



## **UN Guiding Principles on Business and Human Rights at 10 – *Towards a Decade of Implementation***

This document constitutes our initial response to the open consultation on the UNGPs 10+ initiative. We will also share brief summaries of relevant materials by 28 February 2021.

### *Reflections on a transformative decade for business and human rights*

- Through the gradual acceptance of the UNGPs by the international business community, since their unanimous adoption at the Human Rights Council in 2011, there has been a notable shift from ineffective *Corporate Social Responsibility* to more concrete action that must be welcomed.
- Human rights due diligence to identify, prevent, mitigate and account for how enterprises address impacts on human rights, as set out in the UNGPs, has become central to the discussion on business and human rights.
- Progress over the last nine years can be tracked via the evolution in business response through periods of resistance, dismissal, avoidance, acquiescence, acceptance, to more demonstrated support for the UNGPs. The more responsible leaders in business are now actively advocating for mandatory human rights due diligence in order to create a level playing field in this area, where they themselves are taking ownership of the principles. See, for example, statements from the [European Brands Association](#) (AIM), [Business for Inclusive Growth](#), and the [Investor Alliance for Human Rights](#).
- The revision of the OECD Guidelines for Multinational Enterprises to incorporate the Guiding Principles enhanced them to the status of expectations of governments and gave them a corresponding credible, State-based grievance mechanism with the machinery of National Contact Points.
- The important 2017 revisions to the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) incorporate UNGP language and leaves no doubt that Fundamental Principles and Rights at Work are to be respected by business. Freedom of association and collective bargaining are highlighted as the cornerstone of effective human rights due diligence and indispensable in the movement towards decent work for all.
- Elaborating on this centrality of freedom of association and social dialogue, the OECD Due Diligence Guidance for Responsible Business Conduct adopted in 2018 lays out how credible human rights due diligence is informed by stakeholder engagement and further specifies that “stakeholders” include workers, workers’ representatives, trade unions, and Global Unions.
- 24 States have so far adopted National Action Plans (NAPs), which aim to implement the UNGPs through state-led policies and executed action, including legislation. States have a general and overarching responsibility to protect the human rights of those within their jurisdiction, including to protect from business activity. Further, States directly engage in commercial transactions with business, not least through their procurement activities and export credit agencies. As such, these NAPs are essential opportunities to deploy States’ leverage as an economic participant, for implementing the UNGPs, and closing gaps in protection against business activities. NAPs enable the design of a holistic and comprehensive approach to ensuring business respect for human rights via all routes, including both direct and indirect state engagement in business practices. More states

need to put these plans in place, and continue to amend, update and improve existing plans, to achieve progress internationally and encourage the motivation and acceleration of good practices among peer states.

- The forming and engagement of multi-stakeholder initiatives have been guided into improved practices by the UNGP framework. The value of multi-stakeholder initiatives has been particularly explored in the third stage of the Accountability and Remedy Project (ARPIII) led by the UN OHCHR. The three stages of the ARP so far have developed valuable practical guidance on how state judicial, state non-judicial, and non-state based grievance mechanisms respectively can fulfil the effectiveness criteria of the UNGPs, and increase the accountability of businesses implicated in human rights impacts.
- There has been a marked uptake in investor consciousness around responsible business conduct. The Investor Alliance for Human Rights notes the investor responsibility, as businesses themselves, to also respect human rights and equips investors to put this into practice. PRI's Principles for Responsible Investment aim to improve the accountability of the investor community. In March 2020, a group of 176 international investors representing 4.5 trillion USD in assets sent a letter to the 95 companies that scored zero in Corporate Human Rights Benchmark's human rights due diligence assessments. At the international level, the UNGPs have been incorporated into the Sustainability Framework of the International Finance Corporation.
- The project of the UNWG to unpack the gender issues and provide guidance on how to apply a gender lens to the UNGPs recently opened up the vital conversation on how the UNGPs must be used to address gender, vulnerability and/or marginalisation, and the specific issues of particular groups identified. Regional and thematic consultations culminated in a June 2019 report "Gender dimension of the Guiding Principles on Business and Human Rights" to the Human Rights Council.
- Despite progress over the past decade, the COVID-19 pandemic has revealed the true scarcity of effective risk assessment, preventative measures, due diligence activities, and protective and remedial infrastructure. Among other thing, this time of crisis saw companies cancel orders, postpone payments and otherwise withdraw from fulfilling contracts with subcontractors and suppliers, leaving millions of workers along the supply chains, from production to retail, of apparel brands in the garment industry, for example, facing destitution. There were also evident failures by business to recognise and address the disproportionate impact of the pandemic on women, youth, LGBT+ communities, migrants, and people of colour in the workplace.

