

Trade Union Submission to the UN Working Group on Business and Human Rights consultation on Corporate human rights due diligence – identifying and leveraging emerging practice

The International Trade Union Confederation, Public Services International and the International Transport Workers Federation welcome the UN Working Group on Business and Human Rights decision to focus its 2018 report to the UN General Assembly on emerging practice and innovations of corporate human rights due diligence across sectors. We have welcomed the clarification and prominence of the concept of corporate human rights due diligence since the adoption of the UN Guiding Principles on Business and Human Rights in 2011. The Workers Group in the ILO has supported the inclusion of references to the Guiding Principles and specifically the corporate responsibility to carry out human rights due diligence during the update of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 2017. However, in our view, many companies lag behind in the implementation of effective due diligence processes with real efforts stuck in the rudimentary stages. As confirmed by the Corporate Human Rights Benchmark results for 2017, most companies make policy commitments to carry out human rights due diligence but are much weaker when it comes to subsequent steps, such as acting on risks, remediation, stakeholder engagement.

We therefore call on the Working Group's Report to highlight the following key messages in order to ensure that due diligence processes are effectively implemented so that workers throughout global supply chains enjoy their rights protected under international human rights law.

Due diligence procedures with respect to recruitment practices should be strengthened

When it comes to identifying risks with respect to workers' rights in the operations and activities of companies, the recruitment phase is often overlooked with the consequence of decent work deficits and in some case forced labour practices not being addressed in a timely manner. The ILO estimates that there are an estimated 244 million international migrants and 740 million internal migrants. Many of these workers face serious abuse involving deception about the nature and conditions of work, retention of passports, deposits and illegal wage deductions, debt bondage linked to repayment of recruitment fees, threats if workers want to leave their employers, coupled with fears of subsequent expulsion from a country. A combination of these abuses can amount to human trafficking and forced labour. According to the ILO, 24.9 million workers are in forced labour out of which 16 million are exploited in the private sector. Businesses, including employment agencies, must therefore improve their due diligence practices in the recruitment stages, particularly taking into account the ILO Fair Recruitment Guidelines.¹

¹ ILO General principles and operational guidelines for fair recruitment (http://www.ilo.org/global/topics/fair-recruitment/WCMS_536755/lang--en/index.htm)

Section 15: Enterprises and public employment services should respect human rights when recruiting workers, including through human rights due diligence assessments of recruitment procedures, and should address adverse human rights impacts with which they are involved.

Due diligence procedures should be adapted to the adverse risks specific to women workers

We welcome the Working Group's focus on developing guidance to states and businesses on how to adopt a gender lens in implementing the UN Guiding Principles, which reference the importance of gender in various sections. The new OECD Due Diligence Guidance for Responsible Business Conduct also provides helpful guidance on applying a gender-lens to due diligence. The Working Group's Report should build on this work. In this regard, it is extremely important to also take into account the fact that women continue to be over-represented when it comes to informal and precarious employment and are employed in low-wage jobs with no access to social protection, particularly in global supply chains, reinforcing their vulnerability to business-related human rights abuses. Due diligence procedures should therefore be adjusted to ensure that proactive measures to foster gender equality are undertaken and that real or potential adverse impacts different or specific to women are identified, mitigated and addressed. This must include collecting and assessing gender aggregated data and gender specific trends and patterns. Most importantly, businesses must take adequate measures to ensure that women have access to operational-level grievance mechanisms, which may need specific considerations in terms of access to women when it comes to issues such as sexual harassment and other forms of gender based violence and harassment. The Joint Commitment agreed upon by Unilever, the IUF and IndustriAll in order to prevent sexual harassment in the workplace is a good example.²

Specific guidance on due diligence with respect to the rights to freedom of association and collective bargaining is needed

The UN Guiding Principles state that the business responsibility to respect human rights refers, at a minimum, to the rights expressed in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. Freedom of association, freedom to form and join trade unions and the right to bargain collectively are the core components of these instruments. Yet, due diligence practices on freedom of association and collective bargaining remain extremely weak, in particular when it comes to indirectly hired workers. The scope of the rights to freedom of association and collective bargaining is either misunderstood or indeed aggressively opposed to by a number of companies in practice.³ A wide range of policies and practices are used by business enterprises to discourage workers from seeking to form or join trade unions or to avoid having to recognize a trade union, including:

² IUF IndustriAll Unilever Joint Commitment (http://www.industriall-union.org/sites/default/files/uploads/documents/2016/iuf-_industriall-unilever_joint_commitment_to_preventing_sexual_harassment.pdf).

