

ICJ's Intervention Regarding Article 10 Legal Liability on 17 Oct. 2018

Mr Chairman,

The International Commission of Jurists welcomes the inclusion of articles on civil, criminal and administrative legal liability for abuses committed in the context of business activity as provided by Article 10 of the draft treaty. The articles make appropriate distinction between legal liability for legal persons and for natural persons.

Article 10.6 of the draft, on civil liability, makes a commendable attempt to tackle the complex issue of the responsibility of one company for the wrongful acts of another, including subsidiaries and suppliers. However, we consider that this draft will require revision to ensure precision and clarity that will make it fit for purpose in a treaty creating legal obligations.

Its current formulation would entail the legal responsibility of one company for the wrongful acts almost in every circumstance, which creates unnecessary risks and uncertainty, even for those whose rights have been violated. The ICJ considers that it may be more appropriate to focus Article 10.6 on certain kind of relationships, adopting more precise and standard notions of causality and contribution, proximity and foreseeability, [but adding an element of strict liability in the equation [to more robustly encourage the adoption of strong human rights due diligence by the parent/controlling company.]

On corporate criminal liability, [the draft treaty provisions are a step forward in introducing this notion in the draft treaty. But] Article 10.8 calls for criminal liability for all human rights violations amounting to criminal offences under international law and “domestic law”, opening too large a window for divergent and potentially arbitrary approaches. [In fact, the criminal law provisions of some domestic jurisdictions are not themselves always human rights compliant]

At the present stage, the most practical option would be allowing states a certain degree of flexibility, while ensuring that all offences are defined with sufficient clarity to meet the requirements of legality. [International practice offers several good examples in terms of the degree of flexibility for ensuring legal accountability of businesses enterprises, which may be seen in the extended statement in our website.]

To provide legal certainty and due process, the following crimes recognised under international law or for which international law require the imposition of criminal sanctions should be incorporated as part of national criminal law applicable to business corporations:

- war crimes, crimes against humanity and genocide [(as defined under international law in such sources as the grave breach provisions of the 1949 Geneva Conventions and 1977 Additional Protocols, the Rome Statute for the International Criminal Court, and customary international humanitarian and human rights law).]
- torture,
- cruel, inhuman or degrading treatment,
- enforced disappearance,
- extrajudicial execution,
- slavery and slavery-like offences,
- forced labour and similar forms of forced labour,

- forced displacement of people,
- forced eviction,
- the use of child soldiers
- sexual violence.

This Article should also provide for adequate, thorough, impartial and independent, investigations and sanctions following standards suggested in the full version of this statement in our website and to be handed to the Chair.

The ICJ suggests retaining Articles 10.9, 10.10, and 10.12 in their current form and the deletion of Article 10.11.

Thank you.