### **Challenges and opportunities for the Next Decade**

- We are united in acknowledging that, despite the admirable progress of the last ten years, which is to be welcomed, much remains to be done.
- The urgency of the need for increased business action, for the prevention of human rights impacts, labour abuses, and the environmental damage and degradation that is inextricably linked to direct and collective human rights protection, requires mandatory measures.
- The result of approaches set out in Germany's 2016 National Action Plan show that, even where business is given a deadline to achieve adequate voluntary due diligence measures and incentivised by the additional threat of mandatory measures in the event of non-compliance, businesses overwhelmingly fail to take action. This view is further confirmed by the results of the *Corporate Human Rights Benchmark*, which found that half of the companies assessed did not fulfil any of the steps outlined in the UNGPs as part of an effective due diligence process. Only nine out of ten companies were found to have carried out half the necessary steps required for due diligence.

- We support mandatory human rights and environmental due diligence legislation. To this end, the ITUC has developed eight components of effective mandatory due diligence. The ITUC paper “Towards Mandatory Due Diligence in Global Supply Chains” is **annexed** to this submission.
- An important route to achieve international coordination is the agreement, adoption, ratification and effective implementation of an international binding treaty on business and human rights, which follows, strengthens, supports and builds upon the framework of the UNGPs. We **annex** the Global Unions’ most recent joint submissions on the negotiation of this treaty.
- In line with their *duty to protect*, States must prioritise improving access to judicial remedies for victims of human rights violations in global supply chains. Local companies are often under-capitalised, making them essentially judgment-proof. There is usually no effective remedy at home against the local firm, or abroad against the lead firm, which may have contributed to the violation. Transnational corporations are also usually immune from legal accountability when the violation is caused by a supplier. The normative asymmetry between the legally enforceable rules that protect corporate interests and the soft law approaches to transnational corporations’ obligations to respect human rights needs to be completely realigned in the next decade.
- Of particular concern, there is a dearth of attention on freedom of association in the activities of companies related to business respect for human rights. This is as much an issue in the practices of multinational enterprises in relation to their direct employees, as along their supply chains. Freedom of association is fundamental if workers are to ensure that their rights are protected every day on the job. If it is effectively exercised, there is little or no need for external monitoring, auditing or other measures. This is due to the nature of freedom of association as, in addition to a fundamental right, an enabling right that allows and empowers workers to protect other human rights. As such, it needs to be recognised as a salient rights risk: in and of itself, and as a route to the prevention or mitigation of widespread other potential human rights impacts.
- Despite being a fundamental right, it is rarely central, adequately protected or even considered in the due diligence measures taken by many companies. It is not recognised as a common risk, nor taken seriously when breaches occur, and is, ultimately, not given the attention warranted of such an interwoven and underpinning right. That is true within major multinational enterprises, national and smaller businesses.
- Further, where companies have made some first moves to comply with human rights requirements, we often see this twinned with a refusal to engage with worker representatives and unions. In the company view, they have taken some first steps in carrying out human rights due diligence, and therefore see no need for worker engagement for the resolution of worker issues. Companies cannot use engagement in (often negligible) human rights due diligence to justify a lack of respect for freedom of association rights: due diligence can never be deployed *instead of* freedom of association. Firstly, it is manifestly impossible for adequate and effective due diligence – the assessment, prevention, mitigation and addressing of potential or actual human rights impacts - to be carried out without freedom of association and social dialogue. Workers are key stakeholders; potential adversely impacted parties. Furthermore, and equally essentially, as a fundamental right in and of itself, companies must mitigate freedom of association risks and ensure respect for this right throughout its own operations and at every stage of its supply chain. As such, in addition to ensuring respect for freedom of association in its own direct operations, it should be a priority issue in business relationships. These include with subcontractors, labour hire firms, contract workers, franchise holders, and otherwise along the supply chain. To be clear, no top-down measures can replace local freedom of association and collective bargaining as fundamental and essential human rights of

workers. The mapping of supply chain risks must include the assessment of these risks. This is simply not taking place.

