**Submission on Panel on Article 10 of Zero Draft Treaty**

17 October 2018

Prof David Bilchitz (University of Johannesburg; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law, Secretary-General, International Association of Constitutional Law)

Thank you to the Chair for the opportunity to make a submission on the critical provisions relating to legal liability and congratulations on bringing the process to the point where we are considering in detail the provisions of a draft treaty. At the outset, it is important to recognize that, in a sense, these provisions are some of the most central to the new treaty and provide the strongest impetus for such a legal development. What the Guiding Principles on Business and Human Rights and other initiatives lack are hard consequences for those violating human rights: the treaty places an obligation clearly on states to ensure liability – whether it be civil, criminal or administrative – for violations of human rights. I wish to make two points for improvement in this submission: first, I wish to highlight a weakness in the state-based model; secondly, I wish to draw attention to the failure adequately to engage with corporate law.

A core problem which is grounds for this treaty is the fact that existing state-based regimes for holding corporations to account are inadequate. There are also states whose regulatory and enforcement frameworks are absent or limited leading to what are known as ‘weak governance zones’. The approach adopted in the current treaty, in a sense fails adequately to recognize these problems through its focus on states to enact and enforce accountability regimes. It is clear that many states will seek to enforce their duties in this regard: but, what about situations where they cannot or will not?

Two options exist: the first is that international law imposes clear direct obligations on corporations and a means of enforcing liability. The second alternative is for another country to create liability on the corporation based within it for harms caused in a second country. The draft treaty at present adopts the second alternative yet there are two problems with this: first, it is not clear that all jurisdictions will pass equally effective laws for this purpose; secondly, given the current realities of a number of countries refusing to sign or ratify the treaty, a direct route would offer a more secure basis for access to remedies for victims of rights violations. Consequently, to remedy the accountability gap, it is important that the treaty recognise direct obligations on corporations in relation to fundamental rights. The failure to realise these obligations should be a ground of liability which can both ground findings in the Committee established for this purpose; but be the ground for legal liability in countries which do not have adequate laws in this regard.

The second point I wish to make concerns the limited engagement in the treaty with corporate law. The dominant structure through which business is conducted today is the corporation. Whilst it is important of course to include all business forms, the particularities of the corporate structure and the way it has been given effect to in law create specific risks for fundamental rights.

The corporation is itself constituted as an entity with separate legal personality – in other words, it is regarded as a separate person in law from those who invest in it or decide on its behalf. Yet, of course, a corporation is reliant on the natural persons that lie behind it to make decisions and to act on its behalf. Given the size of modern multinational corporations, it is often difficult to trace particular decisions to particular actors. Moreover, there may be multiple structures involved in a decision which mean any particular individual feels less responsible. Nevertheless, the general point remains, that decision-making of a corporation is essentially reliant on individual persons lying behind the corporation.

Corporate law, of course, has recognized these points and seeks to place what are referred to as ‘fiduciary duties’ upon directors. These arise for a range of reasons – including the core separation between ownership (shareholding) and control (managing) which takes place within a company and the potential conflicts that can arise as a result. In order to ensure directors act in the interests of shareholders, corporate law developed a duty on directors to act ‘in the best interests of the company’. A failure to act in this way can result in personal liability on the part of directors in many jurisdictions. The question, of course, that is raised is what constitutes the ‘best interests of the company’? The limits of this submission do not allow a deep exploration of corporate law and debates in this regard.

The draft treaty at present does not expressly engage with corporate law. This is very strange given that one of the core targets of the treaty is the corporation. As it stands, it contains provisions that attempt to address decision-making within a corporation – yet, those provisions strangely do not mention corporate law and the need to shift legislation in that regard. This is not wholly revolutionary: the UK Companies Act, for instance, contains a provision that requires directors to promote the ‘success of the company as a whole’ and that requires having regard to the impact of the company’s operations on the community and the environment’. [[1]](#footnote-1) A delegate from India explained yesterday that India too has a similar and even more extensive provision.[[2]](#footnote-2) Indeed, a shift such as this is central in bringing about a situation in which human rights abuses are prevented. In my view, the treaty should require a change in corporate law to place a fiduciary duty on directors to ensure company activities conform with their obligations to respect (and arguably to protect and promote) fundamental rights.

When we say the ‘company’ has a due diligence obligation, who is responsible for ensuring it is realized? The decision-makers – ie the directors – are the natural place to impose a fiduciary duty to comply with the due diligence obligations which are placed on the company. Failure to do so should also come with the ability to hold directors liable.

Indeed, doing so would help to make sense of Article 10 on legal liability which envisages criminal, civil or administrative liability for violations of fundamental rights. It states that ‘liability of legal persons shall be without prejudice to the liability of natural persons’. A similar provision is stated in Article 10(9) about criminal liability. The missing link in these provisions is the need to recognize upfront obligations on the decision-makers of a company – the directors – to ensure they do not violate rights impermissibly. Once such an obligation is recognized, then liability would follow.

The limits of time mean that I cannot engage the other example on ‘piercing the veil’ where a proper engagement with corporate law may in fact highlight the gaps and advance our ability to determine the circumstances in which one company should be responsible for the activities of another. Doing so could help develop article 10(6) and, in particular, the second part of this article which currently conflates two different considerations – causation and relationship - which should be kept apart.