³ ITUC Global Rights Index, page 7 (<https://www.ituc-csi.org/IMG/pdf/ituc-global-rights-index-2018-en-final-2.pdf>).

- Surveillance and intimidation of trade unionists
- Dismissal and discrimination against trade union members, including through blacklisting, demotions, transfers and less favourable conditions of work
- Non-extension of employment contracts to trade union members on fixed term and temporary employment
- Interference in the decision process by which workers choose whether to be represented by a trade union or by which they choose among different trade union organisations
- Anti-union campaigns and “union avoidance” activities, including by engaging professional consultants. For example, 71-87% of US companies hire union-busting consultants to crush organizing efforts.⁴
- Actively pursuing legal and administrative delays in the process by which trade unions obtain recognition

Moreover, the choice of business model can also seriously interfere with the right of workers to join unions. ITUC research has found that more than 94 per cent of workers employed in the supply chains of the world’s largest 50 companies are not directly hired.⁵ Increasingly complex supply chains and outsourcing of work enable business enterprises to avoid any obligations to the people who perform work on their behalf. Sub-contracting arrangements are used to increase the distance between workers and the legal entity, which controls their wages and working conditions so that meaningful collective bargaining is not possible. Sometimes employers seek to evade the obligations that the law places on employers by disguising the existence of an employment relationship such as by treating the worker as being self-employed. The IUF recently produced the report “The Coca-Cola Company’s Human Rights Report: an exercise in evasion,” exposing an emblematic case of multinational company evading responsibility for a large part of its workforce indirectly hired through bottling companies and denying them the right to freedom of association.⁶ We therefore believe it is important to develop specific guidance on due diligence procedures with respect to the rights to freedom of association and collective bargaining. The Working Group may find the trade union publication on “The UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively” helpful in this regard.⁷

⁴ United States Department of Labour, Ensuring Transparency in Reporting For Employers and Labor Relations Consultants (https://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf).

⁵ ITUC Frontlines Report 2016: Scandal Inside the global supply chains of 50 top companies (<https://www.ituc-csi.org/frontlines-report-2016-scandal>).

⁶ IUF, The Coca-Cola Company’s Human Rights Report: an exercise in evasion (<http://www.iuf.org/w/sites/default/files/Astudyinevasion.pdf>).

⁷ ITUC, UNI, IndustriALL and Clean Clothes Campaign, The UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively (https://www.ituc-csi.org/IMG/pdf/12-11-22_ituc-industrial-ccc-uni_paper_on_due_diligence_and_foa.pdf).

Governments should pass mandatory due diligence and transparency legislation

The UN Guiding Principles are clear in requiring States to ensure business complies with its responsibility to respect human rights. Many governments have responded to this obligation taking various regulatory and policy steps. However, the approach often remains patchy responding to certain sectors only (e.g. conflict minerals EU) or specific risks (e.g. draft child labour due diligence law in the Netherlands, Modern Slavery Act UK) with significant variations of liability for human rights and access to remedy for victims.

Governments should pass legislation to establish a duty of care, a legal obligation to adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights. Those harmed should be able to bring civil (tort) action and claim remedy. The legislation should have extraterritorial reach and allow victims throughout global supply chains to bring legal actions against parent companies. This should be supported by administrative regulations providing for sanctions such as fines or withholding of operational licenses. Moreover, due diligence should in no case provide an absolute defence to a claim regarding human rights abuses, in particular where the company has caused or contributed to the harm.

In this regard, the ITUC welcomed the adoption of the French vigilance law, which establishes such an obligation with an extraterritorial reach extending to the supply chains of companies, including subsidiaries, subcontractors and suppliers. We regretted however that the initial draft proposal was watered down during the parliamentary process. In its current form, the law covers a limited number of companies and no longer provides for a civil fine mechanism. Moreover, the burden of proof has been shifted back to the victim, which may make it very difficult to bring claims in practice. The law provides for engagement with stakeholders but is not very clear on this point (except with respect to the alert mechanism). The trade unions expect that in the future, vigilance plans will have to be negotiated with unions in both parent companies and subcontractors.

