

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

Fifth session (14-18 October 2019)

Article 5 Prevention

This statement is made on behalf of WILPF and members¹ of the #Feminists4BindingTreaty. We welcome the recognition of mandatory human rights due diligence as a central component of the measures needed to prevent human rights violations and abuses in the context of business activities. The recognition of an obligation to exercise human rights due diligence *per se* implies that businesses that do not comply with this obligation shall be held accountable. Nevertheless it should also be made clear that compliance with this obligation does not automatically shield businesses from liability for human rights abuses.

The scope of human rights due diligence obligations and of associated mechanisms for liability are crucially tied to the definitions of “contractual relationships” and of “business relationships”. As mentioned in our statement on article 1, these definitions must be aligned with the definitions elaborated by Treaty Bodies, Special Procedures, and the UNGPs. Thus, they must be updated accordingly in article 5 on Prevention.

Moreover, Article 5 should be strengthened through an explicit reference to gender-responsive assessment. We stress that gender-responsive assessment must be conducted with the meaningful participation of women from all affected communities as well as relevant women’s organisations and gender experts, and must take into account, *inter alia*, impact of business operations on gender roles and gender-based discrimination. Multiple and/or intersecting forms of discrimination should be addressed in such assessment. In this regard, we recall that the Working Group on the issue of human rights and transnational corporations and other business enterprises set out clear guidance, presented to the Human Rights Council in June 2019, for the integration of a gender perspective in implementing the UNGPs, including with regard to gender-responsive assessments.²

To support human rights due diligence practices, **we also recommend the inclusion of references to additional State measures** to ensure the meaningful engagement of all relevant stakeholders whose human rights have been/could be affected across all stages of human rights due diligence, including through access to information as well as to measures to support independent and credible impact assessments. Further, we recommend that the terminology in article 5 (3, a) **with regard to consultation with indigenous peoples, is aligned to the internationally recognised standards of free, prior and informed consent (FPIC). Thus, the**

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 Gender dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43, 23 May 2019, available at: <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>

reference in the draft to “free, prior and informed consultation” should be replaced with “free, prior and informed consent”.³

The Instrument should identify the various situations in which stricter rules for prevention should apply. This includes armed conflict-affected areas, including situations of occupation. In that regard, we recommend to add in article 5 that States should adopt measures to ensure that: businesses conduct enhanced human rights due diligence in armed conflict-affected areas; and that business activities must either not be undertaken, must 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.⁴ Indeed, in certain situations, the immitigability of adverse human rights impacts is such, that no due diligence exercise can ensure the effective respect of international human rights law and international humanitarian law.⁵ Further, additional text should be added in article 5 to mirror Guiding Principle 7, which elaborates on State action that should be taken to deter business enterprises from engaging in conflict-affected areas, including withdrawal of economic diplomacy and financial support.⁶

The Instrument should use terminology that takes into consideration existing analysis and positions 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”. 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.⁷ While there is no unified legal definition of “high-risk areas,” they are often understood as situations of political instability and

³ In line with article 10 of the UN Declaration on the rights of Indigenous Peoples, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf; General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 12, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQclMOUuG4TpS9jwlhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hK8Odk6DUwG3Y>

⁴ Recommendations to this effect have been made by the Independent Fact-finding mission on Myanmar in its report “The economic interests of the Myanmar military”, see para.189 a) to e), A/HRC/42/CRP.3, 5 August 2019, available at:

<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

⁵ 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

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.”

⁶ Business and human rights in conflict-affected regions: challenges and options towards State responses, A/HRC/17/32, 27 May 2011, see paras. 17 and 18, available at: <http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>

⁷ 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:

repression that may lead to violent conflict. 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.

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, the Instrument should define “high-risk areas” and extend enhanced human rights due diligence to these situations in order to ensure a more effective and comprehensive prevention of business-related human rights abuses.

The Instrument should also clarify under article 5 Prevention the obligation of the State to respect, protect, and fulfil human rights when it itself acts as an economic actor - directly or in conjunction with State or non-State actors - in the context of business activities.

States may violate their obligation to respect or to protect in connection with activities of State-owned enterprises and when they engage in contracts or commercial activities with companies and with other States. Business-related human rights violations and abuses linked to actions by States as economic actors have been documented in a variety of sectors and countries, including in the extractive sector,⁸ agribusiness,⁹ in the arms industry,¹⁰ and in the infrastructure sector.¹¹

According to the UNGPs, States must take additional steps and exercise a higher standard of care to prevent and protect from abuses and violations in the State-business nexus, for instance in relation to activities of State-owned enterprises or in areas where the State is an economic actor (e.g. public-private partnerships, public procurement, privatisation of services, investment through sovereign wealth funds), and with other States (as a member of multilateral institutions that deal with business-related issues, as well as when entering into trade and investment agreements).¹² In addition, domestic laws and policies can support and shape business activities, such as through granting of authorisations for business activities and financial or trade support. States must also uphold their human obligations and ensure policy coherence with such obligations in all areas where State-based institutions come into contact with, support, or shape business activity.¹³

⁸ <https://www.globalwitness.org/en/press-releases/south-sudans-leadership-uses-state-owned-oil-company-nilepet-funnel-millions-brutal-security-services-and-ethnic-militias/>; Recommendations to this effect have been made by the Independent Fact-finding Mission on Myanmar in its report “The economic interests of the Myanmar military”, see paragraph 189 a) to e), A/HRC/42/CRP.3, 5 August 2019, available at: <https://www.unglobalcompact.org/library/281> <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

⁹ See, e.g. <https://www.fian.org/en/struggle/the-business-of-land-in-matopiba-brazil>

¹⁰ <https://www.amnesty.org/download/Documents/ACT3008932019ENGLISH.PDF>

¹¹ See, e.g., <https://www.ciel.org/project-update/panama-transmission-line-iv/>

¹² Guiding Principles on Business and Human Rights, see Principle 4, available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/32/45, 4 May 2016, paras. 22-34; Guiding Principles on Business and Human Rights, see Principles 4, 5, 6, 8, 9, 10, available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf; when they negotiate and enforce trade and investment agreements and through privatisation, see General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 13, 21, 22, 29, available at:

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQclMOUuG4TpS9jwLhCjCxiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hLK8Odka6DUwG3Y>

¹³ Guiding Principles on Business and Human Rights, see Principle 8, available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf; The CEDAW Committee has for instance

Finally, with regard to human rights defenders, we recommend that the text of Article 4.15, which recognises that States should take measures to respect, protect and fulfil the rights of human rights defenders, be moved under Article 5, since the work of human rights defenders is key in preventing business-related human rights abuses. In addition, we recommend the deletion of the limitation in article 4.15 “to recognize, protect and promote all the rights recognised in this (Legally Binding Instrument)” since the Instrument does not create new rights and, it should go without saying, that all rights of human rights defenders under international human rights law should be respected, protected and fulfilled.

repeatedly made recommendations to States to ensure rigorous, transparent and gender-sensitive human rights impact assessments of arms transfers, in which State authorities play a central role in the authorisation processes of transfers. See: CEDAW/C/SWE/CO/8-9, paras. 27 (h) and 35; CEDAW/C/DEU/CO/7-8, para. 28; CEDAW/C/ITA/CO/7, para. 20; CEDAW/C/NLD/CO/6, para. 46 (a); CEDAW/C/CHE/CO/4-5, para. 17 (c) and CEDAW/C/FRA/CO/7-8, para. 23