The Office of the United Nations High Commissioner for Human Rights

Business and Human Rights: 'The Accountability and Remedy Project'

CONSULTATION DRAFT

Consultation draft of final guidance prepared by OHCHR for the purposes of inclusion in its final report to the Human Rights Council pursuant to A/HRC/Res/22/26, para. 7

Written comments on this consultation draft should be addressed to

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The closing date for written comments on this consultation draft is

1 APRIL 2016

The Office of the High Commissioner for Human Rights invites comments from all stakeholders on the draft guidance contained in this paper. Stakeholders are particularly invited to comment on the following questions:

(i) Do you agree with the elements of good State practice set out in this consultation document? If not, please explain why not.
(ii) Would you like to suggest any further elements of good State practice?
(iii) Would you like to suggest any "illustrative examples" to be included under any of the elements of good State practice?

For a full introduction to the background, scope and methodology of the Accountability and Remedy Project, as well as a summary of high-level findings, please refer to the accompanying ***Background Paper****, available via: ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx*

About this consultation paper

This consultation document sets out draft guidance by the Office of the High Commissioner for Human Rights (OHCHR) arising from the 'Accountability and Remedy Project,' a project which aims to enhance accountability and access to remedy in cases of business-related human rights abuses, with a particular focus on the most severe cases of abuse.

The purpose of this document is to invite States and all relevant stakeholders to provide comments on the draft guidance. The final version of the guidance will be presented to the Human Rights Council, for its consideration at its thirty-second session in June 2016, pursuant to OHCHR's mandate from the Council in resolution 26/22.

The guidance in this document is accompanied by a Background Paper[1], which explains further the background, choice of scope, and methodology of the Accountability and Remedy Project, and provides further context to the guidance contained in this document.

Structure and format of draft guidance and recommendations

The Accountability and Remedy Project (ARP) was launched in November 2014, in follow-up to a mandate from the Human Rights Council and building on prior OHCHR research and consultations regarding challenges that prevent victims from being able to access effective remedies in situations where businesses are involved in human rights abuses. The ARP comprises six 'Project Components', which address different areas identified in research as preventing accountability and access to effective remedy, and for which additional clarification is needed. These Project Components have been selected for their strategic value and potential to enhance accountability and access to remedy from a practical, victim-centred perspective in the short to medium term.

The draft guidance contained in this consultation document is structured around the six Project Components of the ARP. The guidance has been developed based on an extensive research process, which has included information submitted by stakeholders with respect to 60 different jurisdictions around the world. The guidance is designed to help States adopt a **more effective and comprehensive approach to judicial remedy and accountability** in cases of business-related human rights abuses, particularly in cases of severe abuses. To this end, the guidance takes account of the different linkages that exist between different challenges. While each Project Component addresses a specific set of themes and problems, the guidance arising from the six Project Components adds up to a coherent whole. Taken together it offers a package of options that can be implemented in a manner that is responsive to local needs, challenges and contexts.

The draft guidance largely takes the form of a series of **"Policy Objectives"** and **"elements of good State practice"**. The Policy Objectives and elements of good State practice are identified based on OHCHR's comparative research as expressing themes and objectives that would be recognizable in many, if not most, domestic legal systems. In the report presented to the Human Rights Council, these elements of good State practice will be supplemented and elaborated through **generalized illustrative examples** taken from OHCHR's evidence-gathering process.

[1] Available via: www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

However, for the purposes of this consultation, the Policy Objectives and elements of good State practice are presented without accompanying examples, in order to make the Consultation Draft as simple and accessible as possible. It is hoped that with this format, stakeholders will be able to more easily identify and comment specifically on the actual guidance to States made in this document, i.e. the Policy Objectives and elements of good State practice. Stakeholders are also invited to suggest potential illustrative examples from existing State practice as part of their comments to this paper.

Recognizing the great variety of legal structures, cultures, traditions, resources and stages of development that exist, the guidance in this report is expressed in a way that renders it **readily adaptable to different kinds of domestic legal systems**. The Policy Objectives and elements of good State practice express broad objectives that may be met in different legal systems in different ways, depending on prevailing local structures and conditions. This guidance has also been designed to account of the fact that, in some cases, solutions to problems may not be "human rights specific" and may not be accomplished without more wide-ranging legal reforms.

The guidance is designed to be "purpose-built" for the specific issues addressed under each Project Component. Thus, for Project Components 1 and 2, the elements of good State practice are organized according to broader Policy Objectives, reflecting the policy-oriented nature of these issue areas, and their broader scope and complexity. For Project Components 3-6, the guidance focuses on elements of good State practice without organizing Policy Objectives, as the Policy Objectives for these components are self-explanatory. Furthermore, whereas the guidance for the various Project Components is largely outcome-oriented, the guidance in relation to roles and responsibilities of interested States in cross-border cases (Project Component 2) is more process-oriented in nature, in view of the need for cooperation between States as well as domestic actions. The guidance also varies in the level of detail depending on the complexity of the issues that it is designed to address, and the specific challenges that prevent access to remedy uncovered in OHCHR's research.

Note: Focus on severe human rights abuses and application of this guidance
For the purposes of collecting readily comparable data, OHCHR's data-gathering process for the Accountability and Remedy Project has focussed on "severe human rights abuses." This choice was made in view of time and resource constraints (including the timetable for reporting under the Human Rights Council resolution 26/22), the particular attention warranted by the severity of such abuses for victims, and to ensure that OHCHR's research resulted in directly comparable data and information from different legal systems. Consequently, information-gathering focussed on a defined set of categories of offences, abuses and harms, which are further described in the Background Paper.

However, as business enterprises can have an impact on virtually the entire spectrum of internationally-recognised human rights,[2] the recommendations and guidance that appear in this report are generally not limited to "severe" human rights abuses. Nevertheless, in some contexts (for instance in certain cross-border contexts, and in the context of policies and practices relating to domestic prosecution of business-related human rights abuses), prioritizing severe abuses is warranted, and thus the guidance notes this distinction. For further information about the choice of scope and the focus on severe human rights abuses in information-gathering and research, see the explanation in the Background Paper.

[2] UN Guiding Principles on Business and Human Rights, A/HRC/17/31, Principle 12, Commentary.

Draft guidance

1. Project Component 1: Domestic law tests for corporate legal liability[3]

This component of the Accountability and Remedy Project aimed to clarify how different domestic legal systems attribute and assess corporate legal liability in cases of business-related human rights abuses, with a particular focus on cases of severe abuses.

