

Legal liability of Transnational Corporation.

1. The approach is not what “standard” but what conduct.

Representative from Ecuador on Tuesday, said that we need something that ‘works’ and that **we don’t need to build a perfect legal structure or need precise definitions of concepts such as “transnational corporations,”** citing other instruments as examples (the OECD MNE Guidelines and the ILO Tripartite Declaration). But if **we are speaking of legally binding instruments,** we do need **precise definitions** and **clear processes** - that is what the international rule of law requires and it is also what victims will demand as they seek redress.

One initial comment is that the **literal text and formulation of the panel might set us off in the wrong direction:** societies, whether local, national or global, first need to decide on which “conduct” they want to promote and which norms and conduct they want to dissuade. So, it was perhaps unintentional or a matter of translation, but I think it is **fairly impossible to begin with the question of standards of liability;** rather, you must start with what kinds of conduct we want to address as gross violations., let me quote Dr. Jennifer Zerk herself: "the first difficult of achieving convergence in practice (principles and policies) comes with finding a **suitable definition of the corporate conduct to be targeted that corresponds to the full range of behaviors that amounts to gross human rights** violations and deals adequately with the concept of corporate complicity” (for the Office of the High Commissioner said in its recent report)

The question of which conduct and what standard of liability should be applied in a binding instrument should be driven by a **victim-centered** (to be consistent with UN Guiding Principles’ Pillar 3.) And by a **problem-solving and pragmatic approach.**

2. How to identify a Conduct

In taking a victim-centered approach, we must not begin with formalist and legalist statement that **“all international human rights should be covered in a binding instrument and considered in their fully integrated nature.”** Rather, we should ask **what are the specific immediate needs of victims** and how do these relate to a negative business conduct?

The next step is an analysis with respect to all of the different human rights norms and types of business conduct in a **methodical fashion so as to** determine the art of the possible: where **governments are willing** to commit their own jurisdiction on these areas in a convergence of policy and principles.

In doing so there are some other questions on which need to reflect:

- For which norms is it even **prudent or realistic to expect that companies** could be held accountable **as the primary actor**? (I will refer to that later)
- We need to bear in mind that states themselves have not universally **subjected** themselves to **international accountability** to their duty to protect with respect to **all** human rights, What happens **when states themselves do not yet bind themselves to report on their protection** (even in the relatively light form of mandatory reporting to the UN periodical review system)
- And how to address the challenges when a company is **implicated in such violation not by itself but in tandem with a government actor**, the so called corporate complicity.
- Complex and changing structure of companies which are composed of different legal entities.

3. Liability?

A victim-centered approach might also inform what kinds of liability to impose, including how efficient and effective remedy would be depending on the type of liability imposed. Arguably, until we have reached agreement on which norms we want to cover in the binding instrument, **we will need to postpone the discussion on what kinds of liability to impose.**

4. Liability and due diligence

In any case, I believe that any reasonable approach understands that both civil liability but above all criminal liability applying to any natural or legal person at domestic and international needs legal **certainty**. We further need to clearly focus **violations coming directly and primary from business or from their representatives**. These conducts are different that those are linked to their own business operations with other economic actors but where they have “leverage” capacity and a duty to prevent and mitigate (supply chains) within the due diligence approach. There are important reasons of legal certainty, fair treatment (justice) and efficiency in the preservation of Human Rights which requires to be accurate in the definition of any liability. It is also coherent with the **serious and strong answer that the legal framework normally provide or should provide.**

The due diligence approach as appear in the UNGP goes beyond the legal or not legal liability and has to do with the expectations of society which, by the way, could entail important negative economic and reputational impact (different from a legal liability) if these expectations are far from being satisfied. Experience very often shows that irresponsible behaviors could entail sometimes much more serious economic impacts that a long legal process linked to a theoretical civil liability process. But it will be

inaccurate to systematically refer to this as an area of legal liability. This would also threaten to undermine clear guidance in the UNGPs (Commentary to Art. 22) and the MNE Guidelines about which entity has responsibility to remedy harms.

5. Liability/extraterritoriality:

But as raised in several occasions by report prepared for the Office of the UN High Commissioner and also by other organizations which are not suspected of keeping a high pro-business approach, the answer to the challenges related business liability, whereas it is in domestic or international has to do with the problems raised by the extraterritoriality principle that is consubstantially expected to entail.

At the end of the day, elements like the cost of bringing transnational litigation, differences in legal standards and approaches at domestic level, lack of clear responsibilities among different governments in case of cross border conflicts, among other elements, legitimately question this approach as the most efficient to preserve the victims' rights.

And again, as the **report prepared for the Office of the UN High Commissioner for Human Rights, Dr. Jennifer Zerk, mentions , one of (if not the) the main problems is the “lack of capacity and resources – financial, technical, legal- at local level in many jurisdictions, causing many claimants to favour extraterritorial legal proceeding over local ones, which” not only adds costs and difficulties of legal proceedings, “but also serves to further entrench (consolidate) the original capacity problems”.**

At the end of the day, we all have in this room the moral obligation of not denying where the problems are. Victims of gross human rights violations need of a jurisdictional Forum which is really convenient: a forum where the parties are located, a forum where the witness are located, a forum where the evidence can be found, a forum which is not highly unaffordable, a forum which is familiar with local regulation. We have the moral obligation of not denying this truth, of not diverting the attention on solutions are not such, to those who are asking for effective answers. Some of these problems can be addressed by a significant injection of resources, both financial and technical at domestic level but also responsible attitude of domestic Governments are needed. Of course, there is some important precedent in universal jurisdiction and hearing extraterritorial claims, at domestic level but also at international related to genocide, war crimes among other, but this is not applicable for most other human rights impacts.

6. TC as source of wealth , prosperity.

Finally, let me underline that having heard many of the interventions I have the impression that most of the main concerns, difficulties and urgencies that the international community faces when preserving the respect of Human Right Violations from gross violations have to do with a systematic violation of these rights from International corporations.

Let me finally and humbly remind you how wrong this thinking is. I will not refer to the sincere effort made by many of these global actors in the recent years to bring the Human Right approach right to the hardcore of their operations. I will just call your attention on the transformation that investment and trade has brought to mitigate situation of poverty, misery and injustice in many countries. I will just refer to the upgrade of working conditions, skills and competences, innovation, wealth and prosperity that they have brought directly or indirectly to millions of individuals . The problem , the former Secretary General of this organization recently stated, is not the presence of business that are in its most majority acting responsible but rather its absence.

This is also what is at stake and we have to be responsible in our answers.