

Oral statement on Liability during the [4th IGWG session](#) in the UN Human Rights Council

By FIDH, Greenpeace and SOMO

17 October 2018

Thank you Mister Chair. I make this statement on behalf of FIDH, Greenpeace and SOMO. We welcome the comprehensive provisions on civil and criminal liability of corporations under national law in the [Zero Draft](#), since these provisions have the potential to improve access to justice and narrow the governance gap in relation to corporate human rights abuse. In this intervention, we will make some suggestions on how the treaty text can further deliver on this potential.

Article 10(6) is a particularly useful provision. Building on the expansive scope of Article 9's provisions on due diligence, Article 10(6) provides that parent companies can be held civilly liable for the actions of their subsidiaries and companies in their supply chain, insofar as the criteria of "control", "sufficiently close relation", "strong and direct connection" OR "foreseeability" are proven. Accordingly, Article 10(6) directs national courts to look at the **substance** of the factual relationship between parent and subsidiary companies (or associated companies in their supply chain) in assessing whether the former can be liable for the conduct of the latter, rather than the **formalities** of their legal relationship. This is a positive development, potentially preventing parent companies from hiding behind the corporate veil and avoiding liability for human rights abuses associated with their operations.

When it comes to the civil liability described in 10.6 and its relation to article 9, the Draft could benefit from distinguishing two grounds of liability:

1. Liability for lack of compliance with **due diligence obligations**;
2. Liability for human rights violations by entities with **sufficient proximity** to the company under scrutiny.

Regarding the second ground of liability, we strongly advise deleting article 10.6.a and using the 'proximity' condition where control is assumed under certain conditions, for example, ownership. Further specificity would be welcomed here in order to prevent the notion of 'sufficiently close relationship' from being restrictively understood.

Furthermore, drafters need to ensure liability for violations by 'sufficiently proximate actors' does not encourage companies to artificially reduce proximity. **This is why article 10.6.c is so important:** because it compels companies to mitigate risks throughout their structures and supply chains, beyond ownership and proximity relations.

Article 10.4 is positive but needs further strengthening in order to close existing accountability gaps. Victims usually carry the **burden of proof**, having to demonstrate that the parent company has exercised a decisive influence on the conduct of the subsidiary and that it is liable, even where the material evidence is in the hands of the parent company. Therefore, the draft should create a more specific obligation that indicates when the reversal of the burden of proof is necessary, which shouldn't be discretionary. We strongly advise to make it obligatory in the final draft, which would require greater detail as to when the burden of proof was to be reversed (such as where access to information is denied).

Article 10(11) marks a positive contribution. By stipulating that the exercise of universal jurisdiction is *obligatory* instead of only *permitted* under international law (i.e. the status quo), Article 10(11) has

the potential to increase the use of universal jurisdiction by national courts and progressively develop international law. However, since most human rights violations will not amount to international crimes, the significance of this development is limited.

Notwithstanding these positive elements, Article 10(12) potentially undermines other provisions in Article 10, deferring to national law in determining whether legal persons can be subject to criminal liability.

Finally, while the possibility of administrative liability is introduced under 10.1, it is not developed in the Zero Draft. We consider this a missed opportunity, since there are examples of administrative liability effectively holding businesses accountable for human rights abuses. A provision building on these best practices should be developed in subsequent drafts.

I thank you Mr. Chair.