The Office of the United Nations High Commissioner for Human Rights

'The Accountability and Remedy Project'

DISCUSSION PAPER FOR CONSULTATION 19-20 NOVEMBER 2015

This paper has been prepared for discussion at the Accountability and Remedy Project multistakeholder consultation in Geneva on 19-20 November 2015. The paper contains an early version of draft recommendations and guidance relating to several components of OHCHR's Accountability and Remedy Project ('ARP'), for which OHCHR has carried out research through a common, global process. The paper seeks to provide a basis for discussion and for gathering stakeholder views and feedback. Feedback from stakeholders will be collected at the 19-20 November consultation and through a public call for comments. Based on the feedback collected, ongoing research, and consultations with key experts, a revised version of the draft guidance will be published for further consultation and comments in early January 2016.

The ARP is conducted pursuant to a mandate from the United Nations Human Rights Council (resolution 26/22), and the final version of the draft guidance presented here will form part of a larger report by OHCHR to the Council. The final report will be considered by the Human Rights Council in June 2016. The ARP consists of six distinct, but interrelated project components. This document provides an early draft for possible recommendations and guidance in relation to four of the six project components. The final report will include recommendations and guidance in relation to the six project components, as well as further elaboration on the linkages between the findings of the various components and the overall context and aims of the ARP.

Contents

Background

In November 2014, the Office of the High Commissioner for Human Rights launched an initiative to make domestic legal responses fairer and more effective for victims of business-related human rights abuses, particularly in the most severe cases. The initiative, called the "Accountability and Remedy Project" ('ARP'), aims to deliver credible and concrete recommendations and guidance to States to enable more effective implementation of the 'Access to Remedy pillar' of the UN Guiding Principles on Business and Human Rights.

The ARP comprises six distinct, yet interrelated project components, corresponding to strategic issues identified in research as requiring further clarification and guidance. 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 within a relatively short time frame. The six components are:

1. Domestic law tests for corporate legal liability
2. Roles and responsibilities of interested States in cross-border cases
3. Overcoming financial obstacles to legal claims
4. Good practices in criminal law sanctions
5. Good practices in civil law remedies
6. Strengthening the work of domestic prosecution bodies

For project components 1, 3, 4 and 5, OHCHR has carried out research through two complementary research processes: the Open Process' and the 'Detailed Comparative Process' (ongoing). Between 1 May and 1 August 2015, OHCHR sought multistakeholder inputs through the 'Open Process', a global online consultation where respondents were invited to provide information on how domestic law systems function in practice in cases of allegations of business involvement in severe human rights abuses. Respondents were invited to answer a series of questions relating to tests for corporate legal liability applied in criminal, quasi-criminal and civil/private law regimes (project component 1), the financial risks of civil litigation and ways to help overcome these (project component 3), current practices with respect to criminal law sanctions (project component 4) and civil law remedies (project component 5). The Detailed Comparative Process has sought more in-depth, comparative information from 20+ focus jurisdictions from UN different regions, a diversity of legal traditions and different levels of economic development. This process is ongoing.

This document presents the draft findings and recommendations in relation to project components 1, 3, 4 and 5. For the other two project components, OHCHR is carrying out research through separate processes, and the findings from these work streams will be presented separately.

In developing its methodology for the ARP, OHCHR recognises that business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights (see Guiding Principle 12, Commentary). However, the ARP focuses on severe human rights abuses for several reasons. First, in view of the tight timetable for research and reporting under Human Rights Council resolution 26/22, it makes sense to prioritise for study and action those abuses which are most egregious in nature and which carry the severest consequences for victims. Second, severe human rights abuses often take place in a context that makes obstacles in access to remedy and accountability particularly challenging and therefore warrant particular attention. Third, for severe

human rights abuses there are, in many jurisdictions, domestic criminal regimes and institutions that are sufficiently well developed and well defined to enable meaningful comparative analysis and meaningful conclusions to be drawn about the effectiveness of different approaches and strategies. On the other hand, while the liability of individual offenders may have been clarified in many domestic legal regimes, the liability of corporate entities is still uncertain in many cases, making the clarification of corporate liability for severe human rights abuses a logical next step in terms of legal development.

As an aid to stakeholders and respondents, and to ensure comparability of empirical data, questions posed under the Open Process and the Detailed Comparative Process were structured by reference to a list of well-established categories of severe human rights abuses (including criminal offences which may be components of these categories). A list of the categories of offences, abuses and harms for which information was collected for the purposes of the Accountability and Remedy Project appears in Box 1 below.

Box 1: Categories of offences, abuses and harms for which data was collected under the Open Process and the Detailed Comparative Process.

- murder;
- serious physical assault;
- torture and other forms of cruel, inhuman or degrading treatment;
- war crimes;
- crimes against humanity;
- genocide;
- summary or arbitrary executions;
- enforced disappearances;
- arbitrary and prolonged detention;
- slavery;
- slavery like practices, including forced labour and human trafficking;
- worst forms of child labour;
- grave and systematic abuses of labour rights;
- serious violations of workplace health and safety standards resulting in widespread loss of life or serious injury;
- large scale environmental pollution or damage;
- other (a) grave or (b) large scale abuses of economic, social or cultural rights.

Domestic law tests for corporate legal liability
(ARP project component 1)

This project component had the following aims:

(a) 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; and

(b) develop "good practice" guidance for States in relation to the factors to take into account in the judicial determination of corporate liability in such cases.

Problems arising from a lack of clear and consistent tests for corporate liability in domestic law

The UN Guiding Principles on Business and Human Rights state that "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy." (Guiding Principle 26). **Of the many legal barriers to remedy faced by victims of business-related human rights abuses, the lack of clear and coherent tests for corporate liability in many, if not most, jurisdictions is one of the most serious and fundamental**.

Lack of clarity in legal tests, and the resultant lack of predictability as to how they may be applied in specific cases, **seriously undermines the usefulness and effectiveness of domestic legal regimes, both as a form of deterrence and as a means of obtaining redress for victims in cases of business-related human rights abuses**. This lack of clarity and consistency in many jurisdictions means that for relevant stakeholders (for instance, victims, victims' legal representatives, prosecutors, regulators and companies), there is **no clear basis for decision-making** about appropriate legal action and responses. Lack of clarity and coherence also has the potential to greatly **complicate and draw out legal proceedings**, which adds to the **costs** and **financial risks** of litigation and prosecutions and leads to **further inefficiencies** in the use of publicly funded judicial resources (see discussion of project component 3, below). Finally, lack of clarity and coherence in domestic tests for corporate liability in business-related human rights cases **undermines the legal certainty needed for sound investments by companies, efficient corporate management, and sustainable economic growth**.

