Mr. Maina Kiai

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to freedom of peaceful assembly

and of association

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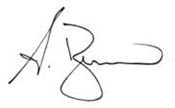
LEX/MS 31 January 2015

**Questionnaire on freedom of peaceful assembly and of association in the context of natural resource exploitation**

Dear Mr Maina Kiai,

Please accept our submission in response to your request for information in relation to your report on freedom of peaceful assembly and of association in the context of natural resource exploitation which will be presented to the UN Human Rights Council in June 2015. This submission will focus on workers’ right to freedom of association and collective bargaining in extractive industries.

Yours sincerely,



Sharan Burrow

ITUC General Secretary

**I. Introduction**

About 3.5 billion people live in countries rich in oil, gas or minerals.[[1]](#footnote-1) Yet, the job opportunities created in the extractive industries do not necessarily enable workers to escape poverty. In several countries, workers in extractive industries are forced to accept extremely inadequate working conditions such as long working hours, low wages, occupational health and safety risks, gender discrimination and forced labour practices. Their right to establish and join unions and to bargain with their employers for fair working conditions and salaries so that they can fully benefit from the natural resource wealth of their country is of particular importance.

ILO Convention 87 on Freedom of Association and ILO Convention 98 on Collective Bargaining protect the right of all workers to join and establish trade unions. Companies also have the obligations with regard to workers’ right to freedom of association under the OECD Guidelines for Multinational Enterprises, the UN Human Rights Council resolutions on business and human rights, and the UN Global Compact. The “Protect, Respect and Remedy” framework and the “Guiding Principles on Business and Human Rights,” which were developed by the former United Nations Special Representative on Business and Human Rights Professor John Ruggie and endorsed by the UN Human Rights Council in 2008 and 2011, respectively, reflect the expectation that businesses should respect the right to freedom of association, avoid complicity in abuses, and adequately remedy them if they occur. They specify that businesses must exercise due diligence to identify, prevent, mitigate, and account for the impact of their activities on the right to freedom of association.

However, thirty-three countries, representing over half of the world’s population, have not ratified ILO Convention 87 and ILO Convention 98, including China, India, the US and Brazil. Other countries which have ratified the conventions have continued to violate workers’ rights and have failed at adopting national laws complying with international labour standards. Union members in 28 per cent of nations have reported physical violence to the ITUC. In the past 27 years, 2,942 trade unionists have been murdered in Colombia. In at least one in four countries, employers refuse to bargain despite extensive collective bargaining laws.

**II. Cases of abuses in extractive industries**

Workers in extractive industries have been subjected to discriminatory practices when they attempted to exercise their legitimate rights. Employers refuse to bargain with workers in good faith and have used their security officers and police to violently crush legitimate strikes and protests. In numerous cases, restrictive laws and precarious work arrangements have curtailed the right to join trade unions and exercise trade union activities. The cases below do not constitute an exhaustive list of abuses but illustrate the types of challenges faced by workers.

***Democratic Republic of Congo (DRC)***

DRC is among the world’s largest producers of cobalt, copper, diamonds, tantalum and tin, as well as several other minerals. In 2012, 20 per cent of the world’s industrial diamonds and 12 per cent of tantalum came from the DRC. Artisanal and small-scale mining (ASM) is widespread and estimates of the number of people employed by ASM vary between 500 000 and two million.[[2]](#footnote-2)

Reports of the United Nations High Commissioner for Human Rights on the situation of human rights in the DRC repeatedly pointed at serious human rights violation, including forced labour, in resource rich areas linked to the illegal exploitation of such resources.[[3]](#footnote-3) Civilians have been targeted for abductions and forced labour by armed groups and by combatants of the Allied Democratic Forces. Many of those abducted are forced to engage in work, such as timber cutting, gold mining and agricultural production for the benefit of the armed groups.

