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WOMEN'S INTERNATIONAL LEAGUE FOR
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FIAN INTERNATIONAL
FOR THE RIGHT TO FOOD & NUTRITION

Oral Statement

Sixth session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG)

Wednesday, 27 October 2020
Statement on Article 8
Delivered by Sandra Epal-Ratjen

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This statement is on behalf of FI, FIAN, FIDH, ESCR-Net and WILPF.

Article 8. Legal Liability

In Article 8(1), it would also be helpful to add “causing or contributing to” human rights abuses - which would be consistent with the language in Article 8(7). The paragraph would then read:

“State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for **causing or contributing to** human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.”

We suggest to move paragraphs 5 and 6¹ to the section on remedies, and to clarify the language on reparations. For example, it is unclear as to how reparations and State

¹ « 5. States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, and gender responsive reparations to the victims of human rights abuses in the context of business activities, including those of a transnational character, in line with applicable international standards for reparations to the victims of human rights violations. Where a legal or natural person conducting business activities is found liable for reparation to a victim of a human rights abuse, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights abuse resulting from acts or omissions for which that legal or natural person conducting business activities is responsible.

compensation may be determined (i.e. cases where reparations are awarded in a civil suit, but a criminal case is pending). There may also be cases where the State should also provide reparations along with the business for its role in the human rights abuse or violation.

We also suggest that the last sentence of Article 8(8)² should be modified or deleted. FI notes that liability should be determined after an examination of the alleged abuses, and it should not be limited to whether HRDD was complied with. As currently drafted, the last sentence of article 8(8) could defeat the purpose of this protection against the use of HRDD as an automatic shield against liability.

We suggest deleting the phrase “Subject to their legal principles” at the beginning of Art. 8(9). Also, in the first sentence of Art. 8(9), “international humanitarian law” should be added so that it reads “...amount to criminal offenses under international human rights law **and international humanitarian law** binding on the State Party, customary international law...”

In Art. 8 (4), we suggest to distinguish more clearly civil liability from criminal liability and to add the words “directly linked” in order to be consistent with the formulation of the UNGPs. The paragraph would, thus, read as follows:

*“States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive civil, criminal and/or administrative sanctions where legal or natural persons conducting business activities, have caused or contributed or are **directly linked** to ...”*

We also suggest to add a paragraph 8 (10) which would explicitly state that:

“It shall rest on the defendant business enterprise to demonstrate that it took every reasonable step in accordance with paragraphs 2 and 3 of Article 6 to avoid causing or contributing to a human rights violation or abuse or prevent such violation or abuse.”

Such provision would be consistent with many examples of international law, jurisprudence and domestic laws which apply such reversals and has explicitly been recommended by the General Comment n. 24 of the Committee on Economic, Social and Cultural Rights. We want also to clarify that the presumption of innocence is a criminal law principle and that the reversal of the burden of proof would be proposed here in relation to civil law claims. For this reason, objections to this provision on the basis that it undermines the presumption of innocence have no legal basis.

6. State Parties may require legal or natural persons conducting in business activities in their territory or jurisdiction, including those of a transnational character, to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.”

² “The court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.”