Empirical research carried out by OHCHR in the course of the Accountability and Remedy Project confirms that there is **considerable diversity** in the way different domestic legal systems presently approach questions of corporate legal liability in cases of alleged business involvement in severe human rights abuses. Moreover, within individual jurisdictions there is frequently further diversity in the way that tests for corporate legal liability are constructed, depending on the nature of the human rights affected and the business activities involved.

At the same time, it is possible to identify **common themes** in domestic law tests for corporate liability. These domestic law tests are underpinned by policy ideas and

principles that **transcend different legal systems, structures, cultures and stages of economic development**.

As the UN Guiding Principles on Business and Human Rights make clear, developing and maintaining robust regulatory regimes is a key aspect of the State Duty to Protect. Guiding Principle 3 states that "[i]n meeting their duty to protect, States should … periodically … assess the adequacy of such laws and address any gaps". The Commentary to this Principle further stresses the need for States to review "whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights", adding that "greater clarity in some areas of law and policy … is often necessary to protect both rights- holders and business enterprises".

About this draft guidance: towards a set of policy aims and good practice indicators

This document provides guidance as to the practical steps that States can take strengthen and improve domestic law approaches to corporate legal liability for business-related human rights abuses, with a particular focus on severe human rights abuses. The guidance in this section has been arranged by reference to **five broad policy statements**. These policy statements reflect aims which have informed legislative and judicial responses in many, if not most, jurisdictions. State practice examined as part of OHCHR's empirical work suggests that **support for these policy aims is widespread** and not limited to particular legal structures and traditions.

On the other hand, there are presently significant variations in terms of **effectiveness of implementation of these policy aims at domestic level**. To demonstrate how states can implement these policy aims more effectively in practice, this guidance provides, under each *policy statement* a series of **"good practice indicators,"** which can be used by States to evaluate the effectiveness and coherence of their own domestic law tests for corporate legal liability in respect of the relevant policy goal, and to track their progress towards greater effectiveness. These indicators are supplemented by **further explanation and observations** regarding the advantages and disadvantages of different State approaches from an access to justice point of view, and, where possible, **illustrative examples** of State practice gathered in the course of OHCHR's Accountability and Remedy Project.

There is **scope for improvement in virtually every domestic law jurisdiction** in terms of the effectiveness of present domestic law tests for corporate liability in cases of business-related human rights abuses. Every domestic law jurisdiction could benefit from a **formal legal review** to determine the nature and extent of reforms required, in light of that jurisdiction's particular legal structures, traditions, challenges and needs. **Annex I,** therefore, contains an example of a model terms of reference for a formal legal review process which could be tailored, as appropriate, (a) to different jurisdictions and (b) according to the outcomes of any initial review conducted using the good practice indicators suggested below.

Domestic law tests for corporate liability: Policy Statements

[A note on structure: For conciseness and ease of reference, it is likely that some of the explanatory notes below may eventually be moved to a general section of the final report.]

Policy Statement 1. There should be corporate legal liability for corporate acts that result in severe human rights abuses

Explanatory notes:

i. For the purposes of this guidance, a "corporation" is defined 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. 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. 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 imposed according to the laws of the domestic legal system [*Note: For more information on the criminal and quasi-criminal sanctions that may be imposed on corporations under domestic law (as opposed to the sanctions that may be imposed on individual officers or employees), see the discussion on project component 4, below. For more information on the private law remedies that may be prescribed and applied to corporations under domestic law see the discussion on project component 5, below.*].

ii. All jurisdictions recognise the possibility of corporate legal liability for wrongful corporate acts, although there are differences from jurisdiction to jurisdiction in the type of legal liability that a corporation can attract. In some jurisdictions this may be criminal liability, quasi-criminal liability and liability under private law (or "civil liability"). However, in some jurisdictions this liability may be administrative (or "quasi-criminal") and civil only, because criminal liability is only applicable to natural persons. In jurisdictions that do not permit criminal liability for corporations (i.e. 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* cannot be convicted under criminal law. Jurisdictions that do not recognise the possibility of corporate criminal liability may still allow the possibility of corporate liability for quasi-criminal offences.

iii. There are differences between jurisdictions in the issues which must be proved to establish corporate legal liability in a given case.

iv. There are differences between jurisdictions in the extent to which corporate legal liability must depend on a prior finding of wrongdoing by individual managers or officers.

v. For the purposes of this guidance, a distinction is drawn between (a) domestic regimes that are criminal or quasi-criminal in nature and which depend for their enforcement on public law enforcement authorities and regulatory bodies

("criminal" and "quasi-criminal" regimes) and (b) domestic regimes which are enforced by way of private legal action, usually by those claiming to have been affected by alleged corporate wrongdoing ("private law" regimes).

Good practice indicators:

Good Practice Indicator 1.1*: The domestic legal regime is structured such that there is the possibility of corporate criminal or quasi-criminal legal liability (as well as individual legal liability) in respect of each of the categories listed in Box 1 above.*

Further explanation and observations (GPI 1.1): In most jurisdictions, most of the categories listed above will already attract the possibility of criminal liability. In many jurisdictions, this criminal liability may be extended to corporations as well as individuals, either by the application of general legal principles or by specific provisions expressly extending criminal liability to corporations. The concept of corporate criminal liability is not recognised in all jurisdictions, although some jurisdictions which have not traditionally recognised the concept of corporate legal liability have recently made or considered changes to domestic legal regimes to allow for the possibility of corporate criminal liability, at least for specified offences. In some jurisdictions, even where there is the legal possibility of corporate criminal liability, there remains a strong cultural preference for individual liability.

However, regardless of the type of liability imposed, there is a lack of coherence in many domestic legal regimes in the extent to which severe business-related human rights abuses may be subject to criminal or quasi-criminal enforcement. In some jurisdictions, criminal law or quasi-criminal law enforcement against corporations in relation to some or most of these categories is not possible either because corporate criminal or quasi-criminal liability has not been provided for, or, in some cases, because of a lack of clarity about legislative intent. To rectify this, existing criminal or quasi-criminal laws should be extended and, if necessary, reformed, to ensure (a) the possibility of criminal or quasi-criminal liability in respect of each of the above categories, and (b) to the maximum extent permissible under prevailing constitutional rules and structures, that criminal or quasi-criminal liability is extended to companies and well as individuals.

