;

(d) Its findings in relation to the issues described in paragraph 1 above;

(e) International human rights treaties and other relevant treaties, bilateral and multilateral agreements that the State is party to, including, where appropriate, relevant recommendations made to the State by treaty bodies and peer review mechanisms.

3. The review process will be public, open, inclusive and evidence-based and will involve:

(a) A review structure that will provide adequate opportunities for contribution by key stakeholders;

(b) Proper consultation with legal professionals, criminal justice practitioners, public interest lawyers, members of the judiciary, parliamentarians, academics, affected victims, representatives of civil society organizations, representatives of trade unions and representatives of businesses;

(c) An examination of evidence from research, including evidence of experiences in other countries in the development and implementation of reforms of the laws relating to corporate legal liability in cases of alleged business involvement in human rights abuses.

II. Explanatory notes to the guidance

A. Enforcement of public law offences

1. Principles for assessing corporate legal liability

Box 1: Key concepts 1

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

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

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

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

Offences of "absolute liability" do not require proof that the defendant intended the

relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence. However, the relevant domestic public law regime may permit the company to raise a defence on the basis of its use of "due diligence" to prevent the prohibited event. Where this is the case, the offence may be described as one of "strict liability" (rather than absolute liability).

(a) Key issues of context

(i) Types of legal liability under public law regimes

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

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

(ii) Companies, business enterprises, group business enterprises and supply chains

8. The challenges in terms of accountability and access to remedy posed by the structural and managerial complexity of many business enterprises are outlined in the report.[6] Domestic public law regimes determine the legal responsibilities of parent companies (and other companies within a group business enterprise) in varying ways and to varying degrees depending on regulatory contexts and needs. However, in many domestic public law regimes relevant to respect by business enterprises of human rights, there is lack of clarity as to the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the activities of other constituent companies. This is particularly so with regard to parent companies (as regards the management and supervision of subsidiaries) and business enterprises that make use of complex supply chains.

9. For these reasons, the guidance highlights the need for clearer articulation, through domestic public law regimes, of legal standards of management and supervision with respect to the identification, prevention and mitigation of adverse human rights impacts, particularly with respect to parent companies (1.5) and business enterprises that make use of supply chains (1.6). Furthermore, the guidance recommends regular review of domestic public law regimes to ensure that they continue to provide the necessary coverage and adopt appropriate approaches in the light of evolving circumstances and international obligations (1.9).

[6] See A/HRC/32/19, paras. 21-23.

(iii) Attributing legal liability to a company: primary liability

10. Establishing corporate legal liability entails showing, to the requisite standard of proof,[7] that all the elements of the offence are satisfied. In criminal cases, these elements are likely to involve both "mental" and "physical" elements. The "mental" elements refer to the knowledge and intentions of the alleged offender. The "physical" elements refer to the offender's acts and whether they were the cause of the relevant harm.

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

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

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

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

15. In cases where business enterprises have caused or contributed to adverse human rights impacts, but where there is no detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures, it can be difficult to identify the company (or companies) that should be legally accountable and on what basis. Some domestic law regimes seek to alleviate those problems in specific regulatory contexts by allowing the necessary elements of fault to be inferred from the surrounding circumstances (effectively shifting the burden of proof onto the corporation to show why it should not be held legally responsible a specific case), or in some circumstances by dispensing with the need to prove corporate "knowledge" or "intentions" altogether.[8]

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

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

[8] See box 1: key concepts 1, for "strict liability" and "absolute liability".

(iv) Attributing legal liability to a company: secondary liability

17. An alternate source of corporate legal liability is secondary liability.[9]

18. There is a considerable variation from jurisdiction to jurisdiction and regime to regime as to the type of knowledge that must be proved to establish secondary liability (e.g. the extent to which there must have been shared intent with the main perpetrator to commit an offence) and the causal relationship between the secondary party's actions and the offence (e.g. whether the secondary party's actions were the direct cause of the offence or merely made it more likely).[10] Domestic legal regimes are not always clear as to the modes and levels of contribution to human rights abuses of a third party that will give rise to corporate legal liability on the basis of secondary liability and the manner of attribution of acts, knowledge and intentions to companies.

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

20. The guidance aims to address common problems relating to the secondary liability of business enterprises, highlighting the need for greater clarity as to the modes and levels of contribution that will lead to legal liability (2.1) and the principles for attributing mental elements of offences to companies (2.2). In addition, it recommends that secondary offences are treated with the same seriousness as primary offences and as conceptually distinct from the primary offence, and that liability is not contingent on the liability of the main perpetrator (2.3).

(v) Human rights due diligence

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

22. In law, "due diligence" is a standard of care. The Guiding Principles provide a global standard for human rights due diligence.[11] There is scope for better integration of this global standard in many domestic law regimes.

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

[9] Ibid., for "secondary liability" and "complicity liability".

[10] See the report by J. Zerk entitled "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies", prepared for OHCHR (February 2014), available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, pp. 37-39.

