Corporate liability for gross human rights abuses

Towards a fairer and more effective system of domestic law remedies

A report prepared for the Office of the UN High Commissioner for Human Rights

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DISCLAIMER: This study was commissioned by OHCHR from Dr. Jennifer Zerk to enhance the understanding of legal and practical issues related to domestic law remedies for cases of corporate involvement in gross human rights abuses. The contents of this paper do not necessarily reflect the views of OHCHR.
# Table of Contents

Foreword ............................................................................................................... 2

About the author ................................................................................................. 3

Acknowledgements ............................................................................................. 3

Table of Contents ............................................................................................... 4

Executive summary ............................................................................................ 7

Introduction ....................................................................................................... 13

Methodology ...................................................................................................... 15

Chapter 1: How do businesses become implicated in gross human rights abuses? ........................................................................................................... 16

1.1 Scenarios ..................................................................................................... 16
1.2 Case studies ................................................................................................ 17
1.2.1 Allegations of direct and primary responsibility for gross human rights abuses .................................................................................................. 17
1.2.2 “Commercial supply of technology, goods and services” cases 18
1.2.3 “Financial and logistical assistance” cases (including in the context of disputes or conflict in relation to business activities) ............... 20
1.2.4 “Investment” and “doing business” cases .......................................... 23
1.3 Corporate complicity: a key concept ......................................................... 24
1.4 Gross human rights abuses: definitional problems and scope ..... 25
1.5 Special considerations in relation to conflict-affected and high risk areas .............................................................................................................. 29
1.6 Conclusions ............................................................................................... 30

Chapter 2: Key concepts in domestic law responses to business involvement in gross human rights abuses ................................................................. 31

2.1 Criminal law .............................................................................................. 31
2.1.1 Elements of criminal responsibility under domestic law ............... 31
2.1.2 Corporate criminal responsibility .......................................................... 32
2.1.3 Corporate and individual complicity ................................................. 37
2.1.4 Issues relating to the punishment of corporate entities ................. 39
2.1.5 Criminal law remedies in practice ..................................................... 39
2.2 Private law claims for damages ................................................................. 43
2.2.1 Elements of legal liability ................................................................. 43
2.2.2 Gross human rights abuses as torts .................................................... 45
2.2.3 The allocation of liability within corporate groups ..............................45
2.2.4 Liability for the actions of third parties ...........................................47
2.2.5 Private law remedies in practice: recurring issues and problems 48

2.3 Conclusions .............................................................................................52

Chapter 3: Domestic law responses to business involvement in gross human rights abuses: the international standards ..............................................54

3.1 The State’s “duty to protect” .................................................................54
3.2 Extraterritorial aspects of the State “duty to protect” .......................55
3.3 The corporate responsibility to respect .................................................56
3.4 Access to remedy..................................................................................56
3.4.1 General principles ............................................................................56
3.4.2 Mechanisms ......................................................................................57
3.4.3 Standards of conduct for domestic judicial mechanisms ...............58
3.4.4 Treatment of victims.........................................................................58
3.4.5 Avoiding and dismantling barriers to remedy ..............................59
3.4.6 Limitations periods...........................................................................60
3.4.7 Remedies and sanctions ..................................................................61
3.5 Conclusions .............................................................................................62

Chapter 4: Domestic law responses to business involvement in gross human rights abuses: the reality .................................................................63

4.1 Serious, numerous and widespread barriers to accessing remedy 64
4.1.1 Legal and procedural barriers .........................................................65
4.1.2 Practical and financial barriers .......................................................79
4.1.3 Barriers to justice: some conceptual problems ..............................87
4.1.4 Consequences of barriers to remedy .............................................88
4.2 Distortions in patterns of distribution and use of domestic legal mechanisms .................................................................................................89
4.2.1 The present picture ..........................................................................89
4.2.2 Developments and trends that may alter patterns of distribution and use in future ..........................................................................................95
4.3 Legal uncertainty ...................................................................................98
4.4 Unevenness in levels of legal protection and inequalities in the ability of different groups to access justice .................................................99
4.5 Other possible consequences of differences in legal standards and conditions between jurisdictions .................................................................101
4.5.1 Obstacles to international cooperation ............................................101
4.5.2 Lack of proactive behaviour on the part of domestic law enforcement agencies ..............................................................................................102
4.5.3 Lack of a “level playing field” for companies .................................102
4.6 Conclusions .............................................................................................103

