

Corporate Liability for Gross Human Rights Abuses – Towards a fairer and more effective system of domestic law remedies –

An OHCHR initiative to contribute to more effective and comprehensive implementation of the UN Guiding Principles on Business and Human Rights

Background

In February 2014, OHCHR launched a process to contribute to conceptual, normative and practical clarification of key issues aimed at creating a fairer and more effective system of domestic law remedies to address corporate liability for gross human rights abuses.¹

The process is designed to contribute to **more effective and comprehensive implementation of the UN Guiding Principles on Business and Human Rights** through enhanced preventative and remedial measures in the most serious cases of business related human rights abuse.

As a first step, OHCHR commissioned Dr. Jennifer Zerk² as an independent consultant in May 2013 to prepare a study on the effectiveness of domestic judicial mechanisms in relation to business involvement in gross human rights abuses. The study, entitled *Corporate Liability for Gross Human Rights Abuses – Towards a fairer and more effective system of domestic law remedies*, identifies barriers to accessing justice at the domestic level and the effects of differences in domestic approaches on the way that remedial systems are used in practice. Based on the findings, the study sets out recommendations for areas for further enquiry.

Overview of the study findings

The study builds on previous research in the area as well as a review of more than 40 cases of alleged corporate involvement in gross human rights abuses. It reviews how companies can become involved in gross human rights abuses; the key features of domestic criminal and civil law regimes that are relevant to legal determinations of corporate liability, and the ways in which these mechanisms operate in practice; and the international standards relating to access to remedy under international human rights law and the Guiding Principles. The study goes on to consider, in light of the evidence of State practice and litigation experiences collected to date, how well domestic judicial mechanisms are responding to cases of business involvement in gross human rights abuses in practice.

The study finds that business involvement in gross abuses carries at least the theoretical possibility of civil or criminal liability (or both) in many, if not most, jurisdictions. However, there are significant variations in coverage, and domestic judicial mechanisms are presently failing to translate theoretical legal liability into actual accountability for harm.

The study highlights legal and procedural barriers to justice with reference to examples of State practice; in many cases, these barriers are sufficiently serious as to be potentially prohibitive to

¹ The initiative follows calls made by the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, towards the end of his mandate that the issue of corporate involvement in gross human rights abuses requires further clarification of standards relating to appropriate investigation, punishment and redress, as well as what constitutes effective, proportionate and dissuasive sanctions. See: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>

² Dr. Jennifer Zerk is a writer, researcher, analyst and teacher specializing in business and human rights. A former commercial lawyer, she now works mainly in the area of regulatory analysis and reform and is a leading expert on international and cross-border regulatory issues.

prospective claimants, and have the effect of causing victims to reject local options in favour of pursuing remedies in foreign jurisdictions—which in turn carries its own attendant costs, uncertainties, logistical difficulties and legal challenges. The study also reviews rules and practices in civil and common law jurisdictions regarding the judicial exercise of extraterritorial jurisdiction, as well as the use of existing domestic measures with extra-territorial implications.

Divergence between different legal systems has the further effect of perpetuating some barriers to remedy and in some instances may create new barriers, by distorting patterns of distribution and use of domestic remedial mechanisms, adding to the legal uncertainty for both victims and companies, and hampering prospects for international cooperation. The totality of the overlapping network of domestic and transnational redress mechanisms does not yet translate into an effective system of remedies; in practice, from the perspective of those seeking to hold companies to account, the system is patchy, uneven, often ineffective, and fragile.

Proposed way forward

To begin to address some of the barriers and challenges identified in the study, the study discusses potential ways forward. It reviews convergence models, including models with extraterritorial implications, adopted in other areas such as anti-bribery efforts, but also outlines some of the legal and practical challenges that would likely be encountered through such approaches. However, the study finds that there are many issues of policy and principle which would benefit from further examination and clarification. Therefore, **the study concludes by recommending a consultative, multi-stakeholder process of clarification in two parts:**

1. **A consultative process aimed at clarifying key issues of principles and policies,** including the elements of corporate liability for involvement in gross human rights abuses under private and public law regimes but focusing in particular on criminal law;
2. **A process to identify models of best State practice** in relation to the functioning of domestic judicial mechanisms, including identifying a programme of activities to promote technical cooperation and knowledge exchange to improve domestic judicial mechanisms from a practical, victim-centred point of view.

The study also identifies an urgent need for a renewed focus on the area of **criminal law enforcement, given the apparently very low levels of activity by domestic law enforcement bodies** in this field. It therefore includes recommendations for additional work to be undertaken specifically with domestic law enforcement and prosecution bodies, to better understand the legal, political and practical challenges they face, and to help build local enforcement know-how and capacity.

Study consultation process

OHCHR invites all interested stakeholders to make submissions in writing on the issues identified in the study as requiring further clarification (see issues listed in Chapter 5, section 5.2.1). Submissions can be sent to OHCHR at business-access2remedy@ohchr.org by 1 June 2014.

OHCHR intends to convene a multi-stakeholder consultation based on the study recommendations and the submissions received in the second half of 2014. The aim is to make concrete progress on some of the key issues identified in the study and in subsequent submissions through dedicated expert-level, multi-stakeholder deliberations to enable appropriate responses to the complex, multi-faceted issues identified in the study.

The study can be accessed here:

<http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>