[11] See A/HRC/17/31, principles 17-21 and commentary.

2. Supporting the work of State agencies responsible for the investigation and enforcement

Box 2: Key concepts 2

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

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

(a) Key issues of context

(i) Support for enforcement agencies tasked with investigation and enforcement

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

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

(ii) Transparency and accountability with respect to enforcement discretion

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

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

(iii) Resources, training and expertise

28. OHCHR research and consultations confirm that lack of resources, training and expertise to pursue complex business-related human rights cases against companies, especially in a cross-border context,[12] is a serious concern in many jurisdictions.

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

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

30. Intimidation and reprisals against victims, witnesses, human rights defenders, whistle-blowers and their legal representatives are serious concerns in some jurisdictions.

[12] See paras. 32-38 below.

In addition to placing people at risk of further abuses, such practices may seriously hamper effective investigation and enforcement. However, practical steps can be taken to mitigate these risks, for example, in the methods used to collect and store evidence, or in the means by which testimony is given. In responding to complaints and allegations, practitioners working within enforcement agencies need to be sensitive to the different challenges and risks that may be faced by women and men and the needs and concerns of individuals and groups at heightened risk of marginalization or vulnerability.[13]

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

3. Cooperation in cross-border cases

Box 3: Key concepts 3

For the purposes of the guidance, a "cross-border" case is one where the relevant facts have taken place in, the relevant actors are located in or the evidence needed to prove a case is located in more than one State.

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

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

(a) Key issues of context

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

32. The use of extraterritorial jurisdiction by States is governed by international law. Under international law, direct assertions of jurisdiction over foreign companies and business activities must be justified according to one or more internationally recognized bases of jurisdiction: territoriality, nationality, the protective principle, passive personality and universality.[14] In addition, assertions of extraterritorial jurisdiction are generally agreed to be subject to an overarching requirement of "reasonableness" in the way in which it is exercised.[15]

33. However, while there is international consensus as to when States can exercise extraterritorial jurisdiction in business and human rights cases, there is less clarity as to the

[13] See guidance produced by the United Nations Special Rapporteur on Human Rights Defenders on the protection of human rights defenders in the context of economic development projects, A/68/262.

[14] For an explanation of each of these principles, see J. Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas", Harvard Corporate Responsibility Initiative working paper No. 59 (June 2010), pp. 18-20, available from www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.

[15] Ibid, p. 20.

circumstances in which they should or must exercise such jurisdiction.[16] Against this background, some international treaty bodies have recommended that home States take steps to prevent and/or punish abuse abroad by business enterprises domiciled within their respective jurisdictions.[17]

34. The roles and responsibilities of interested States in cross-border cases are clarified for some regulatory contexts in international legal regimes.[18] For instance, some international legal regimes require that participating States carry out direct extraterritorial enforcement with respect to business operations or activities outside their own territory (e.g. by virtue of being the State of domicile of a parent company of a business enterprise) or may require or authorize the use by participating States of extraterritorial jurisdiction over foreign business enterprises or activities on other bases (e.g. on the basis that victims were nationals or residents of the regulating State).

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

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

36. States have entered into both formal and informal bilateral and multilateral arrangements to facilitate international cooperation with respect to legal assistance and enforcement of judgments in cross-border cases, including cross-border cases concerning adverse human rights impacts of business activities.[19] Some international instruments of relevance to cross-border business-related human rights abuses also include provisions designed to facilitate exchange of information and expertise between domestic law enforcement and judicial bodies, for instance, to enable better analysis of the nature and scale of specific risks, as an aid to detect possible crimes and as a way of strengthening

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

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

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

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

cooperation through progressive improvement of the domestic regimes of participating States.[20] In various fields of law enforcement, States have developed a range of cooperative approaches, including participation in "peer review" evaluation of regulatory effectiveness and capacity, capacity-building activities and the provision of technical assistance.

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

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

4. Sanctions and other remedies

Box 4: Key concepts 4

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

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

(a) Key issues of context

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

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

40. While financial penalties appear to be most prevalent in cases involving corporate defendants, they may not, on their own, amount to an effective remedy.[21] From the perspective of victims, public apologies, orders for restitution, measures to assist with rehabilitation of people and/or resources and measures to ensure non-repetition of the abuse may be equally or more beneficial.

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

[21] In relation to severe human rights impacts, see further the guidance contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

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

B. Private law claims by affected individuals and communities

1. Principles for assessing corporate legal liability

Box 5: Key concepts 5

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

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

The elements required to prove corporate legal liability based on a private law cause of action will vary among regimes and among jurisdictions. These elements may include "corporate intent" to commit a wrongful act and/or "negligence". Some domestic law regimes make use of concepts of "strict liability" of "absolute liability" (see box 1, above).

