

## **Business and Human Rights: The Accountability and Remedy Project**

**An OHCHR initiative to contribute to a fairer and more effective system of domestic law remedies, in particular in cases of gross human rights abuses**

### **DETAILED COMPARATIVE PROCESS**

#### **Track 2: Public interest lawyer and victims' representative perspectives**

##### **1. Background**

The Office of the UN High Commissioner for Human Rights (“OHCHR”) has recently launched an initiative, ‘the Accountability and Remedy Project’, that aims to contribute to a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses.

This initiative, which has also received a mandate from the Human Rights Council (resolution 26/22), aims to deliver credible, workable guidance to States to enable more consistent implementation of the Guiding Principles in the area of access to remedy. The guidance will be developed through inclusive multi-stakeholder processes, and will be designed to take into account different legal systems, cultures, traditions and levels of economic development.

The programme of work comprises six distinct, but interrelated projects. The projects have been chosen in consultations with experts for their strategic value and potential to deliver change in the short-to-medium term. For four out of the six projects, information gathering will take place through two complementary research processes, the ‘Open Process’ and the ‘Detailed Comparative Process’. This questionnaire relates to the Detailed Comparative Process. Further information about the OHCHR’s programme of work can be found [here](#).

##### **2. The purpose of this exercise**

Thank you for taking the time to contribute to this part of the process, which aims to elicit information from public interest law practitioners and other victims’ representatives in our 20 focus jurisdictions in relation to the themes that comprise the Accountability and Remedy Project. OHCHR relies on a substantial amount of voluntary support to be able to complete its ambitious programme of work. We greatly appreciate each and every contribution of expertise and effort.

The information and insights you provide will feed into OHCHR’s Detailed Comparative Process (Track 2). The information collected through this process (DCP Track 2) will be analysed together with the questionnaires completed by law firms for each of the 20 focus jurisdictions (DCP Track-1), and subsequently used in project-specific analysis. Hearing directly from practitioners with practical experience in the 20 focus jurisdictions is critical to obtain a complete picture of the ‘As-Is’ situation, and in the development of proposals for improvement.

In the interest of transparency, we would like to publish your contributions on the project portal at the Business and Human Rights Resource Centre. However, if you prefer the report not to become public, or if you would prefer that it be published without information that may identify the author, please let us know. Any

accompanying information you may wish to submit regarding specific cases in your jurisdiction will not be published unless you request otherwise.

### 3. Questions

Please answer the questions below as fully as possible from your/your organization's experience as practitioners. Where you are asked to consider cross-border elements/cases, this is specifically stated.

Please limit your response to 15 pages or less. Please feel free to attach accompanying information, such as case information/examples, and references to specific principles, regulation or statutes. For an explanation of the terms highlighted in grey boxes, please see the Glossary in Annex 1.

#### A. **Approaches to corporate criminal and quasi-criminal liability under the laws of the jurisdiction**

- A.1 As a general rule, how is **criminal** or **quasi-criminal** liability attributed to a legal entity under the laws of this jurisdiction? In other words, what tests must be satisfied to establish liability?
- A.2. Can a **corporate entity** be held **criminally** or **quasi-criminally** liable for the acts of third parties under the laws of the jurisdiction, for instance on the basis that it had assisted, or instigated or encouraged a **criminal** or **quasi-criminal offence** (this type of liability is often referred to as **secondary liability**)?
- A.5 From your experience as a practitioner, how does the approach to corporate **criminal and quasi-criminal liability** for **corporate entities** in the jurisdiction influence legal outcomes in cases involving allegations of business involvement in human rights abuses? What challenges (legal and practical) do prosecutors and law enforcement bodies face in proving that the various requirements of tests for liability are met?
  - a. What specific improvements would you suggest?