The lack of clear and coherent tests for corporate liability in many, if not most, jurisdictions **undermines the usefulness and effectiveness of domestic legal regimes**, both as a form of deterrence and as a means of obtaining redress. In many cases this means that State agencies, victims and their representatives, and business enterprises, **lack a clear basis for decision-making** about appropriate legal action and responses. It further can greatly **complicate and draw out legal proceedings**, which adds to the **costs** and financial risks of litigation and prosecutions (see further Project Component 3, below). Finally, lack of clarity and coherence **undermines the legal certainty needed for sound, sustainable and stable investment and economic growth.**

Based on the findings of OHCHR's research, this section presents good practice guidance for States in relation to the factors to take into account in the judicial determination of corporate liability in cases of business involvement in human rights abuses, particularly in cases of severe abuse.

Empirical research carried out by OHCHR confirms that there is considerable diversity both in the way different domestic legal systems presently approach questions of corporate legal liability in such cases and, within individual jurisdictions, in the way that tests for corporate legal liability are constructed, depending on the nature of the human right(s) affected and the business activities involved.

At the same time, it is possible to identify common themes, underpinned by policy ideas and principles that transcend different legal systems, structures, cultures and stages of economic development. These policy ideas and principles form the basis of the Policy Objectives used to organise the guidance in this section.

Policy Objective 1: To ensure that there is the possibility of corporate legal liability for corporate conduct that results in human rights abuses.

Policy Objective 1: Important issues of context

- A "corporation" is defined, for the purposes of this guidance, as an organisation of people recognised in law as a legal entity (or a "legal person"). A corporation has a legal existence that is separate from its owners. This feature of company law regimes is often referred to as "separate legal personality". Corporate legal liability refers to the **legal liability of a corporation as a whole**, as opposed to the legal liability of individual officers and employees.

- All jurisdictions recognise the possibility of corporate legal liability for wrongful corporate acts, although there are differences from jurisdiction to jurisdiction in

[3] For additional background and context to this project component, see the Background Paper.

the **type of legal liability that a corporation can attract**. In some jurisdictions this may be criminal liability, quasi-criminal liability[4] and liability under private law[5] (or "civil liability"). However, in some jurisdictions, corporations may only attract administrative (or "quasi-criminal") and civil liability, because criminal liability is only applicable to natural persons. In those jurisdictions that do not permit criminal liability for corporations as "legal persons", individual officers in a company may be liable if they have committed or been complicit in a criminal act, but the corporation itself cannot be convicted under criminal law.

- A finding of corporate legal liability for business-related human rights abuses under criminal or quasi-criminal regimes gives rise to the possibility of criminal or quasi-criminal sanctions being imposed according to the laws of the domestic legal system (see further Project Component 4 below). A finding of corporate legal liability for business-related human rights abuses under private (or "civil") law regimes gives rise to the possibility of private law remedies being awarded to the claimant according to the laws of the domestic legal system (see further Project Component 5 below).

Policy Objective 1: Elements of good State practice

1.1.1. Corporate conduct that amounts to human rights abuses by a business enterprise carries the possibility of corporate criminal or quasi-criminal liability.

1.1.2. Corporate conduct that amounts to human rights abuses by a business enterprise carries the possibility of corporate liability under private law.

1.1.3. Tests for corporate legal liability are clearly expressed, are relevant to different types, sizes and structures of business enterprises and take account of developments in corporate management best practice.[6]

1.1.4. Corporate criminal or quasi-criminal legal liability does not depend on a prior successful conviction of an individual offender.

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[4] Criminal or quasi-criminal regimes depend for their enforcement on public law enforcement authorities and regulatory bodies. In this consultation document, the term "quasi-criminal" liability is used interchangeably with "administrative liability" and refers to liability for breaches of legal standards that usually have some, but not all, of the qualities of criminal offences. For instance, it may not be necessary for a successful prosecution of a "quasi-criminal" or "administrative" offence to prove the level of intent or mental blameworthiness that would be necessary to establish that a criminal offence had been committed. Quasi-criminal, or "administrative" offences tend to have a more "regulatory" character than criminal offences.

[5] In this consultation document, the term "private law" is used interchangeably with "civil law" for the branch of law that is concerned with relationships between private actors, rather than between the authorities and private actors, and which are enforced by way of private legal action ("private law" regimes).

[6] See, for example, the various tests that focus on the quality of a company's management, rather than the actions and intentions of specific individuals, such as the "corporate culture" test to determine "corporate fault"; a "collective fault" approach whereby knowledge, intentions and actions of a group of individuals can be "aggregated"; and tests that allow inferences to be drawn about corporate intention or causality, based on surrounding circumstances (including management issues). See also Policy Objective 3, which explores further the potential for connections to be made between the quality of corporate management and corporate liability.

Policy Objective 2: To ensure that there is the possibility of corporate legal liability for corporate complicity in human rights abuses carried out by a third party.

Policy Objective 2: Important issues of context

- "Secondary liability", sometimes referred to as "complicity liability", refers to the liability of a person for the acts of another person by virtue of the fact that the first person has contributed to, or been complicit in, the acts of the second person in some way.

- The United Nations Guiding Principles on Business and Human Rights (the 'UN Guiding Principles') note that "most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime."[7]

- There are many differences between domestic law jurisdictions as to: (a) the types of offences for which a company can be criminally or civilly liable under theories of secondary liability; (b) the nature of that secondary liability (e.g. whether criminal or quasi-criminal); (c) the extent to which secondary liability is dependent upon a prior finding of primary liability on the part of the main perpetrator; and (d) the matters that must be proved in order to achieve a successful prosecution or private law claim on the basis of theories of "secondary liability" or "complicity".

Policy Objective 2: Elements of good State practice

1.2.1. Intentional, reckless or negligent contributions by business enterprises to the human rights abuses of third parties carry the possibility of corporate criminal or quasi-criminal liability.

1.2.2. Intentional, reckless or negligent contributions by business enterprises to the human rights abuses of third parties carry the possibility of corporate liability under private law.

1.2.3. Tests for corporate legal liability on the basis of theories of "secondary" or "complicity" liability (i.e. causing or contributing to human rights abuses committed by another person or organisation) are clearly expressed.

1.2.4. The domestic legal system makes it clear that offences based on theories of secondary or complicity liability (whether criminal or quasi-criminal) are to be treated with the same level of seriousness as primary liability offences.