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

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

(a) Key issues of context

(i) Problems of gaps in coverage and lack of suitable causes of action

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

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

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

(ii) Companies, business enterprises, group business enterprises and supply chains

45. The accountability and access to remedy challenges posed by the structural and managerial complexity of companies and business enterprises, and especially group business enterprises, are outlined in the report.[22]

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

(iii) Attributing liability to a company: primary liability

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

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

49. In business and human rights cases, it can be difficult and costly[23] to identify the company (or companies) that should be held legally accountable and on what basis, without detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures. Some domestic private law regimes contain elements that alleviate those problems to some extent by allowing the necessary elements of fault to be inferred from the surrounding circumstances, or by applying objective standards to determine what would have been "foreseeable" to the corporate defendant (rather than what was subjectively "foreseen" by the defendant), or by dispensing with the need to prove corporate "knowledge" or "intentions" altogether through the use of "strict" or "absolute" liability.

50. The guidance highlights the need for approaches to private law liability that are capable of addressing systemic fault and individual fault (see 12.2). In addition, the

[22] See A/HRC/32/19, paras. 21-23.
[23] See paras. 57-61, below.

guidance suggests that States consider ways to ensure that the distribution of evidential burdens of proof takes account of considerations of access to remedy and considerations of fairness to all parties (see 12.5).

(iv) Attributing liability to a company: secondary liability

51. Companies may be legally liable under private law regimes for causing or contributing to human rights abuses of other individuals or entities by virtue of theories of secondary liability. Depending on the relevant domestic law regime, secondary liability under private law regimes may result from instigating or inciting a wrongful act or providing material assistance to the primary wrongdoer. In some jurisdictions, and under some regimes, secondary liability may result from omissions (e.g. failures to prevent wrongdoing) as well as positive acts.[24] The principles used to determine secondary liability vary from regime to regime and jurisdiction to jurisdiction.

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

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

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

(v) Human rights due diligence

55. In many jurisdictions, a company's human rights due diligence will be relevant to the question of whether the company had discharged the applicable standard of care for the purposes of private law tests for negligence. The Guiding Principles provide a global standard for human rights due diligence.[25] However, OHCHR research raises questions as to whether this standard for human rights due diligence is adequately reflected in domestic law regimes and properly understood by domestic authorities and judicial bodies.

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

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

[25] See A/HRC/17/31, principles 17-21 and commentary.

2. Overcoming financial obstacles to legal claims

Box 6: Key concepts 6

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

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

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

(a) Key issues of context

(i) Diversifying funding sources

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

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

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

(ii) Court costs and fees

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

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

3. Cooperation in cross-border cases

Box 7: Key concepts 7

"Cross-border" cases are those where the relevant facts have taken place in, the relevant actors are located in, or the evidence needed to prove a case is located in, more than one

State.

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

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

(a) Key issues of context

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

62. While the exercise of extraterritorial jurisdiction in the public law sphere is governed by international law,[26] the use of extraterritorial jurisdiction in private law cases is governed largely by the domestic law of the forum State.[27] Consequently, outside the scope of regional or international regimes to regulate the use of adjudicative jurisdiction,[28] there is not yet evidence of a coherent trend in State practice with respect to the roles and responsibilities of interested States in cross-border private law cases.

63. OHCHR research has identified a number of differences of approach with respect to key issues such as "universal civil jurisdiction", the applicability of a doctrine of "exhaustion of legal remedies", the extent to which a factual nexus is required between the claim and the forum State for the courts of the forum State to be able to exercise jurisdiction at all and, finally, the extent to which the nature and severity of the abuse may have a bearing on the way that jurisdictional rules are applied.[29] At the same time, some international treaty bodies have called on home States to take steps to facilitate greater access to State-based judicial mechanisms by those adversely affected by foreign business-related human rights impacts of business enterprises domiciled in the respective home States.[30]

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

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

65. States have entered into international treaties to facilitate international cooperation with respect to legal assistance (e.g. regarding the taking of evidence) and enforcement of

[26] See paras. 32-35, above.
[27] This body of domestic law is often referred to as "conflicts of law" or "private international law".
[28] See for instance, within the European Union, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[29] See note 16 above.
[30] See, for example, Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, para. 44.

judgments in private law cases with a cross-border element.[31] However, as in the field of public law,[32] these require effective implementation at a practical level to ensure that mutual legal assistance in private law cases can be quickly and efficiently sought and obtained.

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

(iii) Access to information for claimants and their legal representatives

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

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

4. Private law remedies

Box 8: Key concepts 8

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

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

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

[32] See paras. 36-38, above.

(a) Key issues of context

(i) Compensatory damages, punitive damages and other non-monetary remedies

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

70. Useful guidance as to what constitutes an effective remedy in practice can be found in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Private law regimes should recognize and take account of the different and sometimes unique ways that adverse human rights impacts of business activities can be experienced by different individuals and groups within society and especially by individuals and groups at heightened risk of vulnerability or marginalization.

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

(ii) Distribution of monetary compensation awarded following a collective redress action

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

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

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