#### B. **Potential private law ('civil law') liability under the laws of the jurisdiction**

- B.1 What principles govern **legal liability** of a corporation under **private law** (or "**civil law**") in the jurisdiction?
- B.3 What general principles or special rules are used to determine the liability of a **parent company** under private law for the acts or omissions of **subsidiaries**?
- B.4 From your perspective as a practitioner, how do the principles governing corporate liability, and the tests used to establish liability under private law, influence legal outcomes in cases involving allegations of business involvement in human rights abuses? What challenges (legal and practical) do claimants face in proving that the various requirements of tests for liability are met?
  - a. What specific improvements would you suggest?

C. **Litigation funding and financial risks to claimants in bringing claims**

- C.1 Please describe the main methods used by claimants to help fund and reduce the costs of legal claims in the jurisdiction (e.g. legal aid, pro bono legal help, contingency fees, litigation insurance, third party funders, class actions etc). From your perspective as a practitioner, which of these are likely to be *most relevant in practice* to claimants in cases against corporations for involvement in human rights abuses?
- C.2 From your perspective as a practitioner, how does the availability (or non-availability) of funding impact the ability of claimants to bring their claim through the courts?
- C.3 What improvements would you suggest to either help reduce the costs of bringing claims or improve the ability of financially disadvantaged claimants to secure the resources necessary to bring a claim in the jurisdiction? [**Note:** *this may include ways to reduce costs, ways to increase access to resources and funding for claimants, ways for claimants' representatives to recover costs, technology-based solutions to reduce costs, alternative mechanisms that may avoid the need to bring a court claim, etc.*]

D. **Criminal and quasi-criminal sanctions**

- D.1 What kinds of **criminal** or **quasi-criminal** (or “**administrative**”) penalties can be imposed on corporate entities under the laws of the jurisdiction? In your view, how effective are these sanctions in holding companies to account for involvement in human rights abuses?
- D.2 What improvements or other types of criminal law sanctions than those currently available [in jurisdiction] would you suggest to:
- a. Improve victims' access to effective remedy; and
  - b. Discourage recurrence of abuses and encourage corporate compliance with human rights standards?

E. **Civil law (private law) remedies?**

- E.1 In the case of a private law claim against a corporate defendant, what kinds of remedies can be awarded in the event that the claimant is successful?
- E.2 What improvements or additional types of civil law/private law remedies than those currently available would you suggest to:
- a. Improve victims' access to effective remedy; and
  - b. Discourage recurrence of abuses and encourage corporate compliance with human rights standards?

F. **Case studies**

Please review the three case studies below. For each case study, please respond to the following questions:

1. Would the events in question potentially give rise to either criminal or quasi-criminal charges or provide a cause of action for a private law claim in the jurisdiction? If criminal or quasi-criminal charges are a possibility, what public authorities or law enforcement bodies would you approach?
2. If you think the events in question potentially provide a cause of action for a private law claim, what sources of funding might be available to the victims in order to enable them to proceed?
3. From your experience as a practitioner in the jurisdiction, can you indicate a likely/realistic case trajectory? Please indicate why you predict a given case trajectory with references to any specific laws, regulations, principles or practical challenges/opportunities in the jurisdiction.
4. If your response to (3) was that the case is **not** likely to result in a successful outcome for the claimants, what specific legal or practical changes/measures do you think would have been most significant in bringing about a different outcome?
5. Sanctions and remedies:
  - a. In the event that the claim were successful as a private law claim, please indicate what types of remedies you think would be most likely to be awarded in the jurisdiction?
  - b. *Only if criminal or quasi-criminal charges against a corporation are a possibility in the jurisdiction:* If the case gives rise to potential criminal or quasi-criminal liability, what types of sanctions and/or other remedies do you think would be most likely to be imposed by the courts?

## Case studies

### Case study 1

Company Y is incorporated in the jurisdiction.

Company X is incorporated in another state, State A, and is a majority-owned subsidiary of Company Y.