Chapter 5: A way forward.............................................................................105
5.1 Is convergence a realistic and desirable goal? ................................. 106
5.1.1 Building greater consistency in domestic approaches: some comments on the applicability of “anti-bribery” models ....................... 106
5.1.2 Potential pitfalls of convergence.................................................. 107
5.1.3 Achieving convergence in practice: practical and technical issues relating to scope, standard-setting and implementation .............. 108
5.1.4 Practical value of pursuing binding “convergence” initiatives as a way of improving access to remedy: a preliminary assessment........ 110
5.2 Recommended next steps .................................................................. 111
5.2.1 Consult and clarify ......................................................................... 111
5.2.2 Further activities to build know-how and capacity of domestic prosecution bodies................................................................. 113
5.3 Final comments .................................................................................. 113

Glossary and Abbreviations ........................................................................ 115

Appendix 1 .................................................................................................. 116

Appendix 2 .................................................................................................. 117
have relied on primarily universal jurisdiction under a piece of legislation that is now repealed.48

The practical, investigative and evidential challenges involved in prosecuting an extraterritorial criminal case, like the ones profiled above, should not be underestimated. Case study 6 (Lima/Israel) illustrates some of the difficulties. In that case, the authorities reportedly initially rejected the complaint partly on the basis that it involved overseas activities that would be difficult to investigate, especially without the cooperation or support of the authorities of the relevant State. In many jurisdictions, prosecutors have wide discretion as to whether or not to pursue a matter, and availability of resources (both investigative and prosecutorial) must surely be a relevant consideration in deciding whether or not to proceed. As with other areas of criminal law, extraterritorial crimes can be extremely difficult to investigate and enforce in practice, without practical support from other affected States.49

2.2 Private law claims for damages

2.2.1 Elements of legal liability

In addition to criminal law proceedings, most jurisdictions provide for the possibility of private claims for compensation for wrongful behaviour. While these kinds of claims are not in most cases aimed at gross human rights abuses specifically, they are a potential means of obtaining legal redress, provided the behaviour complained of falls within the relevant domestic law tests for liability.

The definition of wrongful behaviour employed in each domestic system is therefore key. In both common law and civil law jurisdictions, behaviour can be “wrongful” based either on the intent of the perpetrator or because of negligence. “Intentional” torts in common law systems (United States, United Kingdom, Australia, Canada, New Zealand) include assault, battery, and false imprisonment. Additional categories of intentional tort recognised in the United States include “wrongful death” and “intentional infliction of emotional distress”.

There are overlaps between intentional torts and crimes under domestic penal codes. Many jurisdictions permit parallel civil and criminal proceedings arising from the same wrongful behaviour and, because of different standards of

48 Belgium’s 1993 Act Concerning Punishment for Grave Breaches of International Humanitarian Law has proved extremely controversial. Following amendments in 1999, the legislation provided for universal jurisdiction over crimes against humanity, genocide and war crimes and gave victims the right to initiate complaints. In 2003, the Act was substantially amended and then repealed in 2003 in favour of new laws generally requiring there to be a greater connection (e.g. nationality of the offender or the victim) between the alleged crimes and Belgium. Cases where neither the victims nor the perpetrators were Belgian nationals would only be allowed to proceed where the alternative jurisdiction did not have the institutions adequate to allow for a fair trial.

proof (beyond reasonable doubt in criminal cases and “balance of probabilities” in civil cases) it is not unusual for a private law claimant to succeed in a tort-based case despite a criminal prosecution being unsuccessful. In some jurisdictions (e.g. Germany, Japan), the requisite element of “wrongfulness” or “illegality” is supplied directly by the content of the domestic penal code or other provisions designed to protect legal rights and private interests. In a number of civil law jurisdictions (Belgium, France and Ukraine), victims can join their claims for civil recovery to criminal proceedings.