1.2.5. Tests for corporate legal liability on the basis of theories of "secondary" or "complicity" liability are relevant to different types, sizes and structures of business enterprises and take account of developments in corporate management best practice.[8]

[7] A/HRC/17/31. See Guiding Principle 17, Commentary.
[8] See further Policy Objective 3 below.

1.2.6. Corporate legal liability (whether under criminal law, quasi-criminal law or private law) does not depend on a prior successful conviction of the primary perpetrator or perpetrators.

Policy Objective 3: To ensure that tests for corporate liability are properly aligned with the need for sound human rights risk management practices by business enterprises.

Policy Objective 3: Important issues of context

- The UN Guiding Principles on Business and Human Rights emphasise the importance of sound management to address actual and potential adverse human rights impacts.[9] The UN Guiding Principles state that all business enterprises should carry out human rights due diligence "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts".

- Furthermore, the UN Guiding Principles make it clear that providing support and guidance to companies with respect to the technical requirements of human rights due diligence is part of the State's duty to protect human rights. The Commentary to Guiding Principle 3 notes that "[g]uidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practice. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families."

- The due diligence standard is a key feature of many domestic legal regimes. There are a number of different ways in which domestic legal regimes can encourage business enterprises to use due diligence to identify, prevent and mitigate adverse human rights impacts. For instance, the exercise of due diligence may be a specific legal requirement, the lack of which could be used as a basis for corporate legal liability. In the area of civil (or "private") law, whether or not a business enterprise has exercised due diligence will be a key factual issue in a determination of whether that business enterprise should be held legally liable under legal theories of negligence. Alternatively, in other contexts, the fact of having exercised due diligence (or not) to avoid a prohibited state of affairs may be relevant to whether the business enterprise can invoke a legal defence in criminal or quasi-criminal proceedings, depending on the provisions of the relevant criminal or quasi-criminal regime.

Policy Objective 3: Elements of good State practice

1.3.1. Tests for corporate legal liability under criminal and quasi-criminal regimes provide appropriate incentives to companies to exercise due diligence to identify, prevent and mitigate risks of adverse human rights impacts arising from their own activities.

[9] See, in particular, Guiding Principles 15-20.

1.3.2. Tests for corporate legal liability under private law regimes provide appropriate incentives to companies to exercise due diligence to identify, prevent and mitigate risks of adverse human rights impacts arising from their own activities.

1.3.3. Tests for corporate legal liability (under criminal, quasi-criminal and private law regimes) provide appropriate incentives to companies to effectively supervise their officers and employees in such a way that ensures that risks of adverse human rights impacts arising from the relevant business activities are properly identified, prevented and mitigated.

1.3.4. Tests for corporate legal liability under criminal and quasi-criminal law regimes provide appropriate incentives to companies to exercise due diligence to identify, prevent and mitigate risks of adverse human rights impacts that they may contribute to, including through their business relationships.

1.3.5. Tests for corporate legal liability under private law regimes provide appropriate incentives to companies to exercise due diligence to identify, prevent and mitigate adverse human rights impacts that they may contribute to through their business relationships.

1.3.6. Relevant State agencies (e.g. regulatory authorities and domestic law enforcement bodies) have access to clear, consistent, workable (and, where appropriate sector-specific) guidance as to the technical requirements of human rights due diligence, and its relevance in various legal and law enforcement contexts.

Policy Objective 4: To ensure that tests for corporate legal liability are properly aligned with the need for higher levels of vigilance in specific contexts, such as where the risks of corporations causing or contributing to or becoming complicit in severe human rights abuses are particularly high.

Policy Objective 4: Important issues of context

- The UN Guiding Principles on Business and Human Rights note that "the scale and complexity of the means through which enterprises meet that responsibility [i.e. the responsibility of business enterprises to respect human rights] may vary according to these factors [i.e. size, sector, operational context, ownership and structure], and with the severity of the enterprise's adverse human rights impacts."[10]

- Domestic legal regimes use various techniques to encourage higher levels of vigilance from business actors in certain sectors and contexts, particularly where the relevant business activities carry particularly serious risks of harm to the environment or to human health. These techniques include the use of strict or absolute liability for certain regulatory offences, or reversals of burdens of proof in certain cases.

[10] See Guiding Principle 14.

Policy Objective 4: Elements of good State practice

1.4.1. The domestic criminal law regime makes 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 involvement (whether directly or by reason of complicity) in severe human rights abuses.[11]

1.4.2. The domestic legal regime makes appropriate use of strict or absolute liability as a means of reducing legal, practical and other relevant barriers that could otherwise lead to a denial of access to remedy.

[11] To establish liability under a strict or absolute criminal (or quasi-criminal) offence, it is not necessary to show that the company intended the prohibited conduct or outcome; only that the prohibited conduct or outcome in fact occurred. Depending on the relevant legislative provisions, it may be possible for a company to raise a defence by showing that it had in fact used due diligence. Alternately it may be that liability will automatically follow the occurrence of harm, irrespective of whether or not the company can prove that due diligence was in fact exercised in the specific case.

2. Project Component 2: Roles and responsibilities of interested States in cross-border cases[12]

This component of the Accountability and Remedy Project aimed to explore State practices and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications in cross-border cases of business related human rights abuses, and to consider the different ways in which international cooperation (at both diplomatic and operational levels) can improve the ability of victims to access remedies in such cases.

Because trade and investment cross national boundaries, allegations of business involvement in human rights abuses may give rise to legal issues (and hence the potential for legal liability) under the laws of more than one State. While overlapping domestic legal regimes are inevitable in a globalizing world, they can give rise to jurisdictional conflicts, as well as disjointed and inconsistent domestic legal responses.

OHCHR research and consultations in the course of the Accountability and Remedy Project have identified two key problems that are presently undermining the ability of domestic legal regimes to respond effectively to cross-border cases concerning business involvement in human rights abuses. The first is a **lack of clarity at international level as to the appropriate use of extraterritorial jurisdiction** in such cases. This is a significant source of legal uncertainty for affected persons as well as business enterprises. The second, related to the first, is a **lack of cooperation and coordination** between interested States with respect to the detection, investigation, prosecution and enforcement of cross-border cases. This lack of cooperation and coordination has had negative effects on access to remedy in a number of individual cross-border cases, for instance by hampering the ability of prosecutors to act on some complaints, by adding to the costs and procedural complexity of cross-border cases, and by introducing delays that have significantly reduced the likelihood of a successful prosecution.

