

PANEL 5: LEGAL LIABILITY

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Thank you, Mr. Chairperson. I take this opportunity to thank the Chairmanship of this Intergovernmental Working Group for the invitation to present some reflections in relation to the fifth section of the Elements, which addresses a question so fundamental as the legal liability within the domestic normative framework of States. It is a great honor for me to address this Intergovernmental Working Group. Of course, I would like to underscore that this intervention is made on an individual basis, and not as an advisor to the Mexican Delegation participating in this session; thus, my comments shall not be considered under any circumstance as representing the position of the Mexican State.

I also wish to extend my recognition to the Presidency for the vast array of options that have been included in the Elements, which constitute, without a doubt, an important basis to discuss and define the aspects that shall be addressed in the draft text of the legally binding instrument.

The Elements document focuses in four broad areas or categories in which legal liability should be established for corporate involvement in human rights abuses, one of which addresses the international responsibility of the State for its actions or omissions in effectively regulating non-State actors under their jurisdiction or territory. The introductory text to this section stresses that civil and administrative penalties should be strengthened in cases of human rights violations or abuses by businesses, and that States that do not already contemplate the criminal liability of legal persons should consider including this type of provisions in their legislative frameworks, in addition to separating the individual criminal liability of decision-making corporate officers from the criminal liability of the legal entity. To some extent, the focus of a future draft instrument would thus revolve around regulating conducts that may be in breach of international human rights law, which would then be fundamentally different to those treaties recognizing general human rights or protecting specific vulnerable groups.

In my view, there are several positive aspects in the Elements document regarding legal liability. For example, it proposes a general obligation on States parties to “adopt legislative and other measures in accordance with their national legal systems and principles” to establish the legal liability of businesses, which may be of a criminal, civil or administrative nature, “resulting from their activities throughout their operations”. This clearly echoes two significant points: first, the fact that such liability may arise from activities over which businesses have a duty of care, including in their supply chains or business relationships, which would be in line with the suggested preventive measures revolving around the concept of human rights due diligence, and which could of course cover the transnational nature of corporate activities that the scope of this instrument would intend to address; and second, they also reflect the proposal made by the Special Rapporteur on Crimes Against Humanity of the International Law Commission, who proposed in Draft Article 5 that “Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.”

Thus, the fact that the Elements document proposes a broad clause recognizing the diversity in the existing legal systems of the world, and leaving to the discretion of States to decide the best approach under their national legal system and principles to implement this obligation, would be respectful of the margin of action that States need to implement their international obligations. This finds several equivalents in other international human rights instruments, such as in article 2.1 of the Convention Against Torture, or in article 3.4 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, both of which clearly leave to the States' discretion the type of domestic measures required to give effect to the provisions contained in those instruments. In a sense, this demonstrates the plausible diplomatic and legal viability that such a general proposal could have.

In this regard, it is equally important that the Elements propose that civil liability shall not be contingent on criminal liability; that the finding of individual liability shall not exclude the liability of the legal person, regardless of whether it is of a civil or criminal nature; or that participation, complicity or an attempt to commit any criminal offence recognized as a violation or abuse of human rights may give rise to criminal liability. As broad principles, which could be accompanied by a general clause pointing out the margin of action of States depending on their legal systems or principles, these aspects would also find a basis in other existing international human rights instruments.

However, this would not necessarily be the case for those provisions that do go into more detail and mandate States to adopt specific legal actions, such as in those focusing on administrative or criminal liability, which could potentially be contrary to their domestic legal principles or system, and thus be ultimately rendered ineffective. Therefore, some of these areas are better left to the decision of States at the domestic level, rather than being determined in an international legal instrument.

From a different standpoint, the aspect of extraterritoriality, implicit in several sections regarding civil liability, is another interesting addition to this section, particularly if considered in relation to the human rights due diligence that may be imposed upon corporations as a matter of domestic law in accordance with the Elements. In that regard, it is useful to quote the widely-known *Lotus* judgment by the Permanent Court of International Justice, which states: "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to *persons*, property and *acts* outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." For the purpose of these Elements, this judgment would give appropriate ground for States to determine, perhaps in a multilateral space such as this one, if the time has come to implement this rule in relation to the complex and globalized economy and world that we live in. This passage speaks about *persons*, which could include legal persons, and *acts*, such as those that the Elements intend to cover. And, of course, this could not only refer to the regulatory or prescriptive aspect of extraterritorial jurisdiction, but also to its adjudicative dimension, which may be better suited for discussion in the panel on jurisdiction. As the International Law Commission has noted, "Although there appears to be a strong need for codification in this field, some may question whether the practice is sufficiently uniform or widespread to support a codification effort at this time. However, recent

developments in this regard indicate that practice may be converging towards a more uniform view of the law.”

Finally, in relation to the aspects included in the Elements regarding the international responsibility of the State, it is my opinion that the text mostly reflects the position adopted by the International Law Commission’s articles on responsibility of States for internationally wrongful acts, on the one hand, as well as the existing international *corpus juris* regarding the lack of human rights due diligence by the State to prevent or address human rights violations by non-State actors under its jurisdiction. However, the last point, implicitly referring to State-owned enterprises, would probably be better placed in the section of preventive measures, due to its focus on implementing due diligence as a means to prevent a human rights violation or abuse.

This point takes me to my final remarks. First of all, it is of notable importance that States and other participants in this process, as Rosalyn Higgins would say, take into account the necessity to base our work on the standards and principles laid out by general international law, in order to advance the protection of human rights in the business sphere under a recognized legal basis. International human rights law does not exist in a parallel universe; it cohabitates with other regimes of international law. As we continue to advance in this process, it is of utmost importance that we base it on widely accepted principles and practice of international law, in order to construct a regime that is both legally feasible and diplomatically viable.

Thank you, Mr. Chairperson.