

**Legal liability of TNCs and other business enterprises:  
What standards and for which conducts?**

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Excellencies, distinguished delegates, ladies and gentlemen,

The theme of this panel is critical to developing effective legal remedies against those companies which act in disregard of human rights norms applicable to corporate behaviour. In my view, a number of principles should be kept in mind while devising standards of legal liability of corporations.

- 1) First of all, the legal standards of liability should be fair to both companies and victims. Nevertheless, special attention should be paid to the disadvantaged position of victims in relation to TNCs which have access to much more resources and expertise than the affected communities.
- 2) The stipulated legal rules should be able to respond to well-known obstacles that exist in holding companies accountable through litigation. I will in particular highlight three of such obstacles: complex corporate structures built on the bedrock of the twin principles of separate corporate personality and limited liability; the doctrine of *forum non conveniens*; and procedural rule governing discovery proceedings, standing, legal aid, class action, and the limitation period.
- 3) Different standards would have to be applied for civil liability and criminal liability. Moreover, considering that states have diverse legal systems and traditions, the proposed treaty should provide states some flexibility as to how standards are applied under domestic systems.
- 4) It will be desirable to achieve legal certainty regarding standards as much as possible, so that the relevant parties could assess their legal positions beforehand and thus minimise chances of frivolous or vexatious litigation.
- 5) In view of the transnational nature of certain corporate wrongs, mutual assistance and cooperation among states during all stages of the legal process – from investigation and collection of evidence to extradition and enforcement of judgments – will be critical.
- 6) As companies could violate human rights both by actions and omissions, the treaty should regulate both situations. On the other hand, in terms of conduct settings, the proposed instrument should deal with three distinct types of corporate conduct: one's own conduct; the conduct of one's subsidiaries; and the conduct of one's supply chain partners.

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- 7) Last but not least, the treaty should propose appropriate standards to deal with situations of corporate complicity which could be with state agencies and state-owned enterprises or with other private corporate actors.

Madam chair, after proposing certain general principles that should guide the intergovernmental working group in drafting legal standards of corporate liability, let me discuss briefly two specific aspects: (i) the attribution of responsibility to a legal person; and (ii) the responsibility of a parent company for human rights violations done by its subsidiary.

In my view, the treaty should prescribe several alternative principles to attribute a wrongful conduct to corporations. This would not only accommodate the need for flexibility due to diverse legal systems, but also take care of differences in how corporations operate. The *mens rea* element of “intention”, “knowledge” or “negligence” could be established, for example, with reference to the existing policies and practices of a company. Corporate culture within a given group – whether it is the culture of conscious “hands off” approach or of “extensive supervision” – could also be taken into account to determine whether a company should be liable or not.

The other key issue that the treaty must deal with is the liability of a parent company for human rights abuses by its subsidiaries. The existing approaches to pierce the corporate veil in certain limited circumstances are highly problematic and should be changed. The direct duty of care approach developed by the courts in Australia and the UK tries to bypass some of the difficulties inherent in lifting the corporate veil. However, this legal bypass could be used only if certain conditions are satisfied.

I will, therefore, suggest that a parent company should be accountable for human rights violations by its subsidiaries as a matter of principle, unless the parent company can show that it did not know (or had no reasons to know) about the human rights violations in question, or that the violations took place despite the parent company taking appropriate preventive and redressive due diligence steps.

Such a limited rule will be appropriate on the ground of furthering justice. It would also be fair and equitable in economic terms: if a company is allowed to combine the financial or personnel assets of its subsidiaries to show the economic might of a corporate group, the same yardstick should apply in paying compensation to victims. Companies of a group should not be allowed to become an “enterprise” for business purposes but behave like distinct entities for human rights purposes.

To conclude, Madam chair, we should not assume that legal rules that have empowered companies to maximise profits and evade responsibility for public wrongs are either given or sacrosanct. Time has come to send a clear message to companies and corporate officials that when human rights are at stake, they will not be allowed to hide behind corporate forms.

Thank you very much for your attention.