Transparency and disclosure requirements, such as the UK Modern Slavery Act and the California Transparency in Supply Chains Act, have also been a way in which governments have tried to encourage due diligence premised on the idea that companies will be more inclined to constrain identified harms, if they have to disclose them. However, to be effective these requirements must provide for monitoring and enforcement mechanisms and impose sanctions where companies fail to meet minimum requirements.

Under the UN Guiding Principles, as well as other international instruments such as ILO Convention concerning Labour Clauses in Public Contracts of 1949 (No. 94), the state duty to protect extends to situations where a 'commercial nexus' exists between public actors and businesses through public procurement. Most National Action Plans on Business and Human Rights refer to human rights and public procurement. In Sweden, County Councils require that contractors have due diligence processes in place to identify and mitigate risks of adverse impacts in the production of goods or services. Specifically, the contract performance clauses used by the County Councils require suppliers to implement procedures to ensure that the production of goods or services delivered during the term of the contract takes place under conditions that are

compatible with the Councils' Code of Conduct. Sweden's County Councils and the municipality of Stockholm include a question regarding knowledge of their supply chain in their sustainability assessment questionnaire for contract awardees. Governments should put laws and policies in place to ensure that respect for human and labour rights is a condition for award of public procurement, investment of state funds, and trade and investment support.

Companies should enter into direct agreements with trade unions to design and implement the due diligence process

Industrial relations are an important form of meaningful stakeholder engagement throughout the whole due diligence process, in particular when it comes to workers' rights. Collective bargaining and due diligence are often seen as separate processes but can indeed reinforce each other. The OECD Due Diligence Guidance for Responsible Business Conduct encourages companies to partner with or enter directly into agreements with trade unions for the design and implementation of due diligence processes, the implementation of standards on workers' rights and the raising of grievances. Agreements with trade unions can take various forms and can be made at the workplace, enterprise, sectoral or international level. They include collective bargaining agreements, Global Framework Agreements, protocols and memoranda of understanding. The ILO MNE Declaration also points out that meaningful consultation with stakeholders should take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process. While Global Union Federations have succeeded in increasing the number of agreements, many companies are still lagging far behind in this area. The Working Group Report should highlight and promote direct agreements as a form of stakeholder engagement for due diligence. Governments should further be encouraged to support capacity building of stakeholders, including trade unions, to ensure their effective participation in the due diligence process.

Most companies fail to factor remediation into their due diligence processes

According to the 2017 Corporate Human Rights Benchmark, more than three-quarters of companies failed at indicating how they actually remediate impacts when they occur and what lessons they have learned. Nine out of ten companies did not seem to be adequately ensuring the mechanisms are publicly available and explained, nearly three-quarters did not seem to be committing to non-retaliation over complaints made, and almost no company had been found to be explaining how they align and cooperate with state-based grievance mechanisms.

Companies must improve at factoring remediation into their due diligence processes. It is important that companies have systematic approaches in order to assess their responsibility and to provide for or cooperation in their remediation. Effective operational-level grievance mechanisms are a systematic means of providing remediation processes. The OECD Due Diligence Guidance suggests that companies engage with workers' representatives and trade unions to establish a process through which they can raise complaints to the enterprise, for example, through grievance

mechanisms set forth in any collective agreements or through Global Framework Agreements. The ILO MNE Declaration calls on multinational enterprises to their leverage to encourage their business partners to provide effective means of enabling remediation for abuses of internationally recognized human rights.

Further research into the potential adverse human rights impacts related to business models and sourcing/procurement practices at sectoral level is needed

While the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector clearly recognizes the potentially harmful impacts purchasing practices of retailers, brands and their buying intermediaries can have on human and labour rights, there has not been sufficient guidance on this issue in other sectors. Further sector-specific guidance on due diligence would therefore be helpful. For example, when it comes to road transport logistics, companies should be encourage to assess whether business models used by their supplier firