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

***Sixth session (26-30 October 2020)***

***Item 4:  Articles from 16 to 24***

Thank you Mister Chairperson. This statement is made on behalf of the “Feminists for a Binding Treaty”.

Firstly and in line with our proposals on Article 6.3 g), we recommend adding after “*conflict-affected areas*”, the phrase  “*operating contexts that pose severe human rights risks*” , which is language used by the UNGPs under Principle 21. This recommended addition aims to extend enhanced human rights due diligence to high-risk contexts to ensure more effective and comprehensive prevention of severe business-related human rights abuses. As the UN Working Group on Business and Human Rights put it in its recent report on Business, human rights and conflict-affected regions, “*while armed conflict is the most obvious trigger for heightened due diligence, other situations can put a State under such a level of stress that it becomes more prone to serious human rights violations. Genocide and crimes against humanity can occur during peacetime*.”[[1]](#footnote-1) It is, thus, essential to insist on a contextual assessment of human rights impacts, rather than one limited to areas affected by conflict. For example, some industries and products may not be considered as risky *per se* but might well pose severe human rights issues in certain contexts.[[2]](#footnote-2)

With regard to our proposal, we recall that several soft law and legally-binding instruments already refer to “*high-risk areas*” in addition to conflict-affected 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.[[3]](#footnote-3) While there is no unified legal definition of “*high-risk areas*”, they are often understood as contexts of political instability and repression that may lead to violent conflict. High-risk areas could also cover contexts of  internal disturbances and tensions — which would include riots, isolated and sporadic acts of violence,— not reaching the threshold of an 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 or  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.

Expanding enhanced human rights due diligence to “*operating contexts that pose severe human rights risks*” is also in line with the above-mentioned report of the UN Working Group on Business and Human Rights on conflict-affected regions, which identifies several risk factors and contexts that should raise the level of due diligence[[4]](#footnote-4) including:

* The weakness or absence of State structures such as the lack of independent and impartial judiciary, the lack of effective control of security forces and high level of corruption,
* A record of serious violations of international human rights and humanitarian law,
* Environment conducive to serious human rights abuses such as imposition of emergency laws or extraordinary security measures, strengthening of State security apparatus and strict control or banning of communication channels; banning or expulsion of NGOs, media, international organisations or other relevant actors.[[5]](#footnote-5)

Enhanced human rights due diligence with regard to armed conflict-affected areas, including situations of occupation, should also aim at preventing risks of violation of international humanitarian law. This is also in line with the UNGPs, which provide that in situations of armed conflict enterprises should respect the standards of international humanitarian law.[[6]](#footnote-6) We, thus, recommend  adding “*including risks of violations of international humanitarian law where applicable*” after the term “*business relationships*”. In addition, where risks cannot be prevented or mitigated, business activities should not be undertaken, should be suspended or terminated depending on the level of risks. We, hence, recommend  adding after the words “*sexual violence*” the following language “*and to suspend or terminate operations if necessary*”.[[7]](#footnote-7)

Secondly, we welcome article 16.4, which recognises that certain groups, including women, face heightened risks of human rights abuses within the context of business activities in conflict-affected areas. We suggest to clarify in this article that the list of groups facing heightened risks list is not exhaustive. In line with this, we suggest adding after “*internally displaced persons*”, the following language *“among other groups, paying particular attention to the multiple or intersectional forms of discrimination and impacts faced by persons belonging to more than one of these groups”*.

Finally, we recommend,  in line with our general position on the text of the 2nd draft LBI,  that articles 16.3 and 16.4 refer to human rights “*violation*” in addition to “*abuse*”

1. A/75/212, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Business, human rights and conflict-affected regions: towards heightened action, para. 16, 21 July 2020 [↑](#footnote-ref-1)
2. Report of the independent international fact-finding mission on Myanmar, A/HRC/39/64, 12 September 2018, para. 74, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\_HRC\_39\_64.pdf [↑](#footnote-ref-2)
3. The EU conflict minerals regulation provides the following definition: “‘conflict-affected and high-risk areas’ means areas in a state of armed conflict or fragile post-conflict as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”, see 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, Article 2 f), available at: http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN; The OECD Guidelines on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provide the following definition: “Conflict-affected and high-risk areas – Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.”, see OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Third Edition, see p. 66: https://www.oecd.org/daf/inv/mne/OECD-Due-DiligenceGuidance-Minerals-Edition3.pdf; Finally, the UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas provides the following definition: “Conflict-affected or high-risk areas are countries, areas, or regions: that are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely, in which there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present, that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence, that are currently in transition from violent conflict to peace.” 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. 7, available at: https://www.unglobalcompact.org/docs/issues\_doc/Peace\_and\_Business/Guidance\_RB.pdf [↑](#footnote-ref-3)
4. A/75/212, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Business, human rights and conflict-affected regions: towards heightened action, para. 16, 21 July 2020 [↑](#footnote-ref-4)
5. A/75/212, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Business, human rights and conflict-affected regions: towards heightened action, para. 16, 21 July 2020 [↑](#footnote-ref-5)
6. See Commentary to Guiding Principle 12 [↑](#footnote-ref-6)
7. 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.188 a) to e), the UN Independent Fact Finding Mission in Myanmar has for instance recommended that: “*No business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into or remain in a business relationship of any kind with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them (including subsidiaries) or their individual members, until and unless they are re-structured and transformed as recommended by the Mission.*”, A/HRC/42/CRP.3, 5 August 2019, available at: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx> [↑](#footnote-ref-7)