

**Seventh Session of the Open-ended intergovernmental working group on
transnational corporations and other business enterprises
with respect to human rights
ORAL STATEMENT – ARTICLE 8**

On behalf of: CIDSE, CCFD-Terre Solidaire, Broederlijk Delen, CAFOD, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll Office for Global Concerns, Trócaire, Alboan and Commission Justice & Paix Belgium.

28 October 2021

Mr. Chair,

I deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Broederlijk Delen, CAFOD, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll Office for Global Concerns, Trócaire, Alboan and Commission Justice & Paix Belgium.

When establishing the liability of companies and their business relationships for causing or contributing to harm, the third draft changes the tense used in the **Art 8.6.** to the past, referring to persons with whom companies '**have had**' a business relationship. It is positive that the draft reflects liability for historical damages; however, the current language could confuse and lead to interpreting the provision as uniquely referring to past business relationships.

The first part of Art 8.6 should be amended replacing 'have had' with "**have or have had**" as follows:

***Art 8.6** – States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they **have or have had** a business relationship (...).*

The notion of control in **Art. 8.6** is also problematic. As the draft lacks provisions establishing a clear rebuttable presumption of control, it can be assumed that "*to establish legal liability, it must be proven in each individual case that a company effectively exercised control over their business relationships.*"

This can be **difficult** because corporate relations between different companies (percentage of shares, appointment of directors, voting rights such as "golden shares") are often not apparent to third parties. Similarly, if control is exercised through contractual relations (right to unilaterally determine price, quality and quantity of products), it may be challenging to prove control without access to these contracts.

In light of the variety of control situations and the differences between legal systems, the text should require States to ensure that their domestic systems provide for a **presumption of control** in the meaning of Art 8.6. A sentence should be added to Art 8.6, worded as follows:

***Art 8.6** – States Parties shall determine in their domestic law that control over one legal person by another legal person is **presumed** with reference to corporate, contractual and other business relations between the former and the latter into account.*

The LBI also lacks an explicit recognition of **joint or several liability**, with one or more businesses directly causing abuses and the other(s) (or several) controlling it but failing to prevent it from causing or contributing to harm. The text should explicitly recognise the possibility for joint and several liability. Such provision could be added at the end of **Art 8.6** which should read as follows:

“States parties shall ensure that their domestic law includes the possibility of joint and several liability in addition to liability for own business activities and liability activities for other persons.”

Corporations should not be exempted from liability for harm in reason of their compliance with due diligence obligations. It is essential that this is as unambiguous as possible.

Art 8.7 establishes this clearly in the first part, except for the use of ‘automatically’, and the second part is ambiguous. Art 8.7 should be strengthened and simplified by reformulating it as follows:

***Art 8.7** – When determining the liability of a natural or legal person for causing or contributing to human rights abuses or failing to prevent such abuses as laid down in Article 8.6, the competent court or authority can take into account if the person undertook adequate human rights due diligence measures, but compliance with applicable human rights due diligence standards shall not absolve from liability ipso iure.*

Finally, we join Namibia and Palestine in opposing the new Art. 8.bis proposed by Brazil, which defeats the purpose of this article and this Treaty. Right-holders who face high domestic obstacles to justice, or who deal with corporate capture of the state, must be able to seek redress through this treaty.

Thank you, Mr. Chair.