In addition, lack of coordination between States with respect to the use of domestic measures with extraterritorial implications[13] can undermine the efforts of regulatory and domestic law enforcement bodies with respect to the prevention, detection and investigation of cross-border cases of business involvement in human rights abuses.

Clarification of the roles and responsibilities of interested States in cross-border business and human rights cases is a necessary precondition to better and more effective cooperation and coordination between the relevant State agencies (including domestic law enforcement bodies), and, ultimately, better access to remedy at domestic level.

Based on OHCHR's research and consultations, this section sets out draft "good practice" guidance for States in relation the management of cross-border cases and outlines possible strategies for better and more extensive international and bilateral cooperation.

[12] For additional background and context to this project component, see the Background Paper.
[13] Domestic measures with extraterritorial implications are defined as measures taken by a State to regulate people, companies or activities within its own territorial boundaries but which have (or are intended to have) implications beyond the territorial boundaries of that State.

Policy Objective 1: To establish an overview of the range of different legal regimes through which the State may exercise extraterritorial jurisdiction and engage in cross-border cooperation (and which are of potential relevance to cross-border cases concerning business involvement in human rights abuses), and to identify and address any weaknesses or gaps in approach.

Policy Objective 1: Important issues of context

- There are a range of domestic and international legal regimes that directly or indirectly regulate business respect for human rights. These include regimes relating to non-discrimination, labour rights, child protection, human trafficking, environmental protection, consumer rights, property, privacy, and anti-bribery.[14] In addition, domestic legal regimes relating to civil (or "private law") claims may set out a number of possible causes of action for legal remedies for business-related human rights impacts.

- International legal regimes (including international legal regimes aimed at regulating business respect for human rights) may require that participating States carry out direct extraterritorial enforcement in respect of business operations or activities outside their own territory (for example, by virtue of being the State of domicile of a parent company of a business enterprise). In addition, international legal regimes may require or authorise the use by participating States of extraterritorial jurisdiction over foreign business enterprises or activities on other bases (for example on the basis that victims of human rights abuses were nationals or residents of the regulating State). International legal regimes may also require, authorise or recommend the use of domestic measures with extraterritorial implications.

- States have entered into a range of international treaties to support, facilitate and enable international cooperation with respect to legal assistance and enforcement of judgements in cross-border cases, including (though not limited to) cross-border cases concerning business involvement in human rights abuses.[15]

Policy Objective 1: Elements of good State practice

2.1.1. The State has identified the extent to which its various domestic legal regimes that directly or indirectly regulate business respect for human rights (a) have potential relevance for cross-border cases concerning business involvement in human rights abuses (b) require or provide for the use of extraterritorial jurisdiction (c) require or

[14] Note that the guidance in this section of the consultation document is intended to cover domestic legal regimes which have been established unilaterally, as well as to domestic legal regimes that have been developed pursuant to bilateral or multilateral treaties.

[15] Some of these treaties are designed to have broad application, such as the European Convention on Mutual Assistance in Criminal Matters, and various bi-lateral mutual legal assistance treaties. See also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. In the civil (i.e. "private law") context see the Hague Convention on the Taking of Evidence Abroad and the Hague Convention on the Enforcement of Judgments in Civil and Commercial Matters. Other international legal regimes have been established to facilitate greater international cooperation with respect to specific kinds of crime, see for example the UN Convention Against Transnational Organised Crime, which includes provisions relating to mutual legal assistance and the use of joint investigation teams. See further Policy Objective 2 below.

provide for the use of domestic measures with extraterritorial implications and (d) require or provide for international cooperation.[16]

2.1.2. The State has identified, and periodically evaluates the effectiveness of its implementation of, (a) the various international legal regimes to which it is a party that directly or indirectly regulate business respect for human rights and (b) the various international legal regimes to which it is a party which have potential relevance for its cooperation with other States in cross-border cases concerning business involvement in human rights abuses.

2.1.3. The State has evaluated, and keeps under review, the extent to which its relevant domestic legal regimes (see 2.1.1 above) and its implementation of relevant international legal regimes (see 2.1.2 above) provide a coherent and robust response to cross-border business and human rights challenges, prioritising those areas of business activities where the risks of involvement in adverse human rights impacts are the most severe, and takes the necessary steps to address any weaknesses or gaps in approach.

2.1.4. The State has identified the bilateral and/or multilateral treaties and/or other international arrangements to which it is not yet a party but which have the potential to (a) enhance the effectiveness of domestic legal regimes that directly or indirectly regulate business respect for human rights in a cross-border context and (b) enhance the effectiveness of its cooperation with other States in relation to cross-border cases concerning business involvement in human rights abuses and has considered the potential advantages of joining those treaties and/or other international arrangements.

2.1.5. The State has clearly communicated to all relevant State agencies, and has made publicly available, its policies and expectations relating to the use of extraterritorial jurisdiction and domestic measures with extraterritorial implications in different factual and legal contexts, or pursuant to different domestic regimes, which have potential relevance for cross-border cases concerning business involvement in human rights abuses.

Policy Objective 2: To enable domestic law enforcement and judicial bodies readily and rapidly to seek legal assistance from and respond to requests from their counterparts in other States in respect of the detection, investigation, prosecution and enforcement of cross-border cases concerning business involvement in severe human rights abuses.

Policy Objective 2: Important issues of context

- The ability of the relevant State agencies (for instance, domestic law enforcement, investigative and judicial bodies) to rapidly and readily seek and obtain information and assistance with respect to cross-border cases concerning business involvement in human rights abuses, and the ability and willingness of their counterparts in other States to respond rapidly and readily to those requests, can have a crucial bearing on whether there is access to remedy in individual cross-border cases, including the ability of prosecutors to pursue a case. Where abuses are ongoing, delays resulting from the inability to access relevant information can also compound the harms suffered by victims.