Good Practice Indicator 1.2: *The domestic legal regime is structured to provide for corporate liability under private law in respect of each of the categories listed in Box 1 above (p.4).*

Further explanation and observations (GPI 1.2): In most jurisdictions, corporate involvement in wrongdoing of the types listed above will give rise to the possibility of corporate liability for damages and other civil law remedies under domestic private law. [*Note: for further information on civil law damages and other remedies, see the discussion on project component 5*]. However, the corporate acts and omissions that give rise to the possibility of corporate liability under domestic private law regimes frequently do not correspond exactly to the categories listed in Box 1. A review of the scope of the domestic private law regime, and the extent to which it responds to each of the categories listed in Box 1 above, would help to identify any gaps and areas that require legal clarification. See further Model Terms of Reference for a Formal Legal Review, Annex 1, below.

Good Practice Indicator 1.3: *Tests for corporate legal liability are clearly expressed.*

Further explanation and observations (GPI 1.3): In some jurisdictions, the extent of application of criminal (or quasi-criminal) regimes to corporate entities (as opposed to individuals) is left to judicial interpretation (for instance, by inference from the kinds of sanctions provided for). This is unlikely to provide the requisite degree of predictability, transparency and legal certainty for relevant stakeholders (e.g. victims, victims' representatives, prosecutors, regulators, and companies).

Good Practice Indicator 1.4: *Tests for corporate legal liability are relevant to different types, sizes and structures of business enterprises and take account of developments in corporate management practices*

Further explanation and observations (GPI 1.4): Because companies are a legal construction, the application of traditional tests for fault, which have been designed for individuals, can be problematic. This is a particular problem in relation to criminal offences and private law sources of liability that require proof that the corporation intended the harm or intended to commit the acts that caused the harm. In many jurisdictions, it is only possible to prove that a corporation intended the harm (or the acts that caused the harm) if it is possible to identify individuals (e.g. senior managers) working on behalf of the company who themselves intended the relevant harm (or the acts that caused the harm). In these circumstances, the intentions of these individuals can be attributed to the company to supply the necessary element of corporate criminal "intent". This is referred to as the "identification" approach to corporate criminal liability. However, the "identification" approach has been criticised for its limitations in respect of systemic problems, such as poor management and supervision. Because of these limitations, this test of liability tends to be more readily applied to smaller enterprises than larger ones with more complex management structures, resulting in a greater likelihood of conviction of the former.

Illustrative example A (GPI 1.4): In some jurisdictions, and for some offences, legislatures have adopted alternative tests for liability that focus on the quality of a company's management, rather than the actions and intentions of specific individuals. For instance, evidence of negligent management or poor "corporate culture" may be used to supply the required element of "corporate fault" to satisfy legal tests designed to establish whether a criminal offence has been committed and whether a corporate entity is guilty of that offence.

Illustrative example B (GPI 1.4): In some jurisdictions, and for some offences, instead of examining the knowledge and motivations of a specific individual (usually a senior manager) for the purposes of determining corporate "fault", it is possible to aggregate the knowledge and intentions and actions of a group of individuals (e.g. senior managers or certain employees) to determine whether a criminal offence has been committed and whether a corporate entity is guilty of that offence. This approach is referred to as "collective fault" approach (as opposed to an "individual fault", or "identification" approach).

Illustrative example C (GPI 1.4): Some domestic legal regimes have permitted the mental and physical elements of criminal or quasi-criminal offences to be identified as corporate acts and intentions on the basis of inference from the surrounding circumstances. This has the effect of shifting the burden of proof to the corporation to show why the relevant acts and intentions should not be "identified" with the corporation, but should instead be regarded as the acts and intentions of individuals.

Good Practice Indicator 1.5*: Corporate criminal or quasi-criminal legal liability does not depend on a prior successful conviction of an individual offender.*

Further explanation and observations (GPI 1.5): In many jurisdictions, the prosecution of a corporate entity under criminal or quasi-criminal law can take place independently of any prosecution of any individual offenders. However, in some jurisdictions, corporate legal liability (especially under criminal law regimes) is dependant upon a prior finding of liability on the part of individual offenders working on behalf of the company. Because of the potential barriers to accessing remedy that this may entail in cases of business involvement in severe human rights abuses (for instance, in cases where the relevant individuals cannot be identified or have absconded), the legal and policy justifications for this restriction on corporate criminal and quasi-criminal liability require careful examination and consideration.

Good Practice Indicator 1.6*: Victims of business-related human rights abuses are not precluded from pursuing a claim for remedies under private law regimes by virtue of the fact that there is an open or pending criminal investigation, or because there has been a finding that a company is not guilty of a criminal (or quasi-criminal) charge.*

Further explanation and observations (GPI 1.6): Criminal and civil law processes have different aims; criminal systems being concerned primarily with deterrence and punishment of anti-social behaviour, whereas civil law processes are concerned fundamentally with obtaining compensation and redress for individual victims. Moreover, a successful criminal conviction will typically demand a higher standard of proof than that required for the purposes of a civil law claim. For these reasons, criminal and private law legal processes are treated in most jurisdictions as legally distinct, with the consequence that an individual is not prevented from pursuing a private law action against a company for damages (or other private law remedies) because of an open criminal investigation or because of a "not guilty" verdict in criminal proceedings. In some jurisdictions (and particularly in civil law jurisdictions) it is possible for victims to join as a party to criminal proceedings, which gives rise to a potential claim for compensation in the event of a successful criminal conviction. However, this should be in addition to, rather than in replacement of, separate private law causes of action.

Policy Statement 2. There should be corporate legal liability for corporate complicity in severe human rights abuses carried out by a third party

Explanatory notes:

i. "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.

ii. The UN Guiding Principles on Business and Human Rights 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" (Guiding Principle 17, Commentary).

iii. In practice, however, there are differences between jurisdictions in terms of (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".