The Confédération Démocratique du Travail (CDT) reported to the ITUC the lack of effectiveness of the National Labour Council. Unions are unable to influence the agenda of the National Labour Council which limits their ability to bring the many socio-economic challenges, including forced labour, to policy debates. Discriminatory measures against trade unionists have also been identified as a key problem in the defense of workers’ rights and interests. There have also been cases were companies have intervened in union elections in order to coerce workers into electing representatives perceived to be closer to management. The mining company Tenke Fungurume has undermined industrial action by replacing workers who went on strike with agency workers constituting a serious violation of freedom of association.[[4]](#footnote-4)

In addition, the legislative framework restricts the exercise of the right to freedom of association. For example, the legislation requires a 20-year residence period as a condition of eligibility for a person to be entrusted with the administration and management of a trade union organization.[[5]](#footnote-5) The Labour Code does not apply to civil servants who are governed by the general statutes nor to civil servants governed by particular national statutes. The law stipulates penalties against striking workers who enter or remain on work premises affected by strikes,[[6]](#footnote-6) which is a grave violation of the principles of freedom of association.[[7]](#footnote-7)

***Peru***

Peru is the largest gold producing country in Latin America and the sixth largest gold producer in the world. Fourteen percent of the national territory has been designated to mining companies in the form of mining concessions, and illegal mining takes place on extensive stretches of land that are not included in official estimates. In 2013, La Defensoria (Ombudsman) del Pueblo reported that informal and illegal mining took place in 21 regions of Peru, directly employing about 100,000 workers. The Peruvian Ministry of Labor reported that there were 48,000 forced labourers throughout the country and highlighted gold mining in Madre de Dios as one of the three sectors with the highest incidences of forced labour.

In 2011, the UN Special Rapporteur on Contemporary Forms of Slavery found that the rise in gold prices had caused migration from the Andean regions of Peru, as well as from Brazil and Bolivia, to Madre de Dios. Workers were recruited to work in mining with deceit and in-kind cash advances, which were deducted from their salaries. They were exposed to mercury and tropical illnesses, inadequate food, and a lack of health care and social security. The vulnerability of women to sexual exploitation, including female cooks and women forced into prostitution in brothels in and around mining was also highlighted.[[8]](#footnote-8)

In December 2013, the mining company Glencore Xstrata engaged in unfair dismissals, coercion and interference in union affairs to prevent technicians at the Antapaccay copper company in the Cuzco region of Peru from unionising. When Xstrata took over the company, it reclassified 450 technicians as “employees of confidence” for no other reason than to limit their right to organize and bargain collectively and to make it easier to fire them. Then when a group of employees decided to form the Sindicato de Trabajadores Funcionarios de la Compañía Minera de Antapaccay in response to the company’s unfair treatment, the company dismissed them all, saying simply that it was “withdrawing its confidence.” Workers with an unblemished employment record stretching back in some cases over thirty years were dismissed two days after forming a union leaving no room for doubt about the company’s true motives. Subsequently, management offered to reinstate them on condition they quit the union. Having successfully reduced the number of union members, the company drafted a letter in their name asking for the union to be deregistered.[[9]](#footnote-9)

National laws are also an obstacle to the freedom of association in Peru. One example is the fact that a minimum of 20 members are required to form a union in some cases, and the maximum requirement is 50 in others.[[10]](#footnote-10) This minimum number is excessive for trade unions established at the work place level as it excludes workers employed in small- and microenterprises from the right to join unions. Trainee workers may join unions but are excluded from the right to collectively bargain with their employer over working conditions and wages.[[11]](#footnote-11) Workers do not have access to recourse to an independent judicial body when their right to strike is curtailed. It is the Administrative Labour Authority which has the competence to declare a strike illegal.[[12]](#footnote-12) Certain forms of strikes, such as go-slow strikes or work-to-rule, deliberately reducing productivity, or any form of stoppage where the workers remain at the workplace, are banned.[[13]](#footnote-13)

***Turkey***

Only 4.5 per cent of workers in Turkey are unionised which is the lowest trade union density rate in any OECD country.[[14]](#footnote-14) Legal provisions severely curtail the right of workers to freedom of association. For instance, workers in a large number of sectors do not have the right to strike, including in natural gas and petroleum as well as petrochemical works.[[15]](#footnote-15) Fines may be imposed on workers participating in peaceful strike action, if any procedural requirement concerning strike action is violated.[[16]](#footnote-16) Employers may hire new workers in lieu of worker who went on a strike in sectors where strikes are prohibited.[[17]](#footnote-17) The law allows employers may forcible requisition striking workers.[[18]](#footnote-18) The ILO Conference Committee on the Application of Standards has examined Turkey’s failure to give effect to ILO Convention 87 on Freedom of Association during five sittings in the past ten years.[[19]](#footnote-19)