- A number of international treaties exist to enable greater cross-border exchange of information between domestic law enforcement and judicial bodies and to

[16] See note 3 above.

facilitate and support mutual legal assistance between domestic law enforcement and judicial bodies of different States. Some of these international legal regimes have been created in response to specific cross-border human rights challenges with a business connection (e.g. organised crime, forced labour, human trafficking, protection of rights of migrant labourers, protection of children from exploitation).[17] Other international legal regimes providing for mutual legal assistance between States have more general application.[18] Some of these relate specifically to the criminal law context,[19] whereas others are designed to provide a framework for legal cooperation in civil and commercial cases.[20]

- However, even where the relevant laws and international treaty arrangements are in place, State agencies can experience a range of practical difficulties and challenges which can undermine the treaty objectives, including a lack of information about how and where to make a request from State agencies in other interested States, a lack of opportunities and fora for cross-border consultation and coordination, differences of approach with respect to issues of privacy and the protection of sensitive information, a lack of resources needed to process requests in a timely manner, and a lack of awareness of investigative standards in other States.[21]

Policy Objective 2: Elements of good State practice

2.2.1. The State ensures that the necessary bilateral and multilateral agreements are in place to enable (a) domestic law enforcement and judicial bodies and (b) parties to civil proceedings (through the relevant domestic judicial bodies) to request mutual legal assistance from the relevant State agencies of other States in cross-border cases concerning business involvement in severe human rights abuses. Such agreements should address common challenges in the context of cross-border cases such as enabling easier evidence-sharing, promoting agreements on the allocation of the costs of investigation or enforcement, ensuring appropriate levels of protection of personal data and commercially sensitive information, protection of witnesses and whistle-blowers, and establishing when informal channels may appropriately be used to speed up cooperation.

2.2.2. The State enables its domestic law enforcement and judicial bodies involved in the investigation and/or prosecution of criminal (or quasi-criminal) cases to carry out cross-border investigations and prosecutions through Joint Investigation Teams or other

[17] See for instance the UN Convention Against Transnational Organized Crime (including the Protocol to that Convention to Prevent, Suppress and Punish the Trafficking of Persons); the ILO Convention on the Worst Forms of Child Labor; the ILO Convention on Forced Labor (including the 2014 Protocol); the Convention on the Rights of the Child (including the Protocol on the Sale of Children, Child Prostitution and Child Pornography).

[18] See, for example, the European Convention on Mutual Assistance in Criminal Matters, and various bi-lateral mutual legal assistance treaties. See further note 4 above.

[19] See for instance the UN Convention Against Transnational Organized Crime (including the Protocol to that Convention to Prevent, Suppress and Punish the Trafficking of Persons. See also See, the European Convention on Mutual Assistance in Criminal Matters, and various bilateral mutual legal assistance treaties.

[20] In the civil (i.e. "private law") context see the Hague Convention on the Taking of Evidence Abroad and the Hague Convention on the Enforcement of Judgments in Civil and Commercial Matters.

[21] See also section 6, below, regarding elements of good State practice to address general challenges experienced by domestic prosecution bodies in the context of investigating and prosecuting business involvement in cases of severe human rights abuses.

suitable arrangements that enable those involved to agree wherever possible on a joint way forward.

2.2.3. The State sets out a clear policy expectation that domestic legal and judicial bodies will be appropriately responsive to requests from the relevant State agencies of other States in cross-border cases concerning business involvement in severe human rights abuses.

2.2.4. The State ensures that its domestic law enforcement and judicial bodies have access to the necessary information, support, training, and resources to enable personnel to make the best possible use of arrangements with other States for cooperation in cross-border cases concerning business involvement in severe human rights abuses.

2.2.5. The State keeps under review the scope and adequacy of its arrangements for mutual legal assistance with other States in light of the key cross-border human rights risks associated with business enterprises either domiciled within, or operating within, its territory and/or jurisdiction, and takes relevant steps to add to or improve such arrangements as necessary.

2.2.6. The State ensures that there is policy coherence between its arrangements with other States for mutual legal assistance and its policies on matters such as export assistance and the encouragement of inward investment.

Policy Objective 3: To work through relevant multilateral fora—at international, regional and sub-regional levels—to agree and develop common approaches to the technical modalities that can help facilitate and speed up cooperation between domestic law enforcement and judicial bodies in cross-border cases concerning business involvement in severe human rights abuses.

Policy Objective 3: Important issues of context

- See the 'important issues of context' section for Policy Objective 2, above.

Policy Objective 3: Elements of good State practice

2.3.1. The State is involved with, and actively promotes, 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 domestic enforcement or judicial bodies in cross-border cases concerning business involvement in severe human rights abuses, including through mentoring, "peer review" and other capacity-building approaches, and also through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

2.3.2. The State encourages and actively promotes the participation by its domestic law enforcement and judicial bodies (and their representatives) in international initiatives and networks aimed at promoting awareness of different opportunities for, and options for, international cooperation and the provision of legal assistance in cross-border cases of business involvement in severe human rights abuses.

Policy Objective 4: To work through relevant bilateral and multilateral fora to agree and develop common approaches aimed at improving access to information for victims and their legal representatives in cross-border cases concerning business involvement in human rights abuses

Policy Objective 4: Important issues of context

- In a case concerning allegations of business involvement in human rights abuses, the claimants (in civil or "private law" case) or complainants (in criminal or quasi-criminal case) 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 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, which may have relevance to a criminal (or "quasi-criminal") complaint or civil (or "private law") claim. However, in many cases (and particularly in cross-border cases), this information can be difficult and expensive to access.

- A further challenge to accessing regulatory information in cross-border cases arises from differences between States in the extent to which different domestic legal regimes create legal rights of public access to regulatory information (including information about the human rights-related risks and impacts of business activities), and the extent to which exemptions are given for certain classes of information, such as commercially sensitive or confidential information.

Policy Objective 4: Elements of good State practice

2.4.1. The State engages in, and actively promotes, multilateral initiatives aimed at improving the ease and speed with which information can be exchanged between victims (and their legal representatives) and the relevant State agencies of other States in cross-border cases concerning business involvement in severe human rights abuses, including through mentoring, peer review and other capacity-building approaches, and taking account of the need for appropriate safeguards with respect to issues such as the protection of personal data and commercially sensitive and confidential information, and protection of witnesses and whistle-blowers.

2.4.2. The State engages in, and actively promotes, bilateral and multilateral initiatives relating to cross-border access to information regarding the human rights-related risks and impacts of different business activities and which are aimed at achieving greater alignment between different domestic legal regimes with respect to issues such as commercial confidentiality, data protection and the protection of victims and whistle-blowers.

Policy Objective 5: To work through relevant bilateral and multilateral fora to agree and develop methods and systems for the progressive improvement of domestic and international legal regimes which are of potential relevance to cross-border cases concerning business involvement in human rights abuses.

