

Open Ended intergovernmental working group for the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

Second session, 24-28 October 2016

Joint Oral Statement by the International Federation of Human Rights (FIDH) and the International Commission of Jurists (ICJ)

Panel III, subtheme 2:

Madame Chairperson-Rapporteur,

The general duty under various human rights treaties to ensure the realization and the protection of rights includes the duty to establish a national legal framework – including criminal law in the case of protection of the right to life - as a key element. The legal framework should address also the conduct of legal persons that impair the enjoyment of human rights, but State practice is inconsistent and highly diversified.

Legal liability for business enterprises in domestic law typically includes responsibility under criminal, civil and administrative law. In certain jurisdictions, also constitutional law plays a role in the protection of rights. The business liability landscape thus presents a combination of public and private law substantive and procedural elements. The protection of human rights being traditionally understood as something within the realm of public law (including constitutional, administrative and criminal law) it makes sense to assign to that branch of domestic law a leading or predominant role in upholding human rights vis a vis potential corporate abuses. However, the reality shows that those affected by business abuses, especially in certain jurisdictions, tend to use also private law (specifically the law of civil remedies –or non contractual responsibility), which needs to be transformed to better respond to those challenges .

There is a noticeable correlation between offences recognised in domestic law and the international treaties that explicitly require States to establish legal person liability for such offences. But it is clear that corporate criminal liability in many countries is not applied and where it is it covers only a heterogeneous set of serious human rights abuses and not others. Practice across jurisdictions is thus divergent, as noted by, among others, the report of OHCHR on Improving Accountability and Access to a Remedy.

States party to the agreement must adopt effective legislative and administrative measures, in accordance with their national legal systems and principles, to establish in law the legal liability of business enterprises, in particular corporations subject to their jurisdiction, for business conduct that

results in harm to human rights both at home and abroad. Such responsibility should, as appropriate, be criminal, civil or administrative.

States must adopt measures to establish criminal responsibility or its equivalent for business enterprises subject to their jurisdiction for business-related human rights offences. In all cases the offences need to be defined with sufficient clarity in the treaty and always under the condition that criminal liability of the legal entity does not exclude the personal individual criminal responsibility of the company director or managers.

With regard to civil liability, because its effectiveness has been limited by jurisdictional, procedural and financial obstacles, the new treaty should contain provisions to address those key problems.

States party to the treaty should establish the civil responsibility of the business enterprise for their conduct that results in harm to rights guaranteed under their international obligations and rights recognized under domestic law, and business enterprises that have entered into commercial contracts with the State should not be immune from the civil legal liability. The law of civil remedies should contemplate stronger parameters of protection such as strict liability regimes and civil responsibility of the business enterprise should not be made contingent upon the finding of criminal responsibility or its functional equivalent of the same actor.

Thank you.