- Further, freedom of association requests to National Contact Points of the OECD most often end without any dialogue. Either the enterprise refuses or the NCP rejects the possibility. As indicated above, management led efforts on rights like forced labour, are frequently cited as “doing enough” on human rights due diligence, making (the claim is) trade union dialogue unnecessary.
- Business can no longer be permitted to hide behind extensive and complex supply chains. Business responsibility to account for its operations should, at the most basic level, require them to operate within a number of supply chain tiers within which they can ensure decent work for all workers. If a business does not have the capacity to carry out human rights due diligence along long supply chains, they should shorten their supply chains and demand more evidence of verifiable due diligence to be produced by their downstream suppliers. Streamlining supply chains in correlation with capacity combined with evidence of due diligence being carried out by suppliers demonstrates how companies, “regardless of size, sector, operational context, ownership and structure” are to be bound by the same duty to respect human rights in the UNGPs.
- There must be increased understanding that businesses have at least the same, but arguably higher, responsibilities in national contexts where host state governance may be less onerous or protective. Businesses cannot fully respect the rights of workers, directly employed and along their supply chains, without mapping major risks specific to local context and accounting for host state vacuums in protective legislation, for example in relation to occupational safety and labour inspection.
- Involvement in corruption is often directly linked to human rights impacts and abuses. State approval or involvement in such schemes (while inexcusable) does not vindicate business’ own involvement with respect to such state actors. Equally, in their relationships with States, businesses have responsibilities. Corruption may be a root cause of human rights impacts, but also be an immediate cause and, in turn, prop up the systems that propagate poverty, inequality and weak governance that are additional causes. Business is responsible for its role in accepting, incentivising and rewarding the practice. In line with the OECD MNE Guidelines, business should always seek ways to honour international responsible business conduct standards to the fullest extent that does not place them in violation of national law.
- There should be increased investigation into toxic corporate lobbying and its interface, overlap and relationship with corruption. A more substantive focus should be placed on the expectation under the OECD MNE Guidelines for enterprises to refrain from seeking exemptions in the publicly adopted statutory framework related to human rights, with a focus on labour rights.
- States need to be taking every opportunity to fulfil their duty to protect the human rights of workers. To achieve meaningful progress, there must be greater emphasis on State responsibilities engaged through public procurement, investment agreements, and commercial relationships with business enterprises that receive substantial support and services from State agencies such as export credit agencies. Considering the states proprietary, financial or broader public interests in these types of transactions, there is no justification for states not including human rights protections, gender based impact assessments, just transition, fair working conditions, and other requirements in tendering processes and agreements. These must also incorporate monitoring and enforcement. All National Action Plans should include extensive consideration, pledges, regulation, guarantees and requirements of the minimum protective terms to be incorporated into tendering processes to ensure sustainable public procurement that prerequisites respect for human rights of those working directly for and within the supply chains of businesses tendering for public contracts.

- There is a need for an increased understanding of investors as businesses themselves with duties, on their own account, to respect human rights of those potentially affected by the impact of their deployed capital. Further, International Financial Institutions have heightened duties, as groups of states, to protect human rights and this must be reflected in much-improved active engagement ex-ante and post-ante with human rights risk prevention, mitigation and remedy.
- Ensuring the right to an effective remedy for all who may be affected by business remains a major challenge of the next decade and one that needs to be addressed urgently.
- There is a need for an increased focus on the gender aspects of the UNGPs, by building on the vital work commenced by the UNWG. From the more direct impacts of gender discrimination in hiring, training and promotion practices leading to gender-based occupational segregation, through to the asymmetrical human rights impacts on women of indirect business contribution to climate change, and the interrelation with poverty, gender aspects will only grow in importance over the next decade.
- Young workers will be the group to most suffer the impact of developments to come with automation, digitalisation and other challenges for the future of work, including monitoring, benchmarking, and surveillance technology and its impact on workers' privacy rights. The social dialogue negotiation of a just transition to take into account the contemporary needs of the workforce will be a central challenge for the next decade of responsible business.
- The UNGPs are not readily applicable to the human rights impacts of climate change. There needs to be significant progress on the implementation of the ILO's Guiding Principles for a Just Transition through the UNGP framework. There could be benefit in a project similar to that approaching the UNGPs through a gender lens, in relation to climate. The failure to develop just transition plans should in itself be identified as a significant human rights risk.
- Further progress needs to be made on finding solutions to embed the UNGPs in the informal economy. A central part of this work should be on the implementation of ILO Recommendation 204 on the transition from the informal to the formal economy. Reviewing this transition should be central to both state and investor planning and human rights impact assessments carried out in advance of setting the terms of development policies and projects, public procurement tendering, investment agreements, and the granting of licences to access natural resources, dedicating space to consider the overrepresentation of women in the informal economy.
- The lack of universal social protection for workers in the informal economy, non-standard forms of employment, and global supply chains continues to be a human rights blind spot for lead firms. Where human rights due diligence assessments reveal risks to include a local social protection vacuum, wage protection crisis funds or other economic support schemes for workers along the supply chain may be deemed necessary or appropriate. It is imperative that the topic of social protection is dealt with directly through the lens of the UNGPs.
- Since many internationally recognised human rights apply to workers only when they are legally classified as employees, misclassification results in a direct breach of workers' rights resulting in poor pay, labour exploitation, and precarity. This phenomenon can also uniquely affect ethnic minority and migrant workers. It is critical that business adhere to the expectation in the OECD MNE Guidelines, to *structure their relationships with workers so as to avoid supporting, encouraging or participating in disguised employment practices* in line with ILO Recommendation 198 on the Employment Relationship.
- We would also welcome the *transposition* of the ILO Centenary Declaration into the UNGP framework to ensure that workers irrespective of employment status enjoy fundamental rights, an adequate minimum wage, maximum limits on working time and safety and health at work.