**Legal liability**

1. Brief comments from my practical perspective as a lawyer who has spent past 25 years pursuing claims against MNCs, mainly against parent cos.

**Context**

1.    Key purposes of ZD are to create a system of legally enforceable national domestic laws across the globe, which require businesses to take reasonable measures:

(a) to prevent HR abuses arising from activities under their influence/control

(b)  to provide reparation for victims

2.    Primary focus of ZD on HR abuses occurring in multinational host states in developing countries where:

(a) HR abuses more likely to occur

(b) justice is less accessible by victims – this is generally **not** due to absence of appropriate and stringent laws to regulate conduct of local businesses but rather due to:

(i)           lack of enforcement of laws by authorities and

(ii)          victims’ lack of access to remedy, particularly access to information and ability to fund legal representation. Indeed, if access to remedy was improved in host states, imposing liability on businesses upstream (like parent cos) would only be necessary where operating subsidiary insolvent/defunct

3.    Thus, the imposition of legally binding obligations on businesses, such as MNC parent cos, is intended to facilitate legal action in MNC home states where there is a realistic prospect of legal accountability being achieved in practice.

4.    In the UK, MNC lit has led to development of tort-based legal duty of C on parent co. Essentially, parent co will owe a duty where it exercises control over aspects of activities/functions which cause harm that ought to have been foreseeable

5.    MNCs have  certainly taken heed of the risk of being sued in the UK- we know this from discussions with commercial lawyers and the plethora of briefing docs they produce about our cases

6.    But utilisation of UK principles only available:

(a) where UK parent co involved

(b) in states whose cts follow UK law

7.    Moreover, even where circumstances apply, there are obstacles to j in UK, particularly:

(a)    access to information – to prove control of MNC parent

(b) funding/legal representation – to run what is a far more complex case against an MNC parent than an operating subsid

8.    HRDD in UNGPS is broadly similar to UK parent co duty of c – it is also global - but not legally binding on business – understand from their lawyers that many MNCs have limited interest in UNGPs.  Only really interested in potential legal liabilities. Thus UNGPs of limited value wrt: prevention; redress for victims

**Legal liability provisions in the Zero draft**

9.  I note the concern that restriction in ZD to “business activities of a transnational character” would exclude access to remedy against state owned companies. In the current environment it seems to me, from a practical perspective, that this objection is exaggerated.

(a) First, there are presumably already laws in place locally that should make state-owned companies liable for HR abuse

(b) Secondly, as already stated, problem is inability to obtain practical access to justice at all in developing countries. Extending wording to include national companies won’t change this

10.     Article 10 sets out circumstances in which civil liability to compensate victims of HR abuses arises. It is not stated in the ZD, but obligation/duty, breach of which gives rise to liability under A.10, is presumably the DDD under A.9 (under “Prevention”): Requires States to pass domestic legislation imposing “due diligence” obligations (similar to HRDD in UNGPs) on businesses with activities of a transnational character

11.  Article 10.6 imposes civil liability on the basis of (a) control over operations (b) where there is*is strong and direct connection between its conduct and the wrong suffered by the victim*(c) where the harm is foreseeable (I know this is not what it actually says but I think this is broadly the idea)

12. Wording is unclear but  it seems to be contemplated that liability will broadly corresponds to the position under UK law ie that businesses will be liable for harm (a) caused by activities and/or subsidiaries over which they have control (b) that they should have foreseen. (NB although foreseeability is a requirement rather than an option under UK law).

13.  Various concerns have been expressed about A.10.6

(a) whether it may be limited to MNC parent subsidiary relationship and if so:

i) whether MNCs might rearrange their business relationships by not having subsidiaries and thereby avoid liabiity?

iii) whether it is clear that liability arises from it’s conduct rather than that  of its subsidiaries, the latter contravening the principle against piercing the corporate veil.

ii) whether companies like Apple could avoid liability as they deal directly with suppliers not through subsidiaries

Although wording unclear I think 10.6 b. is intended to cover all these concerns*“subsidiary or entity in its supply chain and where there is a strong and direct connection between****its****conduct and the wrong suffered by the victim”*

(b) also questioned whether MNCs that are complicit in HR violations by public security are covered by 10.6? I think they are meant to be 10.6c : *to the extent risk should have been foreseen of HR violations within its chain of economic activity*

14. Of course proving legal liability crucially depends on victims having access to internal corporate documents. This difficulty especially acute in MNC home states that only provide for limited disclosure eg Netherlands/Germany. In this regard:

(a) Under Article 8.4: *Victims shall be guaranteed appropriate access to information relevant to the pursuit of remedies.*

(b) Under Article 10.4 there is a “reversal of the burden of proof for the purpose of fulfilling the victim’s access to justice”. The reversal will place onus on business to show not in control.

**Conclusions**

15.  In conclusion, subject to clarification of the  precise wording , legal liability provisions seem to be broadly on the right track. But must emphasise these provisions cannot not be viewed in isolation. They will only be practically effective when combined with measures to enhance access to remedy that are referred to in other parts of the ZD. It is of course Pillar 3 Access to Remedy that has proved elusive under the UNGPs.  On their own, legal liability provisions  are of academic interest only.

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Article 10. Legal Liability

1. State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions. Liability of legal persons shall be without prejudice to the liability of natural persons.

2. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same actor.

3. Where a person with business activities of a transnational character is found liable for reparation to a victim, such party shall provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

4. Subject to domestic law, courts asserting jurisdiction under this Convention may require, where needed, reversal of the burden of proof for the purpose of fulfilling the victim’s access to justice.

Civil Liability

5. State Parties shall provide for a comprehensive regime of civil liability for violations of human rights undertaken in the context of business activities and for fair, adequate and prompt compensation.

6. All persons with business activities of a transnational character shall be liable for harm caused by violations of human rights arising in the context of their business activities, including throughout their operations:

a. to the extent it exercises control over the operations, or

b. to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim, or

c. to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.