



Improving Accountability and Access to Remedy for Business and Human Rights Abuses: A submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Revised Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

8 October 2019

1. Introduction

Since 2014, OHCHR has received multiple mandates from the Human Rights Council (Resolutions [26/22](#), [32/10](#) & [38/13](#)) to strengthen the implementation of the “Access to Remedy” Pillar of the UN Guiding Principles on Business and Human Rights and thus improve the prospects for corporate accountability and remedy in business and human rights cases.

In furtherance of these mandates, OHCHR’s [Accountability and Remedy Project \(ARP\)](#) aims to deliver credible and workable recommended actions to enable more consistent implementation of the UN Guiding Principles on Business and Human Rights in the area of access to remedy.

The Accountability and Remedy Project has proceeded in three phases, corresponding to the three mandates from the Human Rights Council.

The first phase of the Project ([ARP I, 2014-2016](#)) focussed on the role of **judicial mechanisms** (e.g. domestic courts). OHCHR’s findings and recommended actions in relation to **judicial mechanisms** can be found in the annex of its [2016 report to the Human Rights Council](#).

The second phase of the Project ([ARP II, 2016-2018](#)) was concerned with the role of **State-based non-judicial grievance mechanisms** (e.g. regulators, ombudsmen, national human rights institutions, national contact points under the OECD Guidelines for Multinational Enterprises, etc.). OHCHR’s findings and recommended actions at the conclusion of that phase of work are set out in the annex of its [2018 report](#).

The third and present phase of the Project ([ARP III, 2018-2020](#)) is concerned with the role of **non-State-based grievance mechanisms** (e.g. grievance mechanisms relevant to business and human rights that are established by, administered by or associated with companies, multi-stakeholder initiatives and development finance institutions). OHCHR will report its findings arising from this phase of work to the Human Rights Council in June 2020.

At the conclusion of each stage completed so far, the Human Rights Council has by consensus, welcomed OHCHR’s work on improving accountability and access to remedy for victims of business-related human rights abuse, noted “with appreciation” the relevant report and requested OHCHR to continue its work in this area. (See [Resolution 32/10](#) in relation to ARP I, and [Resolution 38/13](#) in relation to ARP II).

OHCHR’s findings arising from the two completed phases of work (which related to State-based grievance mechanisms) have been distilled into a series of “policy objectives,” supported by “elements” intended to demonstrate the different ways that those objectives can be achieved in practice. This deliberately flexible format was chosen to be implementable in a wide range of legal systems and contexts, while also being practical, forward-looking and reflective of international standards on access to remedy.

As such, OHCHR’s findings and recommended actions arising from ARP can be incorporated into any relevant standard-setting process. Taken together, these project outputs provide a robust, accessible, adaptable and evidence-based resource for States seeking to improve the effectiveness of their legal and policy responses to business and human rights challenges, whether at the domestic level (e.g. through National Action Plans on Business and Human Rights and domestic law reform) or through international institutions and law-making initiatives.

2. Insights from the Accountability and Remedy Project relevant to the OEIGWG Chairmanship Revised Draft

The OHCHR Accountability and Remedy Project and the treaty process share a common goal: increasing access to effective remedy for victims of corporate abuses and ensuring accountability for such abuses.

The purpose of this note is to draw attention to OHCHR findings and recommended actions from phases I and II of the Accountability and Remedy Project, as detailed in the two reports submitted to the Human Rights Council thus far (see [A/HRC/32/19](#) and [A/HRC/38/20](#)), which might usefully be considered by members of the OEIGWG in the context of the negotiations to take place at its Fifth Session.

This note focuses on Articles 4, 5, 6 and 10 of the Revised Draft, as these are the areas where there is most significant overlap between the substance of the Revised Draft and the issues that were prioritised for the purposes of ARP I and II research activities.

Article 4: Rights of victims

Article 4 of the Revised Draft references relevant human rights standards and principles, then lays out minimum standards of treatment of victims of human rights abuses with respect to access to remedy through State-based mechanisms (judicial and non-judicial). It includes provisions on measures needed to reduce acknowledged barriers to remedy, including costs of seeking remedy, “equality of arms” and burdens of proof.

