Nomonde Nyembe’s Presentation

Jurisprudential and other approaches to civil, administrative and criminal corporate liability

Panel III part 2; Wednesday; 15:00

**Introduction**

* Begin by breaking down the different components of this presentation.
* At first, I will speak to the meaning of jurisprudential as used in the title of this panel and how we believe it should influence the work of the IGWG.
* Secondly, I will speak to the Civil means used around the world to ensure corporate accountability.
* And finally, I will speak to the criminal law means used around the world to ensure corporate accountability.
* It is hoped that these methodologies from around the world will assist IGWG in its deliberations.

**Jurisprudential Approaches**

* The word jurisprudential has two connotations.
* The one is the jurisprudence that relates to the interpretation and development of law and legal systems by jurists and advocates through the courts. I will deal with this connotation later.
* The other relates to the legal philosophy developed and theorized by academics and philosophers to assist in the development and critique of the law and legal systems.
* With regards to the latter, that is legal philosophy, we submit that that the IGWG should be minded of the legal philosophies developed not only by theorists in the global north but also by those in the global south in the formulation of the binding treaty.
* The IGWG is reminded that in the same way that the binding treaty does not occur in a vacuum, the current global economy too, does not occur in a vacuum.
* The currently global economy is one that was built, and we would argue, continues to operate on a system of racism. It began with slavery and colonization, racial segregation and apartheid.
* In some parts of the world, particularly in the global south, it continues on exactly that basis for the benefit of corporations in the global north. In others, it continues on the basis of the assumption that the effects of these atrocities no longer exist.
* But the reality is that the economies of the countries in the global north were built on the subjugation and exploitation of the global south. They continue to operate in much the same way.
* Therefore, we suggest that the IGWG use the theories and philosophies for critical race theory and decolonization is unpacking, understanding and addressing the ramifications of the global economy as it currently exists and adverse human rights effects that such and economy and its actors have on those living in the global south – who tend to be people of colour.
* It is also imperative that IGWG includes the most directly and adversely affected of corporate maleficence in its deliberations and panels, particularly people of colour from all regions in the global south.
* In addition, the IGWG should in both the development of the content of the binding treaty and the process for such development consider feminist theory.
* As such, the IGWG should be conscious of the fact that gender norms and standards create differentiated experiences that are often worse for women and other societal minorities such as the elderly and children.
* In order for the binding treaty to effectively achieve the objectives for which it aspires, IGWG should ensure the binding treaty incorporates a gender conscious perspective into its content and its methodology by:
  + Acknowledging gender differentiated experience may occur as a result of corporate activity;
  + Treating gender based adverse and not assuming gender neutral or gender blind effects;
  + Ensuring that women are heard and participate in the binding treaty process.
* Finally the IGWG should by guided by the principle of fairness and equality.
* It is simply unfair and unequitable that in terms of BITs TNCs enjoy equality, national treatment, full protection and security and rationality in decision making for profit while human beings are denied equality, security of tenure and livelihood, physical security, and rationality in decision making at the cost of their lives are denied these essentials.
* In developing the binding treaty, we are of the view that the IGWG be guided by these principles.
* I now turn to corporate civil and criminal liability.

**Civil means**

* **Constitution**
* One of the means by corporate entities are held liable for human rights compliance is by means of such provision to that effect in national constitutions.
* The Constitutions of five countries in Africa provide for the horizontal application of human rights by that I mean person to person (including corporate persons) as opposed to state to person which would be vertical.
* The five African states that include horizontal application are Gambia, Ghana, Kenya, Malawi, and South Africa
* Some of the constitutions, like that of South Africa provide obligations set out in the constitution apply to the corporations to the extent applicable in light of the nature of the right and the nature of the obligation
* Others, like the Constitution of Kenya, bind their provisions to all persons and include in the definition of persons “companies and associations whether incorporated or unincorporated”
* When adjudicated upon in South Africa, the Constitutional Court made clear that the the application of rights to corporate entities may be negative “do not harm” and thus that protect against improper invasion by Corporate entities. The court elaborated that a breach occurs: (i) directly where there is a failure to respect the right; (ii) indirectly where there is a failure to prevent the infringement of the right by another; and (iii) taking steps to diminish the existing protection of the right.
* In another decision by the Constitution Court, the obligation of a corporate entity was extended towards the positive realm of human rights compliance. In that case a corporate entity contracted by the state to provide a basic service, the provision of social welfare grants, was said to have positive obligations vis-à-vis social grant recipients.
* Two things are clear from the above. The first is that the binding treaty may, like some constitutions do, place human rights obligations directly on corporations. Secondly, this language may place both positive and negative obligation on the corporate entity depending on its nature, the obligation and the right.

**Criminal**

* **Regional**
* Support for the notion of international criminal corporate liability may be found in the African Union Draft Protocol on the Protocol of the Statute of the African Court of Justice and Human Rights of 2014
* This instrument includes the following corporate criminal crimes: war crimes, crimes against humanity, corruption, money laundering, trafficking in hazardous waste, and illicit exploitation of national resources.
* Liability is attached to corporations in terms of this instrument on the basis of corporate intention, reasonableness, and corporate knowledge which includes actual or constructive knowledge
* Modes of responsibility include: incitement, instigation, financing, facilitation.
* **Domestic**
* A number of countries include in the domestic criminal codes provisions that allow for corporate criminal liability
* These states include: United Kingdom, Australia, South Africa
* An example of the use of this particular methodology may be found in northern South Africa.
* In northern South Africa a mining company’s operation caused sever environmental degradation. Affected persons lodged a case against both the mining company and its directors with South African environmental law enforcement officers. As a result, the company pleaded guilty and paid not only the fine for the criminal offence of environmental degradation but fixed the damage they had caused.
* This is case is exceptional, it required the foresight of affected persons to know that the degradation constituted a crime, investigators committed to gathering evidence that would strongly support a guilty verdict and prosecutors willing to follow through with the criminal litigation.
* These resources are not even distributed across the globe. For a number of countries there exist a governance gap that would enable corporations to get away with this kind of human rights violation. In addition, a number of states lack the resources to investigate and prosecute violations of this nature.
* It is for this reason imperative that the binding treaty include criminal liability and sanctions to. IGWG could look to national and regional approaches for such.