On 13 May 2014, an explosion and blaze at the coal mine Soma led to the death of 301 mine workers. A fire starting in the mine rapidly depleted oxygen in the shaft, causing hundreds of miners to die of carbon monoxide poisoning. According to the report of the public prosecutor, sensors in the coal mine had reported a risk of fire, but no measures were taken to prevent the accident. The report identified 20 instances of gross negligence that led to the disaster. Overproduction was a contributing factor given that production in the mine was 2.5 times more than planned. More miners than planned were working in the mine, but the ventilation system was not strong enough to provide the miners with clean air. Turkey has the third highest rate of deaths at work for miners in the world. Some 13,000 miners were involved in accidents in 2013 and 1,308 miners have been killed in workplace accidents since 2000.

Moreover, most mine workers in Soma were either casual, unregistered workers and barely earned the minimum wage. In fact, there has been a dramatic increase in the number of precarious workers in Turkey from 358,000 in 2002 to 2.5 million in 2014. Employers prefer precarious forms of employment to decrease direct labour costs and avoid employment protection legislation. This is also a strategy used to avoid trade union representation as precarious workers are in a much weaker position towards their employer due to the instability of their work and their increased vulnerability to anti-union discriminatory measures, such as non-renewal of fixed-term contracts. There is a growing body of research indicating that casual working arrangements and job insecurity are associated with adverse outcomes such increased fatalities, injuries and illnesses, inferior knowledge of rights and regulations concerning occupational safety and health, decreased reporting propensity, less or minimum occupational and safety training.[[20]](#footnote-20)

When about 1,500 workers organised a protest in order to criticise the lack of health and safety at work places and the lack of preventive measures against work place injuries on 16 May 2014, police used teargas, plastic bullets and water cannon to disperse protestors.[[21]](#footnote-21)

In August 2013, Petrol-ls reported to the ITUC that it organised a considerable number of workers at TransAtlantic Petroleum Ltd company and Viking Services BS company, a company operating in the Middle East, North Africa and Eastern Europe in the fields of petroleum and gas exploration and production. As soon as management became aware of the organising efforts, 24 trade unionists were dismissed and six trade unionists were transferred to oilfields in Northern Iraq. Moreover, the company uses intimidation, assaults and threats to deter trade unionists. Petrol-ls has brought the case to court and stages pickets outside the plant.

***Kazakhstan***

Kazakhstan is the largest country in Central Asia and boasts the fastest growing economy in the region, fueled by its large reserves of natural resources such as oil, gas, coal and uranium. In the last decade, Kazakhstan has annually drawn billions of dollars in foreign direct investment, including from the United States, Great Britain, and Russia, most of which pours into its oil and gas sector. Oil sales have accounted for nearly 40 percent of total government revenue in recent years.

Thousands of workers employed in Kazakhstan’s oil and gas sector downed their tools in May 2011 in three strikes at companies operating in the petroleum sector in western Kazakhstan over issues such as low pay and interference by company management in trade union activity. In response to the strikes, public authorities and the three companies violated workers’ fundamental rights, including freedom of association, collective bargaining and expression, and the right to strike.

Ersai Caspian Contractor LLC and KarazhanbasMunai JSC restricted union leaders’ access to company territory and denied workers space to hold general meetings. KarazhanbasMunai JSC failed to recognise the election of a new acting union chairman. Over the months workers were on strike, the three companies altogether fired over 2,000 workers, in some cases in violation of national legislation.

The three companies declined in various ways to review workers’ demands in mediation procedures that could have brought about resolution of the workers’ grievances.

Local courts declared each of the three strikes illegal, citing workers’ failure to comply with national legal requirements to conduct legal strikes, as well as a labor code provision that prohibits strikes at “hazardous production facilities,” a designation that includes Ersai Caspian Contractor LLC, KarazhanbasMunai JSC, and OzenMunaiGas. Local authorities brought administrative sanctions against union members in retaliation for legitimate union activity, and a union lawyer was sentenced to six years in prison for speaking to workers about wage disparity.