In conclusion, liability requires us to grapple with the limited powers of some states as well as the nature of the corporation itself. Recognising direct liability for human rights violations as well as considering and engaging relevant principles of corporate law can only help strengthen the current draft of the treaty. [END OF PRESENTATION]

ADDITIONAL SUBMISSION

The benefits of engaging more deeply with corporate law could assist with crafting more the circumstances in which a parent company may be responsible for the activities of its subsidiaries; or a lead company responsible for the activities of suppliers in its supply chains. I do not want to be taken to suggest that we should simply replicate the provisions and understandings in corporate law: indeed, many do need reform and expansion to take account of fundamental rights. Yet, there are resources there that we have not fully integrated into the treaty.

 Article 10(6) attempts to engage with liability of companies for the activities of subsidiaries or sub-contractors and it proposes three criteria for an imposition thereof: (a) control over operations; (b) a sufficiently close connection with an entity and a strong connection between conduct and the wrong committed; and (c) when risks are foreseen or should have been foreseen. These principles all attempt to consider when it is justifiable for one entity to be held liable for the actions of another and mitigate the effects of the notion that entities are separate persons in the law separation of entities principle.

Currently, the approach adopted in the treaty is to try and avoid engaging with the piercing of the veil by focusing on the responsibilities of the parent or lead company itself. Yet, doing so, may also fail to draw on some of the resources that corporate law already has for when the veil should be pierced. It also can fail to engage with the continuities between human rights law and company law in this respect.

For instance, in my jurisdiction, South African company law speaks now about the right to pierce the veil where there is ‘an unconscionable abuse’ of separate legal personality.[[3]](#footnote-3) Judicial interpretation of this notion has stated that it includes ‘the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts.’[[4]](#footnote-4) In a prior case, the court spoke of the need of courts ‘to look to substance rather than form in order to arrive at the true facts’.[[5]](#footnote-5)

These principles are not particular to South Africa and have been adopted in many other jurisdictions: the separate legal personality of a corporation was always capable of being abused. The focus in the past has, however, been largely on abuse for financial purposes and gain. In our context, what has become clear is that the separate legal personality of corporations can be abused to hide violations of human rights. Where that is the case, we can attempt to utilise similar principles to determine liability.

I would suggest that we draw on these existing tests in the treaty. Thus, the central enquiry in any case where there is a violation by one entity that is connected to another must be whether in substance rather than in form the parent company can be said to be responsible for the actions of the subsidiary or contractor. When would it be justifiable to hold such a company responsible?

Clearly, some of the circumstances outlined in article 10(6) are apposite. Where such a company exercises control over the second would be one such a circumstance: of course, there is, of course, an important question as to what constitutes control here. Clearly, also if there is a direct attempt to abuse legal personality to hide human rights abuses, then that would be a justifiable circumstance. The current draft correctly recognises that such a responsibility should occur in cases where the parent company was negligent in failing to ensure that such abuses did not take place and failed to take steps to inform itself or counteract whether such abuses were taking place. Are there any other circumstances where it may be justifiable to hold one company to account for the actions of another?

The core additional criterion outlined in the draft relates to whether a close relationship between corporations can itself be the ground of liability. The draft itself is unsure about this and so adds on a requirement that there be a direct connection between the conduct and the wrong suffered. It seems that this section includes and conflates two grounds of liability. The latter one is the easier as the question concerns what form of connection may exist between conduct and a wrong to justify liability: clearly, causation would be one but potentially also circumstances in which the corporation contributes or facilitates the abuse: some of the principles relating to liability in cases of complicity could be utilised here.

The harder question is whether or not a relationship alone can be a ground of liability. Clearly, where a relationship allows for one entity to control another, then it may. A second circumstances is highlighted by the corporate law principles: where the separation between entities is a ‘sham’ and there is in fact an identity between them, then that separation should not be recognised. Lastly, and perhaps most controversially, it seems to me that there may be circumstances where a large corporation has benefited from an abuse that was perpetrated by another corporation and in which it has played a limited role. This kind of reasoning is perhaps familiar from cases of historical injustice: whilst this generation of Germans played no role in the activities of the Nazis during the Second World War, there may still be an inherited responsibility to continue to provide reparations to Holocaust survivors. The principle here is that benefiting from an injustice perpetrated by another may place certain duties of remediation on that beneficiary even if they were not a direct cause of the injustice. The benefits of recognising such a principle would be that it would encourage corporations to ensure that they do not benefit from human rights abuses and so, in a sense, heighten their vigilance in this regard.

In conclusion, liability requires us to grapple with the limited powers of some states as well as the nature of the corporation itself. Recognising direct liability for human rights violations as well as considering and engaging relevant principles of corporate law can only help strengthen the current draft of the treaty.

1. Section 172(1)(d) of the United Kingdom’s Companies Act of 2006. [↑](#footnote-ref-1)
2. Section 166(2) of India’s Companies Act of 2013. [↑](#footnote-ref-2)
3. Section 163(4) of the Company’s Act [↑](#footnote-ref-3)
4. *City Capital SA Holdings v Chavonnes Badenhorst St Clair Cooper* 2018(4) SA 71 (CC) at para 29. [↑](#footnote-ref-4)
5. *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) at 804. [↑](#footnote-ref-5)