

Business and Human Rights: The OHCHR Accountability and Remedy Project

**An initiative to contribute to a fairer and more effective system of
domestic law remedies, particularly in cases of severe abuses**

QUESTIONNAIRE FOR LEGAL RESEARCHERS

- 1) Thank you for your assistance with this survey. This survey questionnaire has been prepared for the purposes of the Detailed Comparative Process that forms part of the OHCHR's programme of work on "Enhancing Accountability and Access to Remedy" (the "Accountability and Remedy Project"). For further information about the overall programme of work, please [click here](#).
- 2) For further clarification as to the meaning of **grey highlighted terms**, please refer to the "Definitions" section (see Annex 2) where you will find these terms arranged alphabetically.
- 3) We would be grateful if you could limit the report to no more than 20 pages maximum.
- 4)

PART 1: TESTS FOR CORPORATE LIABILITY

General information about the nature of corporate liability

- 1.1 Please provide a brief description of the nature of corporate liability in the jurisdiction. Your answer should cover both (a) *criminal and/or quasi-criminal liability* AND (b) *liability under private law*.

Further guidance:

- a) For instance, does the law of the jurisdiction recognise a concept of corporate **criminal liability**? If so, is this a general rule, or is it only applied in limited circumstances? If not, does the law of the jurisdiction recognise the possibility of corporate liability for **quasi-criminal offences** or **administrative offences**?
- b) Does the law of the jurisdiction recognise the possibility of corporate liability for wrongs under **private law**? If so, is this a general rule? Are there exceptions to this rule?

- 1.2 To the extent that corporate liability is recognised, how is liability attributed to a corporate entity (a) under **criminal law** or **quasi-criminal law** and (b) under **private law**?

Further guidance:

Please describe:

- (a) The matters that must generally be proved to establish liability;
- (b) The tests that govern how, when and to what extent the acts, omissions and intentions of individuals (or groups of individuals) can be imputed to a **corporate entity** in order to establish the liability of the corporate entity;
- (c) The tests that are used to determine which acts and/or omissions have sufficient proximity to the corporate entity (and/or the business of the corporate entity) to be treated as acts and/or omissions of the corporate entity, and which do not.

- 1.3 Please provide a brief description of the law of the jurisdiction relating to **secondary liability** (a) under **criminal law** and **quasi-criminal law** and (b) under **private law**.
- 1.4 To the extent that corporate liability is recognised under the law of the jurisdiction (see Qu. 1.1 above), please provide a brief description of the tests used to determine whether a **corporate entity** may be liable on the basis of theories of **secondary liability** (a) under **criminal law** and/or **quasi-criminal law** and (b) under **private law**.

Further guidance:

- a) For instance, what facts must a **corporate entity** be aware of to establish liability, and how is that **corporate knowledge** established in practice?
- b) What acts and/or omissions may (or may not) be attributed to a **corporate entity** under tests for **secondary liability** applied in the jurisdiction?
- c) What kind of relationship (or level of “proximity”) must exist between the **corporate entity** (and/or the business activities of the **corporate entity**) and the harm and/or abuse committed by a **primary perpetrator** for courts to be able to establish that the corporation should be liable (whether under criminal law, quasi criminal law or private law) on the basis of theories of secondary liability such as “complicity”?

- 1.5 In the case of a **parent company** of **subsidiaries**, is the liability of the **parent company** for the acts of its **subsidiaries** governed by general rules of **secondary liability** (see Qu. 1.3 and Qu. 1.4 above) or do special rules apply? If special rules apply, please give brief descriptions of these rules, and the circumstances in which they will apply.
- 1.6 Can a **corporate entity** be held liable under theories of **secondary liability** in cases where the **primary perpetrator** cannot be held criminally responsible (e.g. because the **primary perpetrator** cannot be identified, has absconded, or can claim the benefit of some legal immunity)? If so, please give details.
- 1.7 To what extent may the exercise (or non-exercise) of **due diligence** have a bearing on the liability of a corporate entity (a) under **criminal law** and/or **quasi-criminal law** and (b) under **private law**.

