

**SOUTH AFRICAN STATEMENT**

**5 TH SESSION OF THE OPEN ENDED SESSION OF THE IGWG ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES**

**GENEVA**

**ARTICLE 6, LEGAL LIABILITY**

**16 October 2019**

***Check against delivery***

Chairperson,

**On Article 6**

1. It is imperative that the treaty not only apply to all violations of international human rights law but also to international humanitarian law which constitutes crimes under international law. There must be no hierarchy of human rights. South African courts approach a conflict over competing rights by attempting to find a balance between the various rights, instead of promoting one over the other.
2. It will therefore be important that there is a link between liability and prevention. There must be a distinction between the controls of the company vs the control of the activities. Otherwise we could use beneficiary relationship or the ***flow of profit*** the example of this could be the Guiding Principles of Extreme Poverty.
3. ***In this regard, there seems to be a new narrative that the duty of Directors of a Company is to MAXIMISE shareholder profit. Such a narrative seem to promote a view that “anything you can get away with, goes, as long as your shareholders benefit”. Whilst Directors have a fiduciary responsibility, under Corporate Law to act in the best interest of the company, hopefully this instrument will impress on Directors that it should not be just to MAXIMISE shareholder profit, but that the adherence to Human Rights should be considered in their fiduciary responsibilities and thus in the best interest of the company. Incorporating such Human Rights fiduciary responsibilities, should greatly assist with prevention of Human Rights abuses and create a direct link to liability.***
4. In this regard Article 6 should have been specific to provide for a system of legal liability with an express articulation of extraterritorial application in addressing impunities by transnational corporations for human rights abuses. ***Considering the beneficiary relationship or the flow of profit, there is thus foreseeability to also include, and require, an active interest and duty to inspect their supplychain adherence to ALL recognized Human Rights.***
5. My delegation is mindful that addressing issues of legal and practical barriers to accountability and remedy for victims of human rights abuses, requires concerted efforts from states including as appropriate the development of legislative and regulatory frameworks, improvement in the functioning of judicial mechanisms and law enforcement, the development of policy and practice, transparency and closer international corporation including cross border issues.
6. With that being said such expression in Article 6, would have potential to limit the risks involved in situations of lack of coordination domestically. The expression on extraterritorial system would also afford States to impose certain liabilities which may be civil, criminal or administrative on the legal persons domiciled on their territory, for activities conducted abroad by putting pressure on the States in which such operations take place. The system of legal liability must have “extraterritorial authority”, the latter words must be clearly spelled out in the Treaty, as a necessity and for purposes of inclusion in domestic legislation to advance the States’ regulatory capacity which may have been threatened or marginalised by transnational actions.

I thank you