Second and third intersessional thematic consultations of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

ORAL STATEMENTS OF CIDSE ET AL FOCUSED ON ARTICLES 6, 8, 9, 10, 11

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Thank you, Mr. Chair-Rapporteur. I speak on behalf of CIDSE, DKA Austria, Trócaire, Franciscans International and Fastenaktion.

Once again, we would like to express our regret that the second intersessional consultation is being conducted exclusively in person, thereby precluding participation from numerous stakeholders who are unable to bear the travel expenses to Geneva. We respectfully request States to give a mandate to the OEIGWG to decide on the format of future intersessional consultations and revert it to a hybrid form.

Firstly, we wish to underscore that the Updated Draft exhibits substantial deficiencies regarding the due diligence obligations that States ought to impose on corporations. While the definition of human rights due diligence as outlined in Article 1.8 is aligned with the UNGPs, the updated draft offers minimal details and requirements pertaining to the execution of due diligence. In fact, Article 6 is the sole article that addresses the *"practice of human rights due diligence by business enterprises"* as part of the obligation for prevention. Although the non-paper mentions remediation and compensation on Article 8, the updated draft does not delineate a corporate obligation to provide these for damages as a component of corporate due diligence responsibilities. Moreover, it remains ambiguous to what degree this obligation pertains to a company's entire value chain.

For instance, **Article 6.5** states that States should require companies to adopt preventive measures concerning third parties, only "where the enterprise controls, manages or supervises" them. The updated draft restrictively defines business relationships, focusing predominantly on direct affiliations such as affiliates, subsidiaries, agents, partnerships, or joint ventures. This would yield a highly problematic limitation of due diligence obligations strictly to subsidiaries and direct business partners. It is important to recall that the majority of human rights violations transpire at the outset of the supply chain, such as in mining operations or on plantations, which would thereby be overlooked. In this sense, we support Ghana's proposal on a **provision 6.4** which reads: *"States Parties shall require business enterprises and other actors across the full value chain including State entities, to undertake ongoing and frequently updated human rights due diligence, proportionate to their size, risk of severe human rights impacts abuse [...]"*

States should implement duty of care obligations and mandate human rights and environmental due diligence, as presented in the third draft, ensuring coherence in terminology and methodology. Preventive measures must specifically address risks pertinent to conflict-affected regions and business respect for International Humanitarian Law. Additionally, these obligations must explicitly acknowledge the rights and needs of the most affected groups, including Indigenous Peoples, women, and children.

States should further delineate the actions that companies are obligated to undertake to prevent and mitigate adverse impacts. This includes implementing corrective action plans, modifying purchasing and distribution practices, or not entering contexts where human rights abuses or violations cannot be prevented. Moreover, the updated draft must explicitly define “corporate involvement” by clarifying the terms “cause,” “contribute,” and “directly linked,” to attribute responsibility to companies that enable or facilitate adverse impacts through their activities and business relationships.

The updated draft exhibits vagueness concerning liability. Although **Article 8** mandates States to establish a "comprehensive and adequate system of legal liability" and explicitly mentions "criminal, civil or administrative" forms of liability in **Article 8. 2,** these are merely options to be applied based on the legal principles of the State party and the prevailing circumstances. The explicit requirement from the third draft regarding compensation for damages (reparation to a victim) was removed and must be regarded as a mandatory element of liability. The forms of liability pursuant to **Article 8.2. (a)** consider the needs of victims as regards remedy. However, the definition of remedy in **Article 1.9.** does not explicitly include compensation. Consequently, the updated draft fails to clearly establish that injured parties are entitled to compensation under civil law if companies contravene their duty of care, thereby contributing to damage. In this regard, we welcome the proposal in the non-paper regarding **Article 8.5** to substitute the provision, focusing on financial security to cover claims for compensation and judicial costs.

Unlike the third draft, the updated draft remains silent on the issue of liability within corporate groups and along the supply chain. The non-paper outlines inconsistencies on the latter based on the corporate veil principle or the developing tort law principles in which liability depends on the causative nexus between human rights abuse and wrongful performance. We are concerned about the views of the legal experts on the non-paper. We strongly support Palestine, Ghana and South Africa’s proposal to add a **provision 8.6 (bis)** stipulating that all companies in a corporate group or value chain involved in human rights abuse and violation shall be jointly and severally liable. We kindly request the legal experts to provide guidance to States to ensure that a parent company be held liable for abuses committed throughout the value chain.

It is of utmost importance that the LBI reinstates a provision that establishes liability across value chains and complex corporate structures, thereby ensuring the uniform application of corporate accountability across the jurisdictions of State Parties. Furthermore, a provision should clearly articulate that corporate adherence to due diligence obligations does not automatically exempt companies from liability. In this sense, we welcome the addition of **provision 8.6 (quinquies)**, suggested by Palestine, Ghana and South Africa which reintroduces elements contained in **Article 8.7** of the third draft.

The LBI should also require that administrative enforcement of corporate obligations includes consultation with victims of human rights and environmental harm. Authorities must prioritise the needs of victims for remedies when issuing penalties and corrective measures to businesses. **Article 8.2** should specifically reference the rights of victims, including the right to an effective remedy, **as outlined in Article 4** on the Rights of Victim.

Domestic law qualifiers under **Article 8** should be eliminated or, alternatively, Article 8 should explicitly state that essential requirements related to legal liability (Article 8.2.) cannot be overridden by domestic legal principles.

On the other hand, it is essential to emphasize that a significant advantage of the LBI resides in its complementarity with national and regional regulations. It addresses numerous issues possessing an international dimension that cannot be effectively regulated at the national or regional level or can only be addressed to a limited extent. Notable examples include matters concerning competent jurisdiction **(Article 9)** and applicable law (**Article 11**), among others.

With regard to **Article 9**, we propose that the LBI broaden the grounds for jurisdiction and enhance the array of jurisdictional choices available to victims. It should encompass comprehensive and inclusive forum options for claimants, explicitly prohibiting the application of "*forum non-conveniens*" and integrating "f*orum necessitatis*" to ensure access to justice.

Furthermore, in light of the significant deficiencies present in current EU regulations regarding jurisdiction and conflict of laws, which hinder effective enforcement of corporate obligations and available remedies for victims, the LBI could assume a crucial role in facilitating adaptations of private international law rules related to instances of corporate human rights violations and environmental harm.

Concerning **Article 10** in general, States should enable judges to extend statutes of limitations if the facts of the case warrant it. The updated draft could incorporate a provision for this.

Finally, we suggest rephrasing **Article 11.2** on applicable law as follows:

"All matters of substance which are not specifically regulated under this (Legally Binding Instrument) ~~*may*~~ ***shall****, upon the request of the victim, be governed by the law of another State where: […]"*

Finally, as we are approaching the end of the third intersessional thematic consultation, we would like to express our concerns related to the role of the EU. As outlined by other NGOs allies, we are concerned about the proposed changes to the Corporate Sustainability Due Diligence Directive in the Omnibus I package and how these changes – if enacted – could undermine the EU's legitimacy when speaking to human rights abuses and violations in the context of business activities. It will further impact the possibility of a progressive and constructive negotiating mandate for the EU in relation to the LBI process.

We would also like to request more precisions on how the Working Group and the Chair-Rapporteur are going to use the learnings and the conclusions of the consultations. We are particularly concerned that the October negotiations will start to discuss again issues that have been clarified at the consultations, and we would be happy to receive more information on the process.

Thank you

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