Good practice indicators:

Good Practice Indicator 2.1*: The domestic legal regime provides for corporate criminal or quasi-criminal 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) in respect of each of the categories listed in Box 1 above (p.4).*

Further explanation and observations (GPI 2.1): In many jurisdictions, general provisions on, or theories of, secondary criminal (or quasi-criminal) liability create the possibility of secondary legal liability for companies for at least some of the categories listed in Box 1. However, in some jurisdictions (especially those jurisdictions where secondary liability is separately codified in relation to specific offences), there may be gaps and inconsistencies in domestic legal approaches to the question of secondary corporate criminal (or quasi-criminal) liability. In some jurisdictions, the extent to which and the different ways in which a company (as opposed to an individual) may be complicit in the categories listed in Box 1 above does not appear to have received sufficient legal analysis or response. A review and comparison of current legal approaches to secondary corporate liability in relation to each of the categories listed in Box 1 would help to identify such gaps and inconsistencies. See further Model Terms of Reference for Formal Legal Review, Annex I, below.

Good Practice Indicator 2.2: *The domestic legal regime is structured such that there is the possibility of corporate legal liability under private law on the basis of theories of "secondary" or "complicity" liability (i.e. causing or contributing to the human rights abuses of another person or organisation) in respect of each of the categories listed in Box 1 above (p.4).*

Further explanation and observations (GPI 2.2): In many jurisdictions, provided there is a recognised legal basis for a private law claim against the principal perpetrator of severe human rights abuses, there will also be the possibility of a claim based on theories of secondary liability against a company that has caused or has contributed to the severe abuse (provided the requisite elements of the applicable legal tests for secondary liability are satisfied, see further GPI 2.3 below). However, in some jurisdictions there may be gaps and inconsistencies in domestic legal approaches to the question of secondary corporate criminal (or quasi-criminal) liability. A review and comparison of current legal approaches to secondary corporate liability in relation to each of the categories listed in Box 1 would help to identify such gaps and inconsistencies. See further Model Terms of Reference for Formal Legal Review, Annex I, below.

Good Practice Indicator 2.3: *Tests for corporate legal liability on the basis of theories of "secondary" or "complicity" liability (i.e. causing or contributing to severe human rights abuses committed by another person or organisation) are clearly expressed.*

Further explanation and observations (GPI 2.3): Tests for corporate legal liability on the basis of theories of secondary or complicity liability may be laid down in a general criminal code, specific criminal statutes, civil codes and commercial codes. In some jurisdictions, a lack of clarity and predictability as to the applicable tests may be the result of inconsistent approaches between different regulatory instruments and areas of law. There is a lack of clarity in many jurisdictions, and particularly in common law systems, as to the circumstances in which companies may be liable under private law for business-related human rights abuses on the basis of theories of secondary or complicity liability.

Illustrative example A (GPI 2.3): *Secondary corporate liability for criminal (or quasi-criminal) offences:* The criminal code can set out a detailed general definition of the types of involvement that would give rise to secondary or complicity liability. Concepts that frequently appear in legal tests for corporate secondary or complicity liability include instigation of an offence, incitement or encouragement of an offence, aiding and abetting an offender, or providing assistance to an offender after an offence has been committed.

Illustrative example B (GPI 2.3): *Secondary corporate liability for wrongful acts under private law:* Civil and commercial codes can be used to clarify the types of involvement that would give rise to the possibility of corporate legal liability on the basis of theories of secondary or complicity liability. These could mirror the bases for liability provided under the domestic criminal law (see Illustrative example A, immediately above).

Illustrative example C (GPI 2.3): *Further clarification in the criminal or quasi-criminal law context:* Where there are uncertainties about how tests for secondary or complicity liability should be interpreted and applied in specific criminal (and quasi-criminal) cases, it may be

possible to provide the necessary clarification by way of additional guidance, e.g. guidance from central prosecution authorities to prosecutors, or statutory guidance to regulatory bodies.

Good Practice Indicator 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.*

Illustrative example (GPI 2.4): The domestic criminal code may provide that individuals and companies found to be accessories to (or to have aided or abetted) business-related human rights abuses will be treated in law in the same way as the principal offender (i.e. as having been guilty of the same principal offence) and, consequently, are potentially subject to the same or similar sanctions and penalties as the primary perpetrator.

Good Practice Indicator 2.5: *Tests for corporate legal liability on the basis of theories of "secondary" or "complicity" liability (i.e. causing or contributing to severe human rights abuses committed by another person or organisation) are relevant to the corporate context.*

Further explanation and observations (GPI 2.5): There is a lack of clarity in virtually every jurisdiction about the way that theories of secondary (or "complicity") liability operate to allocate legal liability among members of corporate groups, and specifically the inter-relationship between theories of secondary legal liability and the company law doctrine of "separate legal personality". There is also a lack of clarity concerning the operation of theories of secondary or complicity liability in cases concerning supply chains. The application of theories of secondary liability to cases involving corporate groups and supply chains requires further legal development and, to the extent possible within specific domestic regimes, further codification. In doing so, regard should also be had to the policy statements set out at Policy Statements 3, 4 and 5 below.

Good Practice Indicator 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.*

Further explanation and observations (GPI 2.6): In many jurisdictions a company may be held legally liable on the basis of theories of secondary or complicity liability regardless of whether there has been a finding of primary liability against a primary perpetrator. In other words, the prosecutions on the basis of primary liability and prosecutions on the basis of secondary liability are regarded as legally distinct. This is significant in cases where the primary perpetrator cannot be identified, or has absconded or is seeks to claim sovereign immunity. However, in some jurisdictions, corporate legal liability (especially under criminal law regimes) is indeed dependant upon a prior finding of liability on the part of the primary perpetrator. Because of the potential barriers to remedy that this may entail in cases of business involvement in severe human rights abuses, (for instance, in cases where the primary perpetrator cannot be identified, or has absconded, or makes claims of sovereign immunity) the legal and policy justifications for such restrictions on liability should be carefully examined and appropriate reforms proposed.

Policy Statement 3: Tests for corporate legal liability should reflect the need for, and are designed to encourage, good governance, sound management of subsidiaries and proper supervision of employees, officers and contractors.

Explanatory notes:

(i) The UN Guiding Principles on Business and Human Rights emphasise the importance of sound management to address actual and potential adverse human rights impacts (see, in particular, Guiding Principles 15-20). Moreover, Guiding Principle 13 states that the corporate responsibility to respect human rights requires that businesses not only avoid causing or contributing to adverse human rights through their own activities, but that they also "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".

Good practice indicators

Good Practice Indicator 3.1: *Tests for corporate legal liability under criminal and quasi-criminal regimes provide an appropriate level of encouragement to companies and their management to ensure good governance, management, and supervision so as to adequately address the risks of involvement in human rights abuses either through their own activities or as a result of their business relationships.*

Further explanation and observations (GPI 3.1): Domestic criminal law regimes utilise a range of techniques which to respond to the need to encourage good governance, management and supervision and which emphasise the responsibility of companies for acts done on their behalf by their employees and agents. In addition, theories of secondary liability provide a potential basis on which companies may be liable for the human rights abuses of third parties. These theories have potential relevance for the management of human rights related risks that can emerge from specific business relationships, including (a) supply chain relationships (b) relationships with contractors (c) relationships between members of a corporate group (such as parent and subsidiary), (d) relationships between joint venturers and (e) relationships with State entities and agencies, including State owned companies. However, in many jurisdictions these techniques are not sufficiently developed or detailed to provide an adequate and predictable response to these particular risks. For instance, the reluctance of many domestic criminal regimes to impose liability for omissions means that domestic law tests for corporate criminal (or quasi-criminal) liability often fail to send a clear message as to the extent to which companies must take positive steps to identify and deal with human rights related risks arising from business relationships.

Illustrative example A (GPI 3.1): *Poor governance, management or supervision as a source of primary liability under criminal (or quasi-criminal) regimes:* Many jurisdictions recognise the doctrine of vicarious liability (where a person is held legally liable for the acts of another person) of companies for the acts of their employees and agents in the course of their employment or agency. This doctrine creates incentives to supervise employees and agents to ensure that breaches of the law do not occur.

Illustrative example B (GPI 3.1): *Poor governance, management or supervision as a source of primary liability under criminal (or quasi-criminal) regimes:* Some jurisdictions have

developed tests for corporate criminal liability that focus directly on the quality of governance and management. In these jurisdictions, poor management or "corporate culture" can supply the necessary element of corporate "fault" to justify the imposition of corporate criminal liability. Alternatively, the criminal law regimes of some jurisdictions recognise the idea of "collective fault" under which the collective knowledge and actions of a group of people can be attributed to a company, even if there was no single individual with the requisite knowledge and intent to establish liability based on the "identification" theory.

Illustrative example C (GPI 3.1): *Poor governance, management or supervision as a source of secondary liability under criminal (or quasi-criminal) regime.* To establish liability as an accessory, it is necessary to establish that the accessory knew something of the crime to be committed, or at least the intentions of the primary perpetrator. However, in some jurisdictions, this knowledge may be imputed to the party accused of being an accessory under theories of "wilful blindness". This means that the accessory cannot avoid criminal liability for failing to make reasonable enquiries, and take appropriate steps, where the risks of a serious crime being committed should have been apparent.

Illustrative example D (GPI 3.1): Statutory duties of care can clarify the nature and extent of the management and supervisory responsibilities of companies and their management, including as regards suppliers and supply chains. Under such a regime, breach of such statutory duties of care would be a criminal (or quasi-criminal) offence. These management and supervisory responsibilities can be further clarified by way of official guidance.

Good Practice Indicator 3.2: *Tests for corporate legal liability under private law regimes provide an appropriate level of encouragement to companies and their management to ensure good governance, management, and supervision so as to adequately address the risks of involvement in human rights abuses either through their own activities or as a result of their business relationships.*

Illustrative examples A (GPI 3.2): *Poor governance, management or supervision as a source of primary liability under private law regimes:* Poor governance, management or supervision of business activities can be a basis for private law claims for damages for harm in many jurisdictions under theories of negligence. In addition, companies may be liable for the negligent acts of employees or agents under theories of vicarious liability. For causes of action that require proof of intent or recklessness, this may be supplied by attributing the acts and intentions of certain senior managers to the corporation, or, in some jurisdictions, by showing that there were flaws in management systems.

Illustrative examples B (GPI 3.2): *Poor governance, management or supervision as a source of secondary or "complicity" liability under private law regimes:* In most jurisdictions, to the extent that corporate legal liability can arise from negligent management or supervision of a subsidiary, a supplier, or a contractor or business partner, this is conceptualised as a source of primary rather than secondary liability (see example A immediately above). However, as with secondary criminal liability, positive encouragement or instigation to carry out human rights abuses could potentially give rise to secondary corporate liability under some domestic private law regimes. This has potential relevance to a number of different commercial contexts including (a) supply chain relationships (b) contractor and supplier relationships (c) relationships between members of a corporate group (such as parent and

subsidiary), (d) relationships between joint venturers and (e) relationships with State entities and agencies, including State owned companies.

Good Practice Indicator 3.3: *The policy goal of good governance, management, and supervision of subsidiaries, contractors, suppliers and other business relationships is supported by other regulatory regimes and initiatives (including quasi-criminal regimes).*

Illustrative example A (GPI 3.3): Companies may be required to submit compliance programmes to regulatory authorities showing how specific risks (for example serious environmental risks or risks to labour rights) are to be managed, and to report on progress in the implementation of such compliance and risk management plans.

Illustrative example B (GPI 3.3): Companies may be placed under specific statutory duties to assess risks with respect to the activities of subsidiaries or suppliers or other contractors, to adequately monitor and report on those risks. Alternatively, companies could be held legally responsible for the acts of subsidiaries, suppliers or contractors in certain circumstances, unless the company could show that those acts occurred despite the existence of proper managerial or supervisory procedures.

Policy Statement 4: Tests for corporate legal liability should reflect the higher levels of vigilance demanded 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.

Explanatory notes:

(i) Guiding Principle 14 of the UN Guiding Principles on Business and Human Rights notes 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."

(ii) 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.

Good practice indicators:

Good Practice Indicator 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.*

Illustrative examples (GPI 4.1): Where business activities pose particularly serious risks (for instance to the environment or to workplace health and safety) domestic legislatures may create special criminal or quasi-criminal offences to deal with breaches of standards which are strict or absolute in nature. To establish liability under a strict or absolute criminal (or quasi-criminal) offence, it is not necessary to show that the company intended the severe abuses; only that the severe abuses in fact occurred. Depending on the relevant legislative provisions, it may be possible for a company to raise a defence to specific charges by showing that it had in fact used due diligence (see further discussion under Policy Statement 5 below). 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.

