

Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

Fifth session (14-18 October 2019)

Article 14 Implementation

This statement is made on behalf of WILPF and members¹ of the #Feminists4BindingTreaty. We welcome article 14 paragraph 3, which is connected to article 5 paragraph 3 e) that imposes enhanced human rights due diligence obligations in “conflict-affected areas”.

Firstly, we recall the statement made by Franciscans International on art. 5 that the Instrument should use terminology that takes into consideration existing analysis by, *inter alia*, UN mechanisms. In particular, the Instrument should use “armed conflict-affected areas, including situations of occupation”, instead of “occupied or conflict-affected areas”, which would also be more in line with international humanitarian law terminology.² This recommended terminology should thus be reflected in article 14 paragraph 3, and article 5 paragraph 3 e).

Secondly, article 5 paragraph 3 e) should be strengthened to clarify that business activities must either not be undertaken, or be suspended or terminated in circumstances where it might not be possible to prevent or mitigate risks of violations or abuses of human rights and/or of violations of international humanitarian law. Indeed, in certain situations, the immitigability of adverse human rights impacts is such that no due diligence exercise, even enhanced, can ensure the effective respect of international human rights law and of international humanitarian law.³

¹ ActionAid International, Anima Mundi Law Initiative, AWID (Association for Women’s Rights in Development), CaL (Coalition of African Lesbians), CAWEE (Center for Accelerated Women’s Empowerment), CELS (Centro de Estudios Legales y Sociales, Argentina), DAWN (Development Alternatives with Women for a New era), Federation of Women Lawyers (FIDA Kenya), FIAN International, FIDH, Franciscans International, Gender and Development Network, Manushya Foundation, NAPE (National Association of Professional Environmentalists), NAWAD (National Association for Women’s Action in Development), PODER (Project on Organizing, Development, Education, and Research), SIHA Network - Strategic Initiative for Women in the Horn of Africa, Womankind Worldwide, WILPF - Women’s International League for Peace and Freedom

² See, for instance, the Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, Working Group on the issue of human rights and transnational corporations and other business enterprises, 6 June 2014, available at:

<https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>

“A situation of military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically.” (p.2), “While the Guiding Principles do not explicitly address the situations of occupation, an area under occupation falls within the term “conflict-affected area” in the Guiding Principles.” (p.3)

³ See, in particular, the Report of the UN High Commissioner for Human Rights, Database of all enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/37/39, 1 February 2018, available at:

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/39

The draft text currently only mentions “conflict-affected and areas of occupation”. Several soft law and legally-binding instruments also refer to “high-risk areas” in relation to enhanced human rights due diligence by businesses, including OECD and UN Global Compact guidelines, as well as the EU conflict-minerals regulation.⁴ While there is no unified legal definition of “high-risk areas”, they are often understood as situations of political instability and repression that may lead to violent conflict.⁵ High-risk areas could also cover internal disturbances and tensions (which would include riots, isolated and sporadic acts of violence), not reaching the threshold of a non-international armed conflict under international humanitarian law, as well as certain post-conflict situations where there has been a general close of military operations but there is still violence/ high risk of violence breaking out.

Para. 40 “The scale, scope and immitigability of the human rights impacts caused by settlements must be taken into consideration as part of businesses’ enhanced due diligence exercises.”; Para. 41 “OHCHR notes that, considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves, and the systemic and pervasive nature of the negative human rights impact caused by them, it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law. This view was reinforced in Human Rights Council resolution 34/31 on the Israeli settlements, in which the Council referred to the immitigable nature of the adverse impact of businesses’ activities on human rights.”

⁴ REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>; OECD (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing, Paris, available at: <http://dx.doi.org/10.1787/9789264252479-en>; Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors A joint UN Global Compact – PRI publication, United Nations Global Compact, 2010, p. 10, available at:

⁵ The EU conflict minerals regulation provides the following definition:

“conflict-affected and high-risk areas’ means areas in a state of armed conflict or fragile post-conflict as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”, see REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Article 2 f), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>; The OECD Guidelines on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provide the following definition:

“Conflict-affected and high-risk areas – Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.”, see OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Third Edition, see p. 66: <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>; Finally, the UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas provides the following definition: *“Conflict-affected or high-risk areas are countries, areas, or regions: that are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely, in which there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present, that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence, that are currently in transition from violent conflict to peace.”* Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors A joint UN Global Compact – PRI publication, United Nations Global Compact, 2010, p. 7, available at:

https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf

It is important to make clear that the legal framework governing such high-risk situations is different from that governing armed conflicts (mainly in that international humanitarian law is not applicable). At the same time, in our view, the Instrument should define “high-risk areas” in the Instrument and extend enhanced human rights due diligence to these situations in order to ensure more effective and comprehensive prevention of business-related human rights abuses.

We welcome the recognition in article 14 paragraph 3 of the need to assess and address the heightened risks of abuses arising from business activities in conflict-affected areas, paying special attention to both gender-based and sexual violence. However, as we emphasised in our statement on the article on Prevention, gendered impacts go beyond sexual and gender-based violence. We, hence, reiterate the importance of gender-responsive human rights impact assessments, including in the context of enhanced human rights due diligence for business activities related to armed conflict-affected areas.⁶ In this regard, we recommend that the Gender Guidance developed by the Working Group on Business and Human Rights be used as a key reference tool.

Finally, we welcome article 14.4, which recognises that certain groups, including women face heightened risks of human rights abuses within the context of business activities. However, we suggest to clarify in this article that this list is not exhaustive and that particular attention must be paid to the multiple or intersecting forms of discrimination faced by persons belonging to more than one of these groups.⁷

⁶ See the statement of eminent jurists on legal obligations when supporting reconstruction in Syria: “For example, the location of new reconstruction projects may impact women and girls’ security or property rights in a way not experienced by their male counterparts. Additionally, the failure to locate missing and disappeared male relatives is likely to impact property rights and security for women and girls”, available at: https://www.business-humanrights.org/sites/default/files/documents/Eminents%20Jurists%20Statement_Syria%20reconstruction.pdf

⁷ Preambular paragraph 13 of ILO Convention 190 on Violence and Harassment for instance provides language along these lines: « Acknowledging that gender-based violence and harassment disproportionately affects women and girls, and recognizing that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work, and”, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3999810