Authorities broke the strike at Ersai Caspian Contractor in June 2011 after they threatened to round up strikers and bring administrative charges against them if they did not disperse. Security forces brought the strike at OzenMunaiGas to an abrupt end on December 16, 2011 after clashes erupted between people who had gathered on the central square in the city of Zhanaozen, including striking oil workers and police. That day, the local administration had planned Independence Day celebrations on Zhanaozen’s central square where striking oil workers had been gathering daily for several months. After initial clashes on the square, over the course of the day several buildings were set on fire and shops were looted. In response to the outbreak of violence, police opened fire, killing at least 12 people and wounding dozens of others, according to government numbers. Three other individuals died, and dozens of police were wounded in the clashes, according to Kazakhstan’s Prosecutor General’s office. Immediately following the violence, President Nursultan Nazarbaev declared a state of emergency in Zhanaozen and ordered an investigation into the violence. He also ordered a government commission to address the more pressing socioeconomic problems in Zhanaozen and to find new employment for oil workers who had been dismissed from OzenMunaiGas and KarazhanbasMunai.

On March 27, 2012, 37 oil workers and others were tried on charges of organising or participating in the unrest. Despite credible allegations made by many of the defendants in court that police and security forces ill-treated and tortured in pre-trial custody in order to force them to give testimony against themselves and others, the authorities refused to thoroughly and impartially investigate these allegations. On June 4, the court convicted 34 of the defendants, and sentenced 13 of them to prison terms. The rest were released under amnesty, will serve suspended sentences, or were acquitted. The appeals court upheld all but one of the sentences, reducing one prison term from seven to five years. In January and February 2012, authorities also arrested several oil workers and opposition activists who supported the oil workers during the strike for allegedly “inciting social discord.”

On 27 June 2014, the government of the Republic of Kazakhstan promulgated a new law on Trade Unions, and which came into force on 11 July. It supersedes the 1993 law on trade unions. The law raises a number of serious concerns with regard to trade union structure. Articles 11-15 impose a rigid trade union structure consisting of local trade unions, industrial trade unions, territorial association of trade unions and the republican association of trade unions. Affiliation to a higher level of trade union structure appears mandatory (see Articles 14.4, 13.3 and 12.3) and that the creation of a peak body is mandatory (Article 11.2). Mandatory affiliation requirements violate ILO Convention 87.

It is unclear from the law whether there could be more than one republican association of trade unions, or more than one territorial association per geographic unit. Trade union monopolies violate Convention 87.

Further, the law imposes very high member/organization requirements to establish an organization, with the intent we assume to limit the diversity of organizations at levels superior to the local trade union. For example, a republican trade union association must be established by industrial trade unions (though not clear by all or by some subset) and have organizations on the territory of more than a half of the regions, federal cities, and the capital of the country (Article 11.2, 11.3). An industrial trade union must consist of at least a half of the total number of employees or organizations working in a particular industry and allied industries, or have structural units, member organizations on the territory of more than a half of the regions, federal cities and the capital Article 13.2). This may make it very difficult to form these upper-level organizations, and again in practice may lead to the existence of only one such organisation.

***Zambia***

Zambia is ranked as the world’s seventh largest producer of copper, and world’s second largest producer of cobalt (19.7%).[[22]](#footnote-22) In 1998, as the Zambian government was selling the copper mining assets during privatisation, China Non-Ferrous Metals Mining Corporation (CNMC) purchased the Chambishi Copper Mine in an open bid. Non-Ferrous China Africa (NFCA) began production for CNMC in 2003—13 years after the Chambishi mine was last in active production. In 2006, CNMC opened Sino Metal Leach Zambia (known as Sino Metals) near the NFCA underground mine to provide lower-level processing into exportable copper cathode through its tailings leach plant and Solvent Extraction/Electrowinning (SX/EW) plant.