Good Practice Indicator 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.*

Further explanation and observations (GPI 4.2): In most criminal, quasi-criminal and private law cases, prosecutors and private law claimants will have the initial onus of proof, with the burden of proof typically higher in criminal cases than in private law cases. This allocation of burden of proof, and the application of a particularly high bar in criminal cases, protects the rights of the defendant. However, in some cases, legislatures may decide that certain considerations of public policy (including considerations such as access to justice and the need for cost effective law enforcement) justify a departure from traditional allocations of burdens of proof. In such circumstances, the legislature may decide (usually only in the case of quasi-criminal offences) that regulation of business activities through standards enforced by strict or absolute liability offences offers a better balance between the business and community interests concerned.

Policy Statement 5: Tests for corporate legal liability should take account of genuine efforts by corporations to identify, prevent and mitigate adverse human rights impacts.

Explanatory notes:

(i) 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".

(ii) 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."

Good practice indicators:

Good Practice Indicator 5.1: *The fact that a company has carried out human rights due diligence to identify, prevent and mitigate human rights risks, and the quality of that human rights due diligence, will be relevant, where appropriate, to a finding of corporate legal liability.*

Illustrative examples (GPI 5.1): in many jurisdictions, the fact that a company has carried out human rights due diligence, and the quality of that human rights due diligence, would be relevant to the question of whether the company had exercised and discharged an appropriate standard of care for the purposes of private law tests for negligence. In addition, as discussed above, the exercise of human rights due diligence may provide a full or partial defence to offences of strict liability (see Illustrative examples, GPI 4.1, above).

Good Practice Indicator 5.2: *Regulatory authorities and law enforcement professionals 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.*

Further explanation and observations (GPI 5.2): Companies are increasingly subject to requirements under domestic legal regimes to report on human rights due diligence steps taken in respect of specific business relationships (such as supply chains) or in respect of specific issues (such as modern slavery, or conflict minerals). However, there is a need for greater clarity and coherence in many jurisdictions as regards (a) the technical requirements of human rights due diligence more generally and (b) the legal consequences of human rights due diligence in both the criminal and private law contexts. For instance, where the use of due diligence provides a potential defence to criminal or quasi-criminal offences, or to a claim of negligence under private law, judicial assessments of whether human rights due diligence was in fact effectively exercised should be done by reference to clear, accessible and authoritative standards.

Questions for discussion at ARP consultation (19-20 November 2015)

i. Do you agree with the five main policy statements that frame the project component 1 guidance? Are there any that you disagree with?

ii. Are there any other important policy aims that transcend differences in legal systems that we have missed?

iii. Do you agree with the good practice indicators? If not, why not? Are there any more that you would suggest for any of the policy statements, or any clarifications or adjustments that you would make?

iv. Do you have any suggestions for additional Illustrative Examples and helpful examples of State practice for inclusion in this draft guidance?

Overcoming financial obstacles to legal claims
(ARP project component 3)

This project component aimed to survey current 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 abuses, with a view to developing guidance on 'minimum steps' and 'good practice options' for States.

The research methodology used by OHCHR for the purposes of project component 3 has been informed by past and ongoing investigations into the costs of, and funding of, civil litigation at domestic level. Preparatory work included a review of the data and research findings of researchers from the University of Oxford during 2009, following a study of the costs and funding of civil litigation in more than 30 jurisdictions around the world. Supplementary empirical data on litigation costs and funding was collected via the two information-gathering processes devised specifically for OHCHR's Accountability and Remedy Project; the Open Process and the Detailed Comparative Process.

Key preliminary findings

The information collected via the Open Process and the Detailed Comparative Process 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.

Several key trends emerging from the research will need to be taken into the account of in the formulation of recommendations and 'good practice' guidance for States with respect to overcoming financial risks of litigation. These are:

- The contraction in the availability of legal aid in many jurisdictions;
- The growing use of contingency fee structures, including in jurisdictions which have traditionally shown strong cultural resistance to the idea of lawyers being paid a percentage of civil damages;
- The growth in opportunities for "group" or "class" actions, and their growing use in many jurisdictions;
- The growth in markets for third party litigation funding in some jurisdictions (however, with the caveat that the impact of this development appears largely confined for the time being to commercial cases and very large class actions, rather than personal injury and environmental cases more generally);
- The importance of NGOs as a source of information, support (including legal support) and, in many cases, funding and fundraising (with NGOs reported to be the most significant source of legal support for victims of alleged business-related human rights abuses in many jurisdictions);

- Changes in rules of standing in some jurisdictions, creating greater opportunities for representative actions and public interest litigation;
- Initiatives in a number of jurisdictions to streamline judicial processes, e.g. increasing use of electronic communications, video-conferencing, specialised courts, case management techniques and elimination of certain procedural steps (with the caveat, however, that in many jurisdictions it is still too early to assess the impact of these in terms of costs of civil litigation and access to justice).

Towards a set of "good practice indicators" for States

There are obviously limits to what Accountability and Remedy Project recommendations can realistically achieve with respect to the wider economic, developmental, structural, procedural, and resourcing problems that are observed in many jurisdictions and which all have a bearing on the financial barriers faced by claimants in business and human rights cases. On the other hand, it is possible, from the information gathered so far, to identify a number of features of domestic legal regimes, which have the potential to help reduce financial barriers to claimants in such cases. These could form the basis of a set of "good practice indicators" which could be used by States to evaluate the effectiveness and coherence of their own domestic law responses to problems of financial obstacles in business and human rights-related cases, and to track their progress towards greater effectiveness.

These indicators could be supplemented by further explanation and observations regarding the advantages and disadvantages of different State approaches from an access to justice point of view, and, where possible, illustrative examples of State practice gathered in the course of OHCHR's Accountability and Remedy Project.

Some examples of possible "good practice indicators" relating to domestic law initiatives to address the financial risks of litigation are given below in Box 2 on the following page.

Questions for discussion at ARP consultation (19-20 November 2015)

i. Have you any comments in relation to the good practice indicators in Box 2 below?

ii. Are there any further good practice indicators in relation to civil law remedies that you would like to see included? If so, what, and why?

iii. What kinds of issues are the good practice indicators suggested in Box 2 below likely to raise in practice? How should these best be addressed?

