BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

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Corporate Due Diligence and Civil Liability: Comment from multi-stakeholders

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Transcript of the intervention of Lucie Chatelain in the webinar on Corporate Due Diligence and Civil Liability organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese Presidency of the Council of the European Union in partnership with the British Institute of International and Comparative Law, the Portuguese Ombudsman (Provedor de Justiça), the Teaching Business and Human Rights Forum, and NOVA 4 The Globe on the 28th of January 2021.

To react to the panellists' interventions, I would like to make two points with respect to the French law on the duty of vigilance, this time from the perspective of victims with whom Sherpa has been working: first, with respect to how the corporate duty is linked to civil liability and, second, with respect to the limitations in practice.

The first point has to do with the definition of the corporate duty, and its impact on civil liability.

The French law does not restate the definition of HRDD in the UNGPs.

It relies on the notion of "vigilance", which is a pre-existing concept of French civil liability law. In French law, the violation of a duty of vigilance amounts to negligence and can trigger civil liability.

The 2017 law on the duty of vigilance of parent and instructing companies provides for a specific duty of vigilance for certain companies regarding the activities of their subsidiaries, subcontractors and suppliers.

It is partly informed by the notion of HRDD, but the wording is different: it creates an obligation to adopt and *effectively* implement *adequate* measures to identify risks and prevent violations. These terms ("effective"; "adequate") are key to transform soft law into hard law and to give effect to civil liability.

Indeed, if human rights due diligence is just an obligation to adopt internal risk-

management processes, then civil liability is pretty much useless. Unfortunately, the duty of vigilance has been interpreted as such by many companies, which consider that they cannot be held liable if they have "made efforts" and published a plan.

If we want due diligence to work in hard law, it must be clearly defined as the obligation to take all necessary, adequate and effective measures to ensure that human rights violations and environmental harms do not occur in the company's value chain.

Second, the fact that the French law on the duty of vigilance merely refers to existing civil liability rules is limiting for victims' access to remedy.

It is up to the claimant to prove the traditional conditions of civil liability under French law: (1) the lack of vigilance of the company, (2) the harm suffered as a consequence and, (3) how respect for its duty of vigilance could have prevented the harm (causation).

This liability regime may appear ill-adapted to most violations along the supply chain. In particular, in a lot of cases, it can be very difficult to establish that the damage would not have happened if the company had respected its duty of vigilance. The company will argue that it is not the only responsible, that even if it had respected its duty of vigilance perhaps it would not have used the supplier involved in the violation, but that would not have prevented the damage from occurring.

That is why it seems crucial that the upcoming European legislation provides for a specific liability regime that is adapted to those realities.

In particular, there should be a reversal of the burden of proof, as well as a more nuanced and adequate approach to causation. A company shall be liable, unless it can prove that it took all necessary, adequate and effective measures to ensure that no such violation occurs in its value chain. In addition, this defence shall not be available in case of control over the entity that caused the harm because victims should not bear the consequences of internal corporate structure decisions.

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