Corporate liability in cases of allegations of business involvement in serious human rights abuses

- 1.8 Please review the list that appears in Box 1 below. For each category, please answer the following questions with respect to the legal position in the jurisdiction:
- (i) Is this an act or omission (or series of acts or omissions) for which a corporate entity (as opposed to a **natural person**) could be held liable under **criminal law** and/or **quasi-criminal law**? If so:

- a. Would it be **criminal liability** or **quasi-criminal liability**?
 - b. What public bodies in the jurisdiction would be responsible for investigating breaches of the law and taking enforcement action? Are there any special or additional procedural steps (e.g. additional approvals that must be sought) that apply specifically in relation to these kinds of offences?
 - c. Could a corporate entity potentially be liable as a **primary perpetrator**?
 - d. Could a corporate entity potentially be liable for the acts of a **third party** (including a **subsidiary**) under any theories of **secondary liability**?
 - e. Do the relevant criminal or quasi-criminal regimes extend to acts taking place outside the territory of the jurisdiction or are they confined to within-territory harms and abuses?
- (ii) Would this amount to an act or omission (or series of acts or omissions) which could give rise to a **cause of action** under which a victim (or the victim's dependents or a group of victims and/or their dependents) could sue a **corporate entity** for remedies under **private law**? If so:
- a. Could a corporate entity potentially be liable as a **primary perpetrator**?
 - b. Could a corporate entity potentially be liable for the acts of a third party under any theories of **secondary liability**?

Further guidance:

In your answer to Qu. 1.8(ii)(b) above, please take account of both:

- a) The liability of a parent company for the acts and/or omissions of subsidiaries; and
- b) The liability of a corporate entity for the acts and/or omissions of state agencies such as the military, the police and other security forces and law enforcement bodies.

- c. could a corporate entity be liable for harms and/or abuses taking place outside the territory of the jurisdiction or is the scope of the corporate entity's liability confined to within territory harms and abuses?

Box 1: Acts constituting international crimes and other potentially serious human rights abuses

- Murder;
- Serious physical assault;
- Torture and other forms of cruel, inhuman and degrading conduct;
- War crimes;
- Crimes against humanity;
- Genocide;
- Summary or arbitrary executions;
- Enforced disappearances;
- Arbitrary and prolonged detention;
- Enslavement;
- 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 and/or damage;
- Other (a) grave and systematic and/or (b) large-scale abuses of economic, social and cultural rights.

PART 2: QUESTIONS RELATING TO THE FINANCIAL RISKS OF LITIGATION TO CLAIMANTS

- 2.1 What procedural options are open to claimants in the jurisdiction to help reduce the costs of litigation (e.g. class actions, specialist courts, expedited judicial processes, non-judicial grievance mechanisms, court-facilitated mediation, etc.)?

Further guidance:

If there are non-judicial grievance mechanisms in existence in or accessible from the jurisdiction that are specifically relevant to any of the categories of abuse or harm listed in Box 1 above, please briefly describe them here.

- 2.2 In the case of a private law claim by an individual against a corporate entity for remedies for a wrong under private law, who, as a consequence of cost shifting rules, ultimately bears the legal costs of the claimant and the defendant:
- (i) In the event that the claimant is successful?
 - (ii) In the event that the claimant is unsuccessful?

Further guidance

In your answer to 2.2, it would be helpful if you could give a brief indication as to how these rules work in practice. For instance, do the applicable cost shifting rules depend on the type of case involved, or the type of parties involved?

- 2.3 In the case referred to in Qu. 2.2 above, do the courts have any discretion under the laws of the jurisdiction as regards the allocation of

legal **costs** between the claimant and the defendant? If so, can you briefly describe the factors the judge may take into consideration in making decisions regarding the allocation of **costs**?

- 2.4 If, under the rules of the jurisdiction, an unsuccessful claimant may be liable for a defendant's **costs** (see your answer to Qu. 2.2ii above), please provide a brief description of the circumstances (if any) in which a claimant may be required to provide **security for costs**?

PART 3: SANCTIONS AND REMEDIES

- 3.1 In relation to each of the categories listed in Box 1 for which some form of corporate liability is a possibility (see your answers to Qu. 1.8 above), please provide information about the sanctions and remedies that may be imposed on a corporate entity (a) in the event of a finding of **criminal liability** or **quasi-criminal liability** and (b) in the event of a finding of liability under **private law**?

Further guidance:

- a) In relation to monetary fines and financial damages, please provide an indication, if possible, of the typical numerical range of various types of financial penalties or damages, how these are calculated in individual cases, the extent to which there is judicial discretion and, if so, the factors that are taken into account in the use of this discretion.
- b) If mitigating factors (e.g. the extent to which the company had exercised due diligence) are taken into account in the way that sanctions and remedies are determined by the courts, please indicate this, giving examples if possible.
- c) If there are any special regimes relating to any of the categories listed in Box 1 above (including traditional regimes) which may have a bearing on the kinds of sanctions that may be imposed or the remedies that may be available (including traditional sanctions and remedies), please indicate them and provide a brief description of their effect.

- 3.2 Can you identify any laws or legal regimes, or aspects of any legal regimes, in operation in the jurisdiction that are designed to have a **preventative** effect in relation to the involvement of corporate entities in any of the categories listed in Box 1 above. If so, please provide a brief description of these and their potential, actual or intended impacts.