In both civil and common law jurisdictions, findings of negligence turn on the questions of whether the damage suffered by the claimant was “reasonably foreseeable” to the defendant and, if so, whether the defendant had acted in a reasonable way given the risks (e.g. whether all steps that could reasonably have been taken to avoid the risks were in fact taken). In common law jurisdictions, these ideas find expression as duties and standards of care. To make out a successful claim for negligence, the claimant must show first, that there was a duty of care; second, that this duty of care was breached; third, that the breach of duty resulted in damage or loss to the claimant and, finally, the damage suffered was not too remote to justify compensation in the circumstances.

Where the defendant is a corporation rather than a natural person, acts and knowledge (necessary to establish negligence) and intent (necessary to prove state of mind for an intentional tort) can be imputed to the corporate body in much the same way as in criminal cases. This means that, in most jurisdictions, a finding of negligence will typically depend upon what was known and done by the company’s “directing mind and will” (i.e. senior managers and board members).

Proving who knew what and when in a corporate organizational structure can be very challenging for claimants (especially in “non-contractual” or personal injury cases) and is often cited as a significant obstacle to their ability to successfully prosecute a private law claim (see further section 4.1.1 below). In some cases, the burden of proof may be reversed such that, instead of placing the burden on the claimant to prove that there was negligence, the burden falls instead on the defendant to prove absence of negligence. In common law jurisdictions, for instance, the claimant may be able to rely on a doctrine known as res ipsa loquitur (or “the facts speak for themselves”). This doctrine allows negligence to be inferred from the relevant facts, without the need for the claimant to lead evidence relating to what the relevant actors did and did not know at material times. In a limited range of cases, tort-based liability may even be “strict”, meaning that liability flows directly from an act and outcome, without the need to prove any negligence on the defendant’s part. In common law systems, the rule in Rylands v Fletcher has been used to create a body of law whereby defendants may be held strictly liable for environmental damage arising from “ultrahazardous activities”. In the United States this has been used fairly extensively. In other common law jurisdictions, however its use has been much restricted (United Kingdom) or even abolished altogether (Australia).

2.2.2 Gross human rights abuses as torts

With the exception of the United States (see further discussion below), no State has yet developed a civil recovery regime specifically for gross human rights abuses. Instead, claimants wishing to use private law remedies as a way of gaining redress for gross human rights abuses must bring their claim within the parameters of established bases of liability under domestic law. Alternatively, as noted above, victims may, in some civil law jurisdictions, join criminal proceedings as *parties civiles*.\(^{50}\)

In many cases, framing gross human rights abuses in tort law terms is not overly difficult, at least at a conceptual level. The crime of torture, for instance, could be framed in terms of the intentional torts of “assault” or “battery”. Other crimes against humanity, such as enslavement or severe deprivation of liberty, could fall within the tort of “false imprisonment”. In the United States, as noted above, there are additional heads of liability that are potentially relevant to the crime of genocide, such as “wrongful death” and “intentional infliction of emotional distress”.

On the other hand, there are a number of gross human rights abuses that do not fit so easily into established categories of tort-based liability. The crime of apartheid, for instance, does not have an obvious analogy in tort law (although it may be possible to frame a cause of action based on its psychological and physical effects). It is also questionable whether the intentional torts of “assault” and “battery” really convey the gravity and level of condemnation that is appropriate to the crime of torture. It is also relevant to note in this context that many jurisdictions do not provide for punitive damages in private, tort-based cases, on the basis that compensation is intended to be compensatory, not punitive.

However, it is possible that in some jurisdictions (e.g. Netherlands, Japan, South Africa), the fact that an act amounts to a violation of international law can itself provide the element of “illegality” on which to base a private law claim. In the Netherlands (a “monist” legal system) civil law suits can be used to enforce human rights of horizontal effect, such as labor laws and also (arguably) internationally recognized human rights. In Japan, it is arguable that violations of international law could satisfy the required element of “illegality” (or “infringement of rights”) necessary for the establishment of a “tort” under the Japanese Civil Code, although this is untested.

2.2.3 The allocation of liability within corporate groups

The doctrine of separate corporate personality, discussed above,\(^{51}\) means that one member of a corporate group will not automatically be held legally responsible for the acts or omissions of another. A parent company, for instance, does not necessarily owe a duty of care to those affected by the activities of its subsidiaries. And even where a duty of care is found to exist, a

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\(^{50}\) See p.42 above.

\(^{51}\) See p. 38 above.