**Oral statement**

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

Tuesday, 15 October 2019

Statement on article 5

Delivered by Sandra Epal-Ratjen

*Check against delivery*

Thank you Mister Chairperson,

At the outset, let me say that we share and support the proposal by Brazil concerning the order of the articles. Access to justice / rights of victims should come after prevention and liability.

FI joins civil society colleagues, in particular the Feminist group and ESCR-Net, and experts who welcomed the introduction of mandatory due diligence. As articulated in our written submission from February 2019, we think that it is very important that a future draft includes an explicit provision that businesses not complying with this obligation of due diligence shall be held liable for this failure. However, concrete cases which FI has been following and working on, proved that due diligence can easily become a merely procedural and “ticking the box” exercise, with significant concerns around independence, expertise and transparency in these processes. We therefore reiterate that it will also be very important for the future LBI to explicitly state that the mere compliance with this obligation will not automatically shield businesses from liability for human right abuses.

We also would like to highlight two points with regard to prevention in situations of conflicts that should be the subject of stronger provisions in a future draft.

Concretely, we noticed that the current draft uses terminology that could be harmonized and streamlined in a next revision. In particular, we would like to encourage considering 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”.

Secondly, it will be extremely important that a future LBI is clear on the fact that in some circumstances, no matter how enhanced, due diligence will not be able to ensure that a business will not be committing or contributing to human rights abuses/violations and/or international crimes. 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 of international humanitarian law. This notion of immitigability has been recently articulated in particular in the 2018 Report of the UN High Commissioner for Human Rights, on the Database of all enterprises involved in the activities in Israeli settlements.

We would have more specific comments on the way “meaningful consultations” are articulated in the current draft in Article 5.3.b. In the interest of time, we may raise them in writing.

I thank you.