Policy Objective 5: Important issues of context

- The UN Guiding Principles call on all States, when acting as members of multilateral institutions that deal with business-related issues, to "[e]ncourage

those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through assistance, capacity–building and awareness-raising".[22]

- A number of international treaties have been created in response to specific cross-border human rights challenges with a business connection (e.g. organised crime, forced labour, human trafficking, protection of rights of migrant labourers, protection of children from exploitation).[23] These international regimes frequently provide for international cooperation, not only in individual cross-border cases, but also with a view to improving the effectiveness of domestic legal responses in all participating States. Such international cooperation may take the form of sharing of analytical information to help evaluate the nature of cross-border business-related human rights challenges as an aid to detection, or the sharing of experiences in specific cases to help develop consensus as to regulatory best practice. Special provision may be made for capacity-building and the provision of technical assistance to developing States. These provisions reflect recognition by participating States of the potential benefits of greater alignment of regulatory and investigative standards and capacities, not only in terms of the overall performance of individual domestic regulators and law enforcement bodies, but as a basis for better international cooperation in cross-border cases.

Policy Objective 5: Elements of good State practice

2.5.1. The State actively participates in, and actively promotes, through a range of bilateral, sub-regional, regional, and international fora, international initiatives aimed at improving the domestic legal responses of participating States to cross-border human rights challenges with a business connection, including through the exchange of information and know-how, participation in "peer review" evaluation exercises of regulatory effectiveness and capacity, capacity-building activities and the provision of technical assistance.

2.5.2. The State proactively encourages and facilitates participation by its various State agencies with responsibility for regulating business respect for human rights in sub-regional, regional and international networks of regulators with a view to achieving better communication and coordination between its domestic regulatory bodies and their counterparts in other States with respect to cross-border issues and challenges.

Policy Objective 6: To identify the existing domestic administrative mechanisms that provide for adjudication or other dispute resolution processes and which do or could address cross-border cases concerning business involvement in human rights abuses, and to build or strengthen those mechanisms, including their ability to cooperate with similar mechanisms operating in other States.

Policy Objective 6: Important issues of context

- Domestic administrative regimes (e.g. regimes for the licensing of certain business activities, environmental protection regimes, consumer protection regimes) may include non-judicial dispute resolution mechanisms which may be activated in cases of allegations of business involvement in human rights abuses.

[22] UN Guiding Principles on Business and Human Rights, Guiding Principle 10.
[23] See note 16 above.

There may be other non-judicial avenues for specifically raising complaints about the adverse human rights impacts of business enterprises (such as the system of National Contact Points under the OCED Guidelines on Multinational Enterprises).

- Such mechanisms, where they are effective, may have certain benefits in non-criminal cases, for example because they can offer speedier resolution, at lower cost, with lighter bureaucratic procedures.

- Cases referred to such mechanisms may have a cross-border element. Where this is the case, it may be necessary for that mechanism to have access to information, expertise and assistance in other States.

Policy Objective 6: Elements of good State practice

2.6.1. The State has (a) identified the domestic administrative mechanisms that could potentially be invoked in cross-border cases concerning business involvement in human rights abuses (b) evaluated their effectiveness against the effectiveness criteria for non-judicial grievance mechanisms set out in the UN Guiding Principles for Business and Human Rights[24] and (c) taken the necessary steps to address any weaknesses or gaps in those mechanisms identified in the course of that evaluation.

2.6.2. The State proactively encourages and facilitates participation by the domestic administrative mechanisms referred to in 2.6.1 above in sub-regional, regional and international networks with a view to with a view to achieving better communication and coordination between its domestic administrative mechanisms and their counterparts in other States with respect to cross-border issues and challenges, both in specific cases and more widely.

[24] See UN Guiding Principles on Business and Human Rights, Guiding Principle 31.

3. Project Component 3: Overcoming financial obstacles to legal claims[25]

The aim of this component of the ARP was to survey State practices and various 'packages' of measures that can be used to assist financially disadvantaged claimants in bringing claims relating to business-related human rights abuse.

The information collected in the course of the Accountability and Remedy Project confirms that people who are adversely affected by business-related human rights abuses continue to face serious, and sometimes insurmountable, financial barriers to remedy. On the other hand, the problems identified by respondents are not necessarily confined to business and human rights cases. Instead, they are frequently the consequences of wider problems, such as lack of available public funding for legal aid programmes, lack of resources for courts, and inefficiencies in judicial processes, including because of the operation of procedural rules.

Research carried out in the course of the Accountability and Remedy Project highlighted a number of key trends that have implications for the financial obstacles and risks faced by litigants. These include the contraction in the availability of legal aid in many jurisdictions, but also a growing use of collective redress mechanisms and a growing flexibility in many jurisdictions around financial agreements between claimants and their lawyers, designed to enhance claimants' ability to fund a legitimate claim even in the face of constrictions in state-based aid.

Based on the findings from OHCHR's research, this section sets out draft "good practice guidance" for States with a view to reducing financial obstacles to remedy in cases of business-related human rights abuses.

Project Component 3: Elements of good State practice

3.1. State funding is available for private claimants in business and human rights-related cases who are able to show financial hardship, and such funding is available on transparent and non-discriminatory terms.

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

3.3. Rules of civil procedure provide for the possibility of collective redress mechanisms, the criteria for which are clearly expressed and consistently applied.

3.4. 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.

3.5. Court fees (including 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.

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

3.7. Systems exist for the identification of, and transparency and judicial accountability in respect of, court delays.

[25] For additional background and context to this project component, see the Background Paper.

3.8. The domestic legal system permits the possibility of litigation funding by private third parties including third party litigation funders, firms of solicitors (e.g. pursuant to contingency fee and "success fee" arrangements), and providers of litigation insurance.

3.9. Providers of third party litigation funding, e.g. third party litigation funders, firms of solicitors (e.g. pursuant to contingency fee and "success fee" arrangements), and providers of litigation insurance, are subject to appropriate regulation to ensure proper standards of service, and to guard against abuses and conflicts of interest.

3.10. Rules on the allocation of court and legal costs (including attorney's fees) 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 is possible, the swift conclusion of legal claims.

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

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

3.13. Potential claimants have access to readily available, well-publicised and reliable sources of help and advice on their options with respect to litigation funding and resourcing, in their own languages.

4. Project Component 4: Criminal and administrative sanctions[26]

This component of the ARP aimed to survey current and emerging State practice in relation to criminal sanctioning of corporations for business-related human rights abuses, with a particular focus on severe human rights abuses.

