

**Special Rapporteur on human rights implications of hazardous substances
and wastes, Mr. Baskut Tuncak**

Introductory remarks on draft elements regarding “preventive measures”

3rd Session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

25 October 2017

Thank you your Excellency. Excellences, distinguished delegates, friends & colleagues:

For 22 years, the mandate I now hold has received and responded to grave allegations of human rights violations and abuses due to business activities. Most of these have transnational links, and most are—unsurprisingly—abuses of the rights of the most vulnerable, including the poor in countries of all levels of development; indigenous peoples; women and children; migrants and minorities, among others.

A common denominator under many emblematic BHR cases has been toxic pollution, contamination and environmental degradation at large due to business activities. These have traversed the lifecycle hazardous substances, implicating sectors from EIs, to manufacturing of industrial chemicals, pesticides and consumer products, to food and agricultural production, to energy generation, to transportation, and to waste disposal, among others. Indeed, these cases have often illustrated accountability gaps for victims; but, in virtually every case, the tragedy has equally illustrated the gross failure of States and businesses to prevent violations and abuses.

While we should be careful not to label certain groups as vulnerable, the groups most at risk of hazardous substances and wastes are truly vulnerable. For example,

children are poisoned and can suffer irreversible adverse impacts of their rights to life and health before they are even able to say their first word.

Prevention, access to justice & remedy are mutually supportive; but one must never come at the expense of the other. Far too many States rely on the prospect of legal liability to regulate business conduct. A “damage and sue” model of enforcement is not human rights prevention. Far too often, penalties and fees for violations simply amount to a cost of doing business, not prevention.

Today, over 12 million people die prematurely from preventable causes linked to hazardous substances in air, water and soil, due to the failure of States and businesses to take preventative measures, implicating a myriad of internationally recognized human rights. Most have no semblance of an effective remedy.

I emphasize, these human rights violations and abuses are preventable.

Over the past two days, I have heard at least one State mention that the “environment” issue belongs in environmental fora. With due respect, the environment and human rights are inseparable. The environmental fora is decades behind what the science demands of States when it comes to the protection of human rights and prevention of abuses. For example, the chemicals and wastes conventions regulate only 27 of thousands of hazardous substances through their lifecycle, omitting unquestionably toxic chemicals from their scope from which communities are poisoned and suffering abuses and violations.

So, I am pleased to help introduce and comment on the draft elements on “prevention measures”.

- **Point one** - “Any necessary action ... to prevent human rights violations committed by TNCs and OBEs” --- this is a general obligation on States to protect human rights and unquestionable.

However, it should not be limited to certain businesses. Furthermore it should be clarified that the chapter is prospective as the aim is to *prevent*. And it should be clearer in terms of ETOs, jurisdiction, territory, and supply and value chain aspects.

- **Point two** – “shall require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes.” This is much needed.

For example, in the chemical industry hardly any company is conducting human rights due diligence following the letter or the spirit of the UN Guiding Principles. There is no requirement within CSR policies like Responsible Care or the Global Product Strategy, even after seminal cases like Bhopal, from which they originate.

Also, here we need further clarification on what would constitute “activities” and it should not be limited to certain companies

The application to subsidiaries and related enterprises in this regard would be welcome; however, it not simply the supply chain leading up to a product that is a concern, but the full lifecycle including extended producer responsibilities that must be considered. For example, the responsibilities of ship-owners does not end with the manufacture and use of a ship – but must also extend to their choice to dispose of a ship either in an environmentally sound facility or on the beaches of South Asia using abhorrent child labor and leaching highly toxic pollutants into the local environment.

- **Point two also** requires TNCs/OBEs to adopt a “vigilance plan” with many important elements of a due diligence procedure. I find this essential.

For example, obligatory procedures for periodic assessment of subsidiary enterprises in supply chains, actions aimed at risk reduction, early warning system, set of actions for immediate redress, and a follow up mechanism for implementation would be very valuable based on my experience.

However, risk assessments of human rights violations or abuses by TNCs/OBEs are also proposed. This I find problematic in practice. This is ripe for manipulation by companies. States must ensure the integrity of information – both in the risk assessment itself and the underlying information. It should clarify how assessments and the integrity of information can be improved to provide greater clarity and certainty for those at risk of harm. This is an area of great concern, are where, unfortunately, there is much room for improvement.

- **Points three through seven** – they are valuable in driving prevention but not directly related to prevention. I would suggest they are moved to separate sections on rights to information, meaningful participation, and so forth – and also expanded upon -- as they are crucial and cross cutting in nature.

Thank you again, and look forward to the exchange of views with all stakeholders.