

**OEWG ON A LEGALLY BINDING INSTRUMENT ON TNCs AND OBE AND HUMAN RIGHTS**

**6TH SESSION, 2020**

**ICJ Oral intervention on Article 8**

28 October, 2020

Mr Chairperson-Rapporteur,

Article 8 on legal liability is fundamental to ensuring the fair administration of justice around business human rights abuses, and the appropriate allocation of responsibility.

In article 8.7 there is provision for legal liability of a company for its participation in abuses that involve companies under its supervision or control. The ICJ considers that as drafted this language may lead to the interpretation that only the parent or lead buyer in a commercial relationship is legally accountable, while the controlled company or supplier is not. To avoid such an interpretation, this article should recognize joint and several liability in cases where both companies have been involved in activities that caused the harm. In other cases, the responsibility of each company should remain separate for the level of its participation and the damage caused.

The ICJ generally agrees with the new provision in article 8.8 clarifying that the implementation of a human rights due diligence process by a company does not provide it with an automatic immunity from legal liability. Added language should emphasize that a judicial authority must remain empowered to weigh all available evidence, including and beyond human rights due diligence, in its assessments, taking into account criteria of reasonableness and effectiveness of the measures taken by the company.

Article 8.9 is a necessary element in the treaty, but it has been amended and greatly reduced in detail from the previous draft, resulting in diminished clarity. The ICJ suggests that this provision is further developed in its scope and content if it is going to play any significant role. The language used obscures the fact that this provision is about legal liability for abuses that amount to crimes as defined under international law. While the special gravity of these acts is adequately reflected in the type of criminal liability it attracts, there should also be some space for civil liability in these cases without prejudice to the corresponding criminal responsibility.