- 3.3 Can you identify any trends or recent developments in the jurisdiction concerning (a) enforcement of standards against corporate entities (b) corporate sentencing in **criminal** or **quasi-criminal** cases or (c) design of remedies for corporate defendants in **private law** cases? If so, please provide a brief description, with some information about the underlying policy justifications and objectives, if possible.

Further guidance:

For this question, please take into account, as far as possible, trends and developments in other fields of regulation, such as financial regulation, securities regulation, money laundering, anti-bribery, competition law, consumer law, environmental law and employment law.

Please review the three hypothetical case studies in Annex 1 and, for each case study, answer the following questions about the potential legal responses in the jurisdiction.

- 4.1 Would there be grounds to bring **criminal charges** or **quasi-criminal charges** against (a) the companies concerned (b) their officers and/or managers or (c) any other individuals? If so:
- (i) Please specify what these charges could be. (**Note:** Please refer to the relevant provisions of the criminal code or other applicable statutes, as appropriate).
 - (ii) Which regulatory and/or law enforcement bodies would be involved?
 - (iii) What are likely to be the key challenges (both practical and legal) in prosecuting such offences?
 - (iv) What remedies could potentially be obtained in the event that the liability of the company (or companies) is established?
- 4.2 Would the individuals who have suffered harm or loss (or their dependents) have grounds to make a claim under **private law** for remedies against any or all of the companies concerned? If so:
- (i) Please give details as to the possible legal basis (or bases) of such a claim.
 - (ii) What are likely to be the key challenges (practical and legal) in establishing the **private law liability** of the companies involved in this case?
 - (iii) What (if any) sources of funding (other than personal resources) could a claimant look to in order to fund their claim?
 - (iv) What remedies could potentially be obtained in the event that the liability of the company (or companies) is established?
- 4.3 In case studies 1 and 2, what principles would govern the determination of liability (if any) of Company Y for the acts or omissions of its subsidiaries (see case study 1) or suppliers (see case study 2)
- (i) under criminal or quasi-criminal law?; and
 - (ii) under private law.

Annex 1

Case study 1

Company Y is incorporated in [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 [jurisdiction]. Company X’s business premises are all located in [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 [jurisdiction]. Site A is located in [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, 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 2

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 (the owners may be public or private). A corporate entity has the right to carry on business and enter into transactions under its own identity.

Corporate knowledge means, for the purposes of ascertaining the legal liability of a corporate entity, the knowledge (or “state of mind”) of the corporate entity (as determined by legal tests) as opposed to the knowledge of individual officers, managers or employees.

Crimes against humanity has the meaning given in Article 7 of the Rome Statute of the International Criminal Court. See: <http://legal.un.org/icc/statute/romefra.htm>.

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.

Economic, social and cultural rights refer to the rights guaranteed in the International Covenant on Economic, Social and Cultural Rights and include the rights to adequate food, to adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation, and to work.

Enforced disappearances of persons has the meaning given in the Rome Statute of the International Criminal Court, namely “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”.

Enslavement has the meaning given in the Rome Statute of the International Criminal Court, namely “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.

Forced labour has the meaning given in Article 2 of the ILO Forced Labour Convention, 1930. See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029

Genocide has the meaning given in Article 6 of the Rome Statute of the International Criminal Court. See <http://legal.un.org/icc/statute/romefra.htm>.

Human trafficking has the meaning given in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, namely “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

Immunity means a legal exemption from (a) a legal requirement or sanction or remedy that would otherwise apply or (b) which operates to prevent a party from being sued or prosecuted without its consent and includes, for the purposes of this questionnaire, sovereign (or “state”) immunity.

Labour rights mean, for the purposes of this questionnaire, human rights arising from and/or relating to the relationship between employees and their employers and include the rights listed in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. See <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

Natural person means a human being, as opposed to a **corporate entity** (which may also be referred to as a “artificial person” or a “legal person”).

Non-judicial grievance mechanisms has the meaning given in the UN Guiding Principles. See Guiding Principle 25, commentary The term encompasses mechanisms such as ombudsman services, regulatory complaints mechanisms, complaints mechanisms established under industry, multi-stakeholder or other collaborative initiatives or other non-judicial grievance mechanisms (state-based or non-state-based).

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.

Torture has the meaning given in the Rome Statute of the International Criminal Court, namely “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

War crimes has the meaning given in Article 8 of the Rome Statute of the International Criminal Court. See <http://legal.un.org/icc/statute/romefra.htm>.

Worst forms of child labour has the meaning given in Article 3 of the ILO Convention on the Worst Forms of Child Labour, namely:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.