Effective enforcement of criminal laws is a vital aspect of meeting the State's 'duty to protect' (see Guiding Principle 3). Access to remedy includes the ability to ensure the appropriate application of criminal or quasi-criminal sanctions where there has been a breach of legal standards. Criminal law regimes should provide effective deterrence against business related human rights abuses, and especially against involvement in severe abuses. However, in practice the imposition of individual criminal sanctions in such cases is extremely rare, and the imposition of corporate criminal sanctions rarer still.

There are many differences between jurisdictions (and also between different regulatory regimes within jurisdictions) regarding how financial penalties are set (e.g. in terms of the extent to which judges have discretion in the setting of the amounts payable as fines, the factors that must be taken into account, and the prioritisation of those factors). Financial penalties for quasi-criminal (or "regulatory") offences are frequently subject to a maximum statutory amount. In many cases it is questionable whether these amounts would, on their own, be sufficiently dissuasive to act as a credible deterrent.

While financial penalties are the most common form of criminal and quasi-criminal sanctioning of corporations, alternatives to financial penalties are increasingly being explored in many jurisdictions and in many legal contexts. These alternatives include remedial orders, forfeiture of assets, disqualification from public procurement opportunities, disqualification from state support, cancellation of business licences to operate, adverse publicity and, in extreme cases, dissolution. Some domestic legal regimes provide for the possibility of financial compensation for victims of corporate wrongdoing. There is also increasing recognition of the importance of future prevention measures (e.g. through remedial orders, or "corporate probation") as part of an effective sanctions regime.

Criminal and quasi-criminal sanctions can and should reflect the objectives of the domestic legal regime for which they are established. However, in many domestic regimes that regulate business respect for human rights, insufficient attention is given to the goals of compensation and prevention in designing criminal and quasi-criminal sanctions, leading to a general over reliance on financial penalties and a lack of attention to potentially useful alternatives.

Based on OHCHR's findings, this section sets out draft "'good practice" guidance for States in developing criminal and quasi-criminal sanctions for cases concerning business involvement in human rights abuses, taking into account innovations from other areas of criminal law.[27]

[26] For additional background and context to this project component, see the Background Paper.
[27] Note also that the guidance in this section is closely linked to the guidance in section 6 'Domestic Prosecution Bodies'.

Project Component 4: Elements of good State practice

4.1. Criminal and/or quasi-criminal sanctions are sufficiently dissuasive to be a credible deterrent from engaging in the prohibited behaviour.

4.2. Criminal and/or quasi criminal sanctions reflect the degree of culpability of the corporate defendant.

4.3. Within each domestic law jurisdiction, and across different regulatory regimes, criminal and/or quasi-criminal sanctions (including the quantum of fines) reflect a logical and consistent approach, taking into account the relevant regulatory objectives.

4.4. Where possible and appropriate, criminal and/or quasi-criminal sanctions provide opportunities for the financial compensation of victims and other restorative remedies.

4.5. Financial penalties are applied, in part, towards future investigation and enforcement efforts.[28]

4.6. Where possible and appropriate, criminal and/or quasi-criminal sanctions include elements designed to ensure future compliance and/or prevention of future harm.

4.7. Members of the judiciary have access to appropriate guidance as to sentencing of corporate defendants in business and human rights-related cases, which clearly states the factors that are to be taken into account in sentencing, and the prioritisation of those factors, and which is applied consistently and transparently.

4.8. Victims are properly consulted in respect of (a) the design and implementation of corporate criminal and quasi-criminal sanctions, (b) any decision to enter into a delayed prosecution agreement (and the terms of any such agreement) and (c), in the case of a settlement, the settlement terms.

4.9. Where appropriate and relevant, genuine attempts by corporate defendants to identify, prevent and mitigate the adverse human rights impacts of business activities will be taken into account in the determination of criminal law sanctions.

4.10. The domestic legal system does not permit the tax deductibility of amounts paid as financial penalties in criminal or quasi-criminal cases involving allegations of business involvement in human rights abuses.

[28] See also guidance in Section 6 relating to the resourcing of prosecutors and law enforcement activities.

5. Project Component 5: Civil law remedies[29]

This project component aimed to survey current and emerging State practice in relation to civil law (private/tort law) damages in cases of business-related human rights abuses, with a particular focus on severe abuses, and to explore the role of domestic judicial mechanisms in relation to supervision and implementation of settlements and awards.

Private law causes of action provide a mechanism by which victims of business-related human rights abuses can seek a remedy directly from the business enterprise that is determined to be legally responsible the harm. However, cases alleging business involvement in severe human rights abuses rarely proceed to judgment. In most cases they are dismissed at procedural stages, although a number have settled out of court. Whether there is a settlement, or a judicial determination of liability, the remedies obtained by claimants rarely (if ever) meet the international standard of "adequate, effective and prompt reparation for harm suffered".[30]

Extreme differences between jurisdictions in the kinds and amounts of civil remedies that can be awarded further contribute to inequalities between different groups of affected individuals and communities in terms of the levels of legal protection they enjoy. This situation also has serious implications for funding of legal claims and, in turn, access to judicial processes. In addition, problems have been identified with respect to a lack of consultation with affected individuals in some cases as to the types of remedies needed, resulting in inappropriate or ineffective compensatory arrangements. Moreover, there is a lack of clarity in many jurisdictions as to the appropriate standards that apply in the distribution of damages arising from group claims (e.g. large class actions) with the result that, in practice, affected individuals who may be legally entitled to compensation may not receive adequate (or any) compensation.

This section sets out draft "good practice" guidance for States in relation to civil remedies.

Project Component 5: Elements of good State practice

5.1. The domestic legal system applies the principle that, consequent upon a finding of corporate legal liability under private law, there should be adequate, effective and prompt reparation for harm suffered.

5.2. The methodology for assessing the quantum of financial damages (i.e. compensatory damages and, to the extent applicable, punitive damages) is clearly expressed, and consistently and transparently applied.

5.3. The domestic legal system provides for alternative remedies to compensatory damages, such as injunctions (e.g. where there is a risk of irremediable damage) or restitution.

5.4. Victims are properly consulted in respect of (a) the design and implementation of corporate private law remedies and (b), in the case of a settlement, the settlement terms.

5.5. The domestic legal system ensures, through appropriate regulation, guidance or professional standards, that compensatory damages are distributed among members of affected groups of claimants in a fair, transparent, and non-discriminatory way.