Miners at several Chinese-run companies reported poor health and safety standards, including poor ventilation that can lead to serious lung diseases, hours of work in excess of Zambian law, the failure to replace workers’ personal protective equipment that is damaged while at work, and the threat of being fired should workers refuse to work in unsafe places. Injuries and negative health consequences are not uncommon, although many incidents are not reported to the government, contrary to Zambian and international labour law. The troubling situation stems largely from the attitude of Chinese-owned and run companies in Zambia which have tended to treat safety and health measures as trivial. Efforts to address these and other issues of concern to workers—particularly pay, which is higher than Zambia’s monthly minimum wage but much lower than that paid by other international copper mining firms—is hampered by the curtailment of union activity: several Chinese operations suppress workers’ right to join the labour union of their choice and retaliate against outspoken union representatives.

Most miners at Sino Metals and CCS reportedly work 12-hour shifts, compared to the eight-hour shifts outlined in Zambian law and standard in every other copper mining and processing operation in the country. Miners in certain departments at Sino Metals work 78-hour weeks without sufficient overtime, while those in other departments work 365 days a year, or have pay docked from already low salaries. Workers work under the threat of being fired should they refuse to work in areas they reasonably perceived as dangerous. Such threats are not empty: in several instances when workers did stand up to their employer, they suffered lost pay, “charges” (written warnings) for insubordination, and even termination.

In 2005, an explosion at a Chinese-owned explosives manufacturing plant in Chambishi killed 46 Zambian workers; the following year, riots in Chambishi over work conditions culminated in the shooting of at least five miners, allegedly by a Chinese manager. While at least one union exists at each Chinese-owned copper mine, several companies have barred workers from joining the Mineworkers Union of Zambia (MUZ)—despite clear provisions in Zambian labor law that allow workers to be represented by the union of their choice and a court ruling in MUZ’s favor on the establishment of a branch office at these specific companies. Union representatives at the Chinese-run operations faced prejudicial acts taken against them for union activities, including verbal threats to fire an employee, transfer to jobs that are outside a union representative’s training and expertise, and “charges”—which can lead to deductions of monthly pay and even termination of employment—for attending union meetings. Union leaders at several non-Chinese mines also cited problems, indicating a broader failure by the Zambian government to protect union representatives as required under Zambian and international law.

The one- and two-year contracts that are standard in the Chambishi-based Chinese mining operations were repeatedly described as obstructions to meaningful union activity. Union representatives and members at each of these operations identified outspoken colleagues who had been union officials in the local branch and then had their contracts not renewed by management.[[23]](#footnote-23)

In February 2013, the government seized Collum Mine over poor working conditions and violations of trade union rights. There has been frequent industrial unrest since the mine was privatised in 2003. In October 2010, 13 mineworkers were injured when two managers at the mine opened fire on striking workers. Charges against the two managers were later dropped by the State. A pay dispute at the mine in 2012 after government raised the minimum wage resulted in a spontaneous protest by workers during which a Chinese supervisor was killed and another was injured.

In February 2012, the Mopani Copper Mines (MCM) dismissed 19 miners, including a union official from the United Mineworkers Union of Zambia (UMWUZ), for allegedly inciting miners to protest after the company awarded its employees a 17% salary rise. UMWUZ stated that the union official who had been fired was merely there to tell the workers to resume work.

The legal framework for trade unions is also extremely restrictive. Public authorities may refuse to register trade unions on arbitrary or ambiguous grounds.[[24]](#footnote-24) An application for registration of a trade union must be made by not less than 50 supporters which is excessive in particular with respect to small and micro enterprises.[[25]](#footnote-25) The Registrar has a period of 6 months from the date of the application to register a trade union.[[26]](#footnote-26) An employee can only become a member of “a trade union within the sector, trade, undertaking, establishment or industry in which the employee is engaged” which limits the right of workers to freely choose their union.[[27]](#footnote-27)