Some years ago, Company Y developed a new technology, which, as was widely recognised at the time, had potential applications in the apprehension and restraint of criminal suspects. Through Company X, Company Y developed the technology into a device which Company X then sold to law enforcement agencies in State A. Following a serious terrorist incident, the device was extensively used in a law enforcement “crack down” in State A. The operation continued for several months, despite the growing concerns of observers that it had disproportionately and without justification targeted one minority group in particular. Many arrests are made and suspects were incarcerated for long periods (more than a year in some cases) without trial under what the government of State A described as “emergency legislation”. While few details of the operation were publicly available, relatives of the detainees complained at the time that many detainees had been treated harshly, and that they had been subjected to unorthodox and cruel interrogation methods. Eventually, most of the detainees who had been apprehended in the course of this operation were released without charge, although three individuals died whilst in custody.

A subsequent government inquiry into the three deaths raised a number of concerns about the use during criminal interrogations of the device that had been purchased from Company X. Several witnesses to the inquiry expressed the view that this amounted to “torture” under international law. Those who had been subjected to these methods, and subsequently released, reported long term mental and physical health problems, in some cases serious, which medical professionals have attributed to their treatment while in custody.

### Case study 2

Company X and Company Y are both companies incorporated in the jurisdiction. Company X’s business premises are all located in the jurisdiction.

Company Y is an international dealer in exotic cut flowers. It relies on a number of primary producers for a constant supply of fresh flowers to its clients around the world. Company X is one such supplier. To protect its crops and to maximise yield, Company X uses a range of insecticides, herbicides and pest controls, some of which pose a serious threat to human health if not used correctly. Last month, in a spot check by a government inspector, children under the age of 15 were found to be working in greenhouses owned by Company X. Further checks showed that these children had been exposed to harmful and potentially dangerous chemicals in the course of their work, and, furthermore, they appear not to have had access to adequate protective clothing and equipment. The authorities and the management of Company X have been informed.

### **Case study 3**

Company X and Z Enterprises are both companies incorporated in the jurisdiction. Site A is located in the jurisdiction.

Company X is a private security contractor. Company X provides security services to Z Enterprises, a manufacturing company that owns a number of large factories. In 2010, representatives of a prominent trade union raised concerns about serious health and safety failings at one site owned by Z Enterprises ("Site A"). In addition, local community leaders have complained publicly about the lack of consultation between Z Enterprises and local communities about the social and environmental impacts of Z Enterprises' operations at Site A.

At the beginning of 2011 a group of protestors staged a "sit-in" at Site A. The organisers of the protest told the media that they wished to draw attention to Z Enterprises' "poor record as an employer and as a corporate citizen". Within days, the number of protestors at Site A had grown to over a thousand.

On 1 February 2011, news reached the protestors of an industrial accident at Site A that had fatally injured three workers. The sit in-protest at Site A, peaceful until now, suddenly became violent. Security personnel (employees of Company X) began firing on protestors, killing sixteen and injuring another twelve people. A further five people died, and a further thirty five were injured, in a crush which developed as people attempted to flee the scene. The security team on duty on 1 February (two of which were in their first week of employment with Company X) have been suspended from duty pending further investigations.

## Annex 1

### Definitions

**For the purposes of this questionnaire, the following words and terms have the following meanings:**

**Administrative law** means the body of law that defines, and governs the application and enforcement of, administrative offences. For the purposes of this questionnaire, the terms “administrative law” and “quasi-criminal law” are used inter-changeably.

**Administrative offence** means an offence that has some but not all of the qualities of criminal offences. For instance, it may not be necessary to prove the mental element that would necessary to establish criminal liability. Alternatively (or in addition), certain punishments (such as imprisonment) may be excluded. For the purposes of this questionnaire, the terms “administrative offences” and “quasi-criminal offences” are used inter-changeably.

**Cause of action** means, in the field of private law, the facts or combination of facts that would give a person the right to sue another person for judicial remedies or relief on the basis of a specific legal theory.