The High Commissioner’s two reports to the Human Rights Council on “Improving accountability and access to remedy for victims of business-related human rights abuse” (see [A/HRC/32/19](#) and [A/HRC/38/20](#)) contain a series of recommended actions which will be of interest to members of the Working Group wishing to clarify the substance of these provisions in practical terms. For instance, some useful principles to help govern the judicial determination of remedies (Revised Draft, Article 4(5)) can be found in ARP I Policy Objectives 11.2 and 19.2, which call for sanctions and remedies to, among other things,

- be proportional to the gravity of the abuse and the harm suffered,

- reflect the degree of culpability of the relevant company,
- designed in a way to minimize risks of repetition or continuation of harm, and
- take account of issues of gender and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

Additionally, suggestions as to ways that States can help reduce the financial burden on claimants in civil cases (Revised Draft, Article 4(12)(c) – (e) and 4(13)) are set out under ARP I Policy Objectives 15 and 16, which call for claimants to have access to diversified sources of litigation funding and for costs associated with claims to be reduced in various ways.

For ease of reference, the key sections of the ARP I and ARP II findings are itemised in the table below, alongside the Revised Draft provisions to which they potentially relate.

Revised Draft provision	Relevant ARP I and ARP II findings and recommended action
Article 4(3) – (4)	ARP I Policy Objectives 7 and 18 (esp. 18.2).
Article 4(5)	ARP I Policy Objective 11 (esp. 11.2) and 19 (esp. 19.2).
Article 4(6)	<p>ARP I Policy Objective 5 (in relation to the activities of prosecutors) and Policy Objective 18 (in relation to access to information in cross-border private law claims).</p> <p>ARP II Policy Objectives 1 – 4 (in relation to access to information regarding remedial options - or “remedy pathways” – utilising both judicial and State-based non-judicial grievance mechanisms).</p>
Article 4(7)	ARP II Policy Objective 13 (esp. 13.5).
Article 4(9)	ARP II Policy Objectives 1 – 4 (esp. 1 and 3).
Article 4(10)	ARP I Policy Objectives 4 – 8.
Article 4(11)	<p>ARP I Policy Objective 18.</p> <p>ARP II Policy Objective 13.</p>
Article 4 (12)(c) – (e) and 4(13)	ARP I Policy Objectives 15 and 16.
Article 4(16)	ARP I Policy Objective 1 (esp. 1.7), 3 (esp. 3.3), 12 (esp. 12.5), and 14 (esp. 14.3). ¹

¹ For further explanation, see [A/HRC/32/19/Add.1](#), paragraph 15 (in relation to criminal law cases) and paragraphs 49 – 50 (in relation to private law claims).

Article 5: Prevention

Article 5 of the Revised Draft obliges States parties to adopt measures needed to ensure that human rights due diligence activities are undertaken by persons conducting business activities, and sets out the key components of such activities.

A number of important insights – relating particularly to the interplay between the matters covered in Article 5 of the Revised Draft and the substance of Article 6 (Legal Liability) – have emerged from the ARP I phase of work, and subsequent follow-up activities undertaken by OHCHR.

In its 2016 report at the conclusion of ARP I, OHCHR drew attention to the different ways in which human rights due diligence can (depending on the relevant policy objectives) be relevant to assessments of corporate liability under both criminal law and private law regimes (see ARP I Policy Objective 3 (for criminal law cases) and Policy Objective 14 (for private law claims)).

These findings were then the subject of further follow-up work by OHCHR during 2017 under a separate mandate from the Human Rights Council (see [Resolution 32/10](#)). In October 2017, OHCHR convened a comparative law consultation specifically to examine the relationship between human rights due diligence (as described in the UN Guiding Principles) and determinations of corporate liability under national law for adverse human rights impacts arising from or connected with business activities.

This consultation encompassed:

- Judicial and practitioner awareness of the concept of *human rights* due diligence (as opposed to the more widely understood concept of “legal” due diligence);
- Legal relationships between the concept of human rights due diligence and theories of corporate liability (i.e. the interplay between the content of Article 5 and Article 6 of the Revised Draft);
- Existing legal regimes using human rights due diligence as a standard of legal conduct (i.e. of the type referred to in Article 5 of the Revised Draft);
- The relevance of human rights due diligence to judicial determinations of negligence;
- The use of human rights due diligence as a potential defence to legal liability under domestic legal regimes (including in cases where there has been a reversal of a burden of proof, see Article 4(16) of the Revised Draft);
- The relevance of human rights due diligence to corporate liability under theories of corporate complicity in human rights abuses; and
- The relevance of human rights due diligence in the determination of sanctions and remedies, including future prevention as an aspect of an “effective remedy” (matters potentially of relevance to Articles 4(5), 5, and 6(4) of the Revised Draft).