Box 2: Examples of possible "good practice indicators" in relation to overcoming financial obstacles to civil litigation

Good Practice Indicator 1: *Legal aid is available for claimants able to show severe financial hardship, on transparent and non-discriminatory terms.*

Good Practice Indicator 2: *Rules of civil procedure provide for the possibility of "group" or "class" actions, the criteria for which are clearly expressed and consistently applied.*

Good Practice Indicator 3: *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.*

Good Practice Indicator 4: *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.*

Good Practice Indicator 5: *Court procedures include readily identifiable, realistic and affordable opportunities for early mediation and settlement.*

Good Practice Indicator 6: *Procedural rules include adequate checks on (and accountability in the event of) excessive court delays.*

Good Practice Indicator 7: *Third party litigation funders are subject to appropriate regulation to ensure proper standards of service, and to guard against abuses and conflicts of interest.*

Good Practice Indicator 8*: Contingency fee and "success fee" arrangements are subject to appropriate regulation to ensure proper standards of service, and to guard against abuses and conflicts of interest.*

Good Practice Indicator 9: *Providers of litigation insurance are subject to appropriate regulation to ensure proper standards of service, and to guard against abuses and conflicts of interest.*

Good Practice Indicator 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.*

Good Practice Indicator 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 justice for claimants.*

Good Practice Indicator 12: *Domestic law courts make appropriate use of technologies (including information technologies and communications technologies) to operate in an efficient and cost-effective manner.*

Good Practice Indicator 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.*

Criminal law sanctions
(ARP project component 4)

This component of the ARP surveys current and emerging State practice in relation to criminal sanctioning of corporations for business-related human rights abuses (with particular focus on severe human rights abuses) with a view to identifying 'good practice models' for States, taking into account innovations from other areas of criminal law.

Empirical information on State practice and trends in criminal sanctioning of corporations was collected via the Open Process and the Detailed Comparative Process. Respondents to the Open Process were invited to answer three multiple choice questions relating to the criminal and quasi-criminal sanctioning of corporations within their own jurisdictions, which included questions on types of sanctions that may be applied (in human rights cases and more generally), methods used to assess the quantum of financial penalties and factors that may be taken into account in mitigation. More detailed information on criminal and quasi-criminal sanctions was sought from legal practitioners working in different regions through the Detailed Comparative Process.

In addition, further research has been commissioned with a view to gaining a more detailed picture of current and emerging trends in relation to criminal sanctioning of corporations in the areas of anti-corruption, money laundering, securities law and other forms of financial crimes. The aim of this supplementary research, which is ongoing, is a better understanding of the extent to which experiences in these areas carry any useful lessons for future enforcement in the field of business and human rights.

Key preliminary findings

The information gathered for the purposes of the Accountability and Remedy Project on criminal sanctioning of corporations is still in the process of detailed analysis. However, preliminary findings are as follows:

- The most commonly applied criminal and quasi-criminal law sanctions in cases involving corporate defendants are financial penalties (or "fines");
- However, is it not unusual for criminal and quasi-criminal regulatory regimes to also provide for alternative forms of sanction, including 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;
- 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. However, in some cases it is questionable whether these amounts would, on their own, be sufficiently dissuasive to act as a credible deterrent;

- While the levels of financial penalties in cases of regulatory or quasi-criminal offences are usually relatively clear and predictable, there is a lack of clarity in many (if not most) jurisdictions as to the way that financial (and other) penalties would be determined in a case of corporate involvement in international crimes (e.g. war crimes, genocide, crimes against humanity);
- In some jurisdictions, financial penalties may include an amount to be applied in reimbursement of prosecutors' expenses;
- In addition to the requirements of deterrence and punishment, there is increasing recognition of the importance of future prevention measures (e.g. through remedial orders, or "corporate probation") as part of an effective sanctions regime;
- In specific contexts (e.g. human trafficking and child labour), criminal sanctioning regimes are increasingly responding to the need to ensure that there is compensation for victims, for instance through restitution orders, or statutory requirements that the corporate defendants "return illicit financial benefit" to those affected;
- The quality of a company's management and compliance efforts, and the extent to which it had used due diligence to identify and prevent human rights abuses, is likely, in many jurisdictions and in many different kinds of cases, to be taken into account in determining the level of financial penalties.

Towards a set of "good practice indicators" for States

Drawing from the examples of State practice gathered for the Accountability and Remedy Project to date, the intention is to develop a set of "good practice indicators" which could be used by States to evaluate the effectiveness and coherence of their own criminal law sanctioning regimes, as they apply to business and human rights-related cases, and to track their progress towards greater effectiveness.

These indicators could be supplemented by further explanation and observations regarding the advantages and disadvantages of different State approaches from an access to justice point of view, and, where possible, illustrative examples of State practice gathered in the course of OHCHR's Accountability and Remedy Project.

Some examples of possible "good practice indicators" are given in Box 3 below:

Box 3: Examples of possible "good practice indicators" in relation to criminal and quasi-criminal sanctions in cases of severe business-related human rights abuses

Good Practice Indicator 1: *Criminal and/or quasi-criminal sanctions are sufficiently dissuasive to be a credible deterrent from engaging in the prohibited behaviour.*

Good Practice Indicator 2: *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.*

Good Practice Indicator 3: *Where possible and appropriate, criminal and/or quasi-criminal sanctions provide opportunities for the financial compensation of victims and other*

restorative remedies.

Good Practice Indicator 4: *Where possible and appropriate, criminal and/or quasi-criminal sanctions include elements designed to ensure future compliance and/or prevention of future harm.*

Good Practice Indicator 5: *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.*

Good Practice Indicator 6*: 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.*

Questions for discussion at ARP consultation (19-20 November 2015)

i. Have you any comments in relation to the good practice indicators in Box 3 above?

ii. Are there any further good practice indicators in relation to criminal law sanctions that you would like to see included? If so, what, and why?

iii. What kinds of issues are the good practice indicators suggested above likely to raise in practice? How should these best be addressed?

Civil law remedies
(ARP project component 5)

This project component surveys current and emerging State practice in relation to civil law (tort law) damages in cases of business-related human rights abuses (with a particular focus on severe abuses), explores the role of domestic judicial mechanisms in relation to supervision and implementation of settlements and awards, with a view to identifying possible 'good practice models' for States, taking into account innovations from other areas of private law.