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[29] For additional background and context to this project component, see the Background Paper.
[30] See the UN 2005 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, Articles I.2(b) and VII.

6. Project Component 6: Domestic prosecution bodies[31]

The aims of this component of the Accountability and Remedy Project were to investigate the reasons behind the apparently very low levels of activity of domestic criminal law enforcement bodies in relation to cases of alleged business involvement in severe human rights abuses and to identify the specific challenges faced by domestic law prosecutors in such cases.

Effective enforcement of criminal laws is a vital aspect of meeting the State's Duty to Protect. As is stated in the Commentary to Guiding Principle 3, "the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice […] Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation".

At present, complaints to domestic law enforcement bodies about business involvement in severe human rights abuses are unlikely to result in a formal criminal investigation or prosecution. Research carried out by OHCHR, and through collaboration with Amnesty International and the International Corporate Accountability Roundtable,[32] has confirmed that levels of activity by domestic law prosecutors in this area remain very low. While performance varies from jurisdiction to jurisdiction and from regulatory area to regulatory area (with generally higher levels of activity reported in relation to more codified areas of law such as labour and environmental law), domestic law enforcement bodies and practitioners report a range of challenges that inhibit their ability to respond to business and human rights cases.

Key challenges include lack of resources, lack of the necessary specialist knowledge and expertise, lack of suitable training, difficulties gathering evidence in relation to the operation of complex corporate and managerial structures, concerns about intimidation of witnesses and fear of reprisals, lack of political or managerial support and legal complexity (which can add to the financial and other risks of investigations). Challenges are particularly acute in relation to cross-border cases.[33]

This section sets out draft "elements of good State practice" to enhance the effectiveness of domestic prosecution bodies in holding companies to account for involvement in human rights abuses that amount to criminal or quasi-criminal offences.

Project Component 6: Elements of good State practice

6.1. The State publicly acknowledges and supports the vital role of domestic prosecution bodies in meeting the State Duty to Protect against business-related human rights abuses.

6.2. The State has taken steps to ensure close communication and proper and effective coordination between domestic prosecution bodies and other government departments, agencies and other State-based institutions that shape the business practices of businesses domiciled in the territory of that State.

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[31] For additional background and context to this project component, see the Background Paper.
[32] ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ICAR_AI_JointStatement.pdf
[33] The challenges to investigating and prosecuting cross-border cases concerning allegations of business involvement in human rights abuses are explored more fully in Section 2 above.

6.3. The use of prosecutorial discretion, as to whether to investigate and/or prosecute allegations of business involvement in human rights abuses (to the extent such discretion is provided for in the relevant State) is exercised in accordance with a comprehensive prosecution policy which (a) clearly sets out how decisions about whether to investigate or prosecute a complaint will be made and the factors that will be taken into account (b) has been developed following proper consultation with stakeholders and (c) is made available to the public.

6.4. Decisions by domestic prosecution bodies not to investigate or prosecute allegations of business involvement in human rights abuses that would, if proved, amount to a criminal offence under domestic law, are subject to formal challenge through a fair and transparent process.

6.5. Domestic prosecution bodies take proactive steps to ensure that, in a case where a request to investigate or prosecute allegations of business involvement in human rights abuses has been declined, the complainants in the relevant case and their legal representatives are aware (a) of their rights formally to challenge such a decision, and (b) of the procedures that will apply in the event that the complainants and/or their legal representatives choose to exercise their rights of challenge.

6.6. Domestic prosecutors have access to adequate resources with which to investigate and prosecute allegations of business involvement in human rights abuses that, if proved, would amount to a criminal or quasi-criminal offence under domestic law.

6.7. The State has established specialist units (either within domestic prosecution bodies or pursuant to specific legal regimes) with specific responsibility for the detection, investigation and prosecution of cases of business involvement in severe human rights abuses.

6.8. The State ensures that the specialist units referred to in 6.7 above have ready access to specialist expertise relating to the detection, investigation and prosecution of cases of business involvement in severe human rights abuses.

6.9. The State ensures adequate training for domestic prosecutors in respect of the legal and technical aspects of investigating allegations of breaches of domestic criminal (and/or quasi-criminal) law by business enterprises, including allegations of business involvement in severe human rights abuses.

6.10. Domestic prosecutors are aware of the systems that are in place to enable them readily and rapidly to obtain assistance from counterparts in other States in respect of the investigation and/or prosecution of allegations of business involvement in human rights abuses where the case appears to have a cross-border element (e.g. because of the location of relevant alleged facts or acts, or because of the location of witnesses or evidence).[34]

6.11. The State takes the steps necessary to ensure that domestic prosecution bodies have good working relationships and effective communication links and are able to coordinate their activities properly and effectively with other domestic agencies having responsibility for the promotion and protection of human rights, such as National Human Rights Institutions, domestic agencies responsible for the enforcement of labour, consumer and environmental standards, agencies responsible for the enforcement of

[34] See further Section 2, Policy Objective 3 above.

laws relating to bribery and corruption and agencies responsible for the investigation of other criminal complaints (e.g. police).[35]

6.12. Systems are in place to ensure that domestic prosecutors take appropriate steps to ensure the protection of whistle-blowers and potential witnesses from the risk of intimidation and reprisals, and compliance with those procedures is properly monitored and evaluated.

6.13. Systems are in place to ensure that domestic prosecutors have awareness of, and take proper account of, issues of gender, vulnerability and/or marginalization in their dealings with complainants and their representatives and actual and prospective witnesses, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families, and compliance with those procedures is properly monitored.

6.14. Domestic prosecution bodies have the ability to commence an investigation and/or prosecution of cases concerning allegations of business involvement in human rights abuses on their own initiative, without the need for a formal complaint by or on behalf of an affected person.

6.15. The State ensures that (a) policies and procedures that set performance targets for domestic prosecution bodies (b) and financial and other performance incentives for personnel are consistent with policies relating to the correct use of prosecutorial discretion in cases of allegations of business involvement in human rights abuses (including in cross-border cases).[36]

6.16. Domestic prosecution bodies support and encourage involvement of personnel in international, inter-governmental, regional, multilateral and bilateral initiatives aimed at facilitating contact, networking and exchange of know-how between prosecutors and their counterparts in other States.[37]

6.17. Domestic prosecutors 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.

[35] See further Section 2, Policy Objective 3 above.
[36] Ibid.
[37] Ibid.