OHCHR’s findings at the conclusion of that consultation, which includes further suggestions as to practical ways that States can strengthen human rights due diligence regimes and foster more proactive approaches by companies, was submitted to the Human Rights Council at its 38th session (see [A/HRC/38/20/Add.2](#)). These findings are highly relevant to the substance of both Article 5 (Prevention) and Article 6 (Legal Liability) of the Revised Draft and highlights the importance of viewing issues of prevention and liability holistically, rather than necessarily as separate policy items.

Article 6: Legal Liability

Article 6 concerns the content of domestic legal liability regimes and obliges States parties to ensure that findings of liability are met with suitable sanctions and reparations, that failure to supervise can be a basis for liability, and that States provide for criminal, civil, or administrative liability of legal persons for certain criminal offenses.

The basic elements of robust, comprehensive and effective corporate liability regimes (criminal law and private law) were the subject of detailed comparative legal analysis in the course of the first phase of the Accountability and Remedy Project, and OHCHR’s main findings on these points are summarised in ARP I Policy Objectives 1 – 3 (for criminal law regimes) and Policy Objectives 12 – 14 (for private law claims).

The “elements” set out in these Policy Objectives highlight a number of common gaps in domestic regimes that are presently overlooked in the Revised Draft version of Article 6. These elements cover matters such as theories of primary and secondary legal liability (and their relevance to business and human rights cases), the relationship between corporate liability and liability of natural persons, methods of attribution of liability to legal persons (e.g. companies), burdens of proof and matters that may be taken into account in mitigation.

Further explanation of these “elements” can be found in the explanatory addendum to the ARP I report (see [A/HRC/32/19/Add.1](#), paragraphs 6 – 23 (for criminal law cases) and paragraphs 42 – 56 (for private law claims)).

Article 10: Mutual Legal Assistance

Article 10 of the Revised Draft creates an obligation to provide legal assistance in relation to matters covered by the legally binding instrument, and sets out the modalities by which this assistance will take place. The possibility of cooperation through joint investigative bodies is also provided for in Article 10.

During the first phase of the Accountability and Remedy Project, OHCHR conducted research and consultations to identify the practical and administrative steps that can be taken by States to facilitate the smooth and efficient functioning of the mutual legal assistance arrangements they have entered into. These findings, which help to shed light on how general mutual legal assistance regimes can be made more responsive to cross-border business and human rights cases *in particular*, could potentially be used to enhance these Revised Draft provisions.

For instance, in addition to arrangements for mutual legal assistance, the ARP I report calls for greater bilateral and multilateral efforts to increase the speed and ease with which information can be sought and obtained from relevant State bodies in other States in cross-border judicial cases where such information may be relevant to the question of whether an applicable legal standard has been breached.² The ARP I report also calls for greater alignment between different jurisdictions with respect to access to information and issues such as data protection, protection of victims and their legal representatives,

² See [A/HRC/32/19/Add.1](#), paragraphs 36 – 38 for criminal law cases and paragraphs 67 – 78 in relation to private law claims.

protection of whistle-blowers and legitimate requirements of commercial confidentiality (see ARP I Policy Objective 18).

OHCHR's findings in relation to international cooperation in cross-border business and human rights cases are summarised in ARP I Policy Objectives 9 and 10 (for criminal law cases) and Policy Objectives 17 and 18 (for private law claims). Further explanation of these findings can be found at [A/HRC/32/19/Add.1](#), paragraphs 36 – 38 (for criminal law cases) and paragraphs 65 – 68 (for private law claims).

Finally, while the focus on judicial mechanisms in these provisions is understandable, it is important not to overlook the role of State-based *non-judicial* grievance mechanisms in cross-border cases. Questions regarding the role and capacity of such mechanisms to act in cross-border cases, and how such capacity might be enhanced, were considered in the course of the second phase of the OHCHR Accountability and Remedy Project. The ARP II report contains a number of suggestions for improving the effectiveness of State-based *non-judicial* grievance mechanisms in cross-border cases, including through international regulators networks, bilateral and multilateral forums, and embassy and consular services (see ARP II Policy Objective 13).

Conclusion

The OHCHR's Accountability and Remedy Project work has uncovered information and insights of relevance to a number of areas addressed in the Revised Draft. The purpose of this note has been to draw attention to the various ways in which OHCHR's ongoing work in this area – which has been both mandated and welcomed by the Human Rights Council – can be drawn upon by the members of the OEIGWG to develop and strengthen the existing draft provisions.