Empirical information on State practice and trends in civil law remedies in business and human rights cases was collected via the Open Process and the Detailed Comparative Process. Respondents to the Open Process were invited to answer questions relating to civil law remedies within their own jurisdictions, which included questions on types of remedies that may be granted as a result of civil proceedings and factors taken into account in the calculation of compensatory damages. More detailed information on current practices with respect to civil remedies was sought from legal practitioners working in different jurisdictions through the Detailed Comparative Process.

In addition, further supplementary research has been carried out in relation to the standards that govern the distribution of damages in large class actions in different jurisdictions, with a view to gaining a better understanding of the practical challenges surrounding this specific issue, and the extent to which there is an emerging consensus regarding "good practice".

Key preliminary findings

The information gathered for the purposes of the Accountability and Remedy Project on the availability and assessment of civil remedies in business-related human rights cases is still in the process of detailed analysis. However, preliminary findings are as follows:

- The most commonly applied form of remedy in civil cases (and the one most likely to be applied in claims arising from alleged business involvement in severe human rights abuses) is compensatory damages;
- In addition, punitive damages may be applied in a number of jurisdictions in cases where the damage has been particularly serious, where the degree of negligence or recklessness was particularly great, or where there was intention to cause harm. Punitive damages appear less likely to be a feature of civil law regimes than of common law regimes;
- Restitution and injunctions are possible civil law remedies in many jurisdictions;
- In addition, some further alternative civil remedies may be available in some jurisdictions, including compliance orders, supervisory orders and requirements to publish certain information relating to the claim or to make public apologies;
- In personal injury cases, the factors taken into account in assessing compensatory damages in most jurisdictions will be pain and suffering (including, in some jurisdictions, mental distress), out of pocket expenses (e.g. for medical and/or subsequent physical care), and loss of future earnings;

- In some jurisdictions, it is possible for regulators to make use of civil processes to enforce certain statutory or regulatory standards, which may result in financial compensation for groups or individuals affected by breaches of standards by corporate entities, or compliance orders;
- 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 (such as large class actions) with the result that, in practice, affected individuals, legally entitled to compensation, may not receive adequate (or any) compensation.

Towards a set of "good practice indicators" for States

Drawing from the examples of State practice gathered for the Accountability and Remedy Project to date, the intention is to develop a set of "good practice indicators" which could be used by States to evaluate the effectiveness and coherence of their own civil remedial regimes, as they apply to business and human rights-related cases, and to track their progress towards greater effectiveness.

These indicators could be supplemented by further explanation and observations regarding the advantages and disadvantages of different State approaches from an access to justice point of view, and, where possible, illustrative examples of State practice gathered in the course of OHCHR's Accountability and Remedy Project.

Some examples of possible "good practice indicators" are given in Box 4 below:

Box 4: Examples of possible "good practice indicators" in relation to civil law remedies in cases of severe business-related human rights abuses

Good Practice Indicator 1: *The domestic legal system upholds the principle that the aim of compensatory damages is to return the victim of business-related human rights abuses, as far as is possible, to the position he or she would have been in had the abuses not occurred.*

Good Practice Indicator 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.*

Good Practice Indicator 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.*

Good Practice Indicator 4*: 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.*

Questions for discussion at ARP consultation (19-20 November 2015)

iv. Have you any comments in relation to the good practice indicators in Box 4?

v. Are there any further good practice indicators in relation to civil law remedies that you would like to see included? If so, what, and why?

vi. What kinds of issues are the good practice indicators suggested above likely to raise in practice? How should these best be addressed?

Annex 1: Model law review terms of reference

Model Terms of Reference addressed to a Law Commission (or domestic equivalent) to enable a technical review of domestic legal tests for corporate legal liability in cases of business involvement in severe human rights abuses

1. The [*Law Commission/review body*] is requested to investigate and report on the following matters:

1.1 To what extent may corporate entities be criminally (or quasi-criminally) liable for different categories of severe human rights abuses [*Note: see Box 1 above*] under the laws of [*the jurisdiction*]? Are there severe human rights abuses for which corporate criminal liability (or quasi-criminal liability) is not presently possible? If so, (a) what are the policy reasons for such exceptions or exclusions and (b) are these justified?

1.2 To the extent that corporate criminal (or quasi-criminal) liability is legally possible, what tests for criminal (or quasi-criminal) liability are currently applied in cases of corporate defendants? Are these tests sufficiently clear for the purposes of legal certainty and proper administration of justice? Do they respond adequately to reported cases of alleged business involvement in severe human rights abuses? Do they respond adequately to cases involving allegations against corporate groups? Do they provide sufficient encouragement and incentives to companies to ensure that risks of corporate involvement in severe human rights abuses are properly identified and prevented or mitigated, and that workers (including temporary workers), subsidiaries, contractors, suppliers and other business relationships are properly managed, supervised and monitored?

1.3 To what extent may corporations be liable under the private law of [*the jurisdiction*] for severe human rights abuses? Are there severe human rights abuses for which there would presently be no corporate liability to the victims of such abuses under the laws of [*the jurisdiction*]? If so (a) what are the policy reasons for such exceptions or exclusions and (b) are these justified?

1.4 To the extent that there is corporate legal liability for severe human rights abuses under the private law of [*the jurisdiction*], are the legal tests for corporate legal liability sufficiently clear for the purposes of legal certainty and proper administration of justice? Do they respond adequately to cases of alleged business involvement in severe human rights abuses? Do they respond adequately to cases involving allegations against corporate groups? Do they provide sufficient encouragement and incentives to companies to ensure that risks of corporate involvement in severe human rights abuses are properly identified and mitigated, and that employees, subsidiaries, contractors, suppliers and other business relationships are properly managed, supervised and monitored?

2. The [*Law Commission/review body*] is requested to make recommendations that take into account:

2.1 the UN Guiding Principles on Business and Human Rights;
2.2 *[where relevant]* the commitments made by [*the jurisdiction*] in its National Action Plan;
2.3 its findings in relation to the issues described at para. 1 above

3. The [*Law Commission's/review body's*] review process will be open, inclusive and evidence-based and will involve:

3.1 a review structure that will provide adequate opportunities for contribution by key stakeholders;
3.2 proper consultation with legal professionals, criminal justice practitioners, public interest lawyers, members of the judiciary, parliamentarians, academics, representatives of victims' groups, representatives of trade unions, and representatives of businesses;
3.2 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 involvement in severe human rights abuses.