**III. Recommendations**

* Governments should ratify ILO Convention No.87 on Freedom of Association and ILO Convention 98 on Collective Bargaining and bring its national laws in compliance with the conventions.
* Governments should ensure that workers have access to recourse of independent judicial mechanisms when their rights are violated
* Governments should establish labour inspectorates to monitor the enforcement of its national laws with respect to freedom of association at national level
* Governments should conduct effective consultations with trade unions over the working conditions in extractive industries and agree on legal and policy reforms which would improve the protection of the right to freedom of association
* Companies should comply with the UN Guiding Principles on Business and Human Rights by respecting the rights of workers to form or join a trade union by not doing anything that would have the effect of discouraging workers from exercising this right and by not refusing any genuine opportunity to bargain collectively.
* Due diligence for the right to form or join a trade union should involve identifying and preventing anti-union policies and practices as well as mitigating the adverse impacts on the exercise of these rights by other business activities and decisions such as changes in operations.
* Due diligence for the right to bargain collectively must recognise that business enterprises must be prepared to bargain under a wide range of structures in countries where the law and practice does not provide a well-defined framework for bargaining

1. World Bank, Extractive Industries Overview (http://www.worldbank.org/en/topic/extractiveindustries/overview#1) [↑](#footnote-ref-1)
2. Extractive Industries Transparency Initiative (https://eiti.org/DRCongo) [↑](#footnote-ref-2)
3. A/HRC/24/33 of 12 July 2013 [↑](#footnote-ref-3)
4. ILO Digest on Freedom of Association, paras. 632 f. [↑](#footnote-ref-4)
5. Section 241 of the Labour Code [↑](#footnote-ref-5)
6. Section 11 of Order No. 12/CVAB.MIN/TPS/113/2005 of 26 October 2005 [↑](#footnote-ref-6)
7. ILO Digest on Freedom of Association, paras. 658 f. [↑](#footnote-ref-7)
8. For more detailed information see: Verite Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mining in Peru (http://www.verite.org/sites/default/files/images/IndicatorsofForcedLaborinGoldMininginPeru.pdf) [↑](#footnote-ref-8)
9. IndustriAll Global Union, Glencore Xstrata acts true to form in Peru (http://www.industriall-union.org/glencore-xstrata-acts-true-to-form-in-peru) [↑](#footnote-ref-9)
10. Art.14 of the Industrial Relations Law [↑](#footnote-ref-10)
11. Law no. 28518 and its regulation, General Education Law [↑](#footnote-ref-11)
12. Art. 82 of the Industrial Relations Law [↑](#footnote-ref-12)
13. Art.81 of the Industrial Relations Law [↑](#footnote-ref-13)
14. OECD Stats, Trade Union Density (<http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN>) [↑](#footnote-ref-14)
15. Art. 62 of the new Law on Trade Unions and Collective Labour Agreements (No. 6356) [↑](#footnote-ref-15)
16. Art.78 Law on Trade Unions and Collective Labour Agreements (No. 6356) [↑](#footnote-ref-16)
17. Art.65 (5) Law on Trade Unions and Collective Labour Agreements (No. 6356) [↑](#footnote-ref-17)
18. Art. 65 of the new Law on Trade Unions and Collective Labour Agreements (No. 6356) [↑](#footnote-ref-18)
19. http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\_COMMENT\_ID:2556553 [↑](#footnote-ref-19)
20. The Hidden Health and Safety Costs of Casual Employment, Industrial Relations Research Centre, University of New South Wales (<http://wwwdocs.fce.unsw.edu.au/orgmanagement/IRRC/CasualEmploy.pdf>) [↑](#footnote-ref-20)
21. The Guardian, Turkey mine disaster: police use riot tactics at protests about mine safety (http://www.theguardian.com/world/2014/may/16/turkey-mine-disaster-teargas-plastic-bullets-protesters) [↑](#footnote-ref-21)
22. Zambia Mining (http://zambiamining.com/mining-in-zambia-2/) [↑](#footnote-ref-22)
23. For more detail see: Human Rights Watch, "You’ll Be Fired if You Refuse" (http://www.hrw.org/reports/2011/11/04/you-ll-be-fired-if-you-refuse) [↑](#footnote-ref-23)
24. Section 9(5)(c), Industrial and Labour Relations Act, as amended 2008 [↑](#footnote-ref-24)
25. Section 9(2), Industrial and Labour Relations Act [↑](#footnote-ref-25)
26. Section 9(3), Industrial and Labour Relations Act, as amended 2008 [↑](#footnote-ref-26)
27. Section 5(b), Industrial and Labour Relations Act, as amended 2008 [↑](#footnote-ref-27)