



FIAN INTERNATIONAL
FOR THE RIGHT TO FOOD & NUTRITION



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Joint Oral Statement

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

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Statement on Articles 5 to 7
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Thank you Chair, this statement is also on behalf of FIAN, FIDH and the Cairo Institute for Human Rights Studies.

Article 5. Protection of victims

We note with interest interventions such as the one by Namibia on access to justice instead of access to remedy for article 7 and in which relevant parts of current articles 4, 5 and 7 could be gathered.

We already made comments on article 5 earlier in conjunction with article 4. So only two specific suggestions on article 5 if it is kept as a separate article. We recommend changing the title of Article 5 to “Protection of victims and witnesses.” We also suggest deleting the phrase “where appropriate” in Article 5(3) in order to avoid States having discretion in implementing their obligations.

Article 6. Prevention

We note our previous concerns in regards to ‘all internationally recognized human rights’ that is also used in subparagraph 1.

We further highlight that communicating “regularly and in an accessible manner to stakeholders” under Article 6(2)(d) is insufficient; We suggest having more explicit language in regards to access to information for communities. We note that access to information is

included under Article 7(2), however, it is critical that it is also protected in relation to the prevention of human rights violations and abuses.

In regards to Article 6(2), we note that mitigation cannot be ta the core of prevention and is insufficient, and in certain cases, operation/activities should either not be entered in to or should cease.

We suggest that in Article 6(3)(a), “throughout their operations” is changed to “throughout different phases of operations,” so that planning, licensing, construction, expansion, closures and other stages are effectively included.

It would be helpful if some of the language in Article 6(3)(c) is clarified. While it is important to have broad consultations, the use of “other relevant stakeholders” has been interpreted by businesses and States in a manner to ensure that certain projects- with adverse human rights impacts- get approved, and would not necessarily include workers, NGOs, trade unions, or others that may be critical of the activity/operation. Accordingly, we note that it is critical for businesses to respect the results of the consultations, and take primary consideration of consultations with those whose human rights are or may be adversely impacted. An additional paragraph could be added on the need for States to take measures to ensure that individuals and communities whose human rights are at risk from business activities have access to effective precautionary measures to prevent imminent or irreversible harm.

Also in regards to Article 6(3)(c), we concur with the intervention by Palestine. It is also unclear as to how businesses will effectively consult with migrants, refugees, internally displaced persons, and others, especially those that may have an uncertain legal status in the area of operation.

The last line of Article 6(3)(c) should be changed to “protected populations in conflict areas, including situations of occupation.”

Article 6(3)(g) should be similarly streamlined to remove the word “occupied” so that the sentence reads “human rights abuses in conflict-affected areas, including situations of occupation.” This would be in line with the work of other UN mechanisms such as the Working Group on the issue of human rights and transnational corporations and other business enterprises, including in a Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory that use “armed conflict-affected areas, including situations of occupation”, instead of the “occupied or conflict-affected areas”. This statement explains that: “A situation of military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically.” It considers that an area under occupation falls within the term “conflict-affected area”.

Article 7. Access to Remedy

We suggest that language is added to Article 7(1) that ensures that seeking State-based non-judicial mechanisms are not a barrier to recourse via a State’s judicial system.

In regards to Article 7(6), we are concerned that “in appropriate cases” (for reversal of the burden of proof) is vague, and may negatively impact the victims’ ability to access justice. We note a wording as a possible source of inspiration for improvement of Article 7(6), that was raised by the UN Special Rapporteur on toxic wastes in his report in 2019:

*“In cases in which decisions of violations depend on information available only to the State party or business implicated, the human rights treaty bodies and judicial bodies should consider the allegations to be well founded if the State party does not rebut them by providing satisfactory evidence and explanations.”*¹

In addition and related to this proposal, we wish to respond to some arguments made about the reversal of the burden of proof being against presumption of innocence, we want to highlight that such reversal is precedented and is in line with general principles of law and rights such as fair trial, procedural fairness and equality of arms, in the interest of justice.

¹ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, 7 October 2019, UN Doc A/74/480, <https://undocs.org/A/74/480>