**Civil law.** See the definition of “private law” below. For the purposes of this questionnaire, the terms “civil law” and “private law” are used interchangeably.

**Costs** mean, in the field of private law, the financial amounts incurred by a party to litigation which are associated with either pursuing or defending that litigation.

**Corporate entity** means a legal entity which is created by law and is treated in law as being separate and distinct from its owners. A corporate entity has the right to carry on business and enter into transactions under its own identity.

**Criminal charge** means a formal accusation by a law enforcement body that a person or corporate entity has committed an act, or made an omission, which amounts to a criminal offence.

**Criminal law** means the body of law that defines conduct prohibited by the state on grounds that it is threatening, harmful, or otherwise endangering to the property, health, safety, and moral welfare of people and which establishes the sanctions and other remedies that should follow such conduct.

**Criminal liability** means the legal liability of a person or corporate entity under criminal law, whether admitted or determined by a court or other remedial mechanism, and includes the liability of that person or corporate entity for any legal remedies.

**Criminal offence** means conduct that amounts to a breach of criminal law.

**Due diligence** means the reasonable steps taken by a person or corporate entity to identify and avoid adverse impacts on other people, their rights and interests.

**Parent company** means a corporate entity that has, by virtue of ownership of shares or through contractual arrangements, the ability to control the management and/or operation of another corporate entity, referred to in this questionnaire as a “subsidiary”.

**Primary perpetrator** means, in the case of a criminal offence or a wrong under private law, the chief perpetrator of that criminal offence or wrong, or the person with the closest physical connection with the acts or omissions that amount to that criminal offence or wrong.

**Private law** means the body of law that governs the rights and obligations that exist between private parties such as individuals and corporate entities (as opposed to between the individual and the state). For the purposes of this questionnaire, the terms “private law” and “civil law” are used interchangeably

**Private law claim** means a formal legal claim by a private party (such as an individual or corporate entity) under private law and may include, for the purposes of this questionnaire, any claim made by a party in a criminal law matter as a *partie civile*.

**Private law liability** means the legal liability of a person or corporate entity under private law, whether admitted or determined by a court or other remedial mechanism, and includes the liability of that person or corporate entity for any legal remedies.

**Quasi-criminal charge** means a formal accusation by a law enforcement body that a person or corporate entity has committed an act, or made an omission, which amounts to a quasi-criminal offence.

**Quasi-criminal law** means the body of law that creates and governs the application and enforcement of quasi-criminal offences. For the purposes of this questionnaire, the terms “quasi-criminal law” and “administrative law” are used inter-changeably.

**Quasi-criminal liability** means the legal liability of a person or corporate entity under quasi-criminal law, whether admitted or determined by a court or other remedial mechanism, and includes the liability of that person or corporate entity for any legal remedies.

**Quasi-criminal offence** means an offence that has some but not all of the qualities of criminal offences. For instance, it may not be necessary to prove the mental element that would necessary to establish criminal liability. Alternatively (or in addition), certain punishments (such as imprisonment) may be excluded. For the purposes of this questionnaire, the terms “quasi-criminal offences” and “administrative offences” are used inter-changeably.

**Secondary liability** refers to the legal liability of a person or corporate entity for assisting, encouraging, aiding or abetting another person or corporate entity (i.e. the “primary perpetrator”) to commit a criminal offence or a wrong under private law. This kind of liability is often referred to as “accessory liability” or “complicity”.

**Security for costs** means, in private law cases, a amount of money paid into court or a bond or a guarantee that is provided by a claimant which can be called upon if the claimant is unsuccessful and otherwise unable to pay a defendant’s costs.

**Subsidiary** means a corporate entity, the management and/or operation of which is able to be controlled by another corporate entity, a “parent company” (i.e. by virtue of the parent company’s ownership of shares in the subsidiary and/or contractual arrangements) and “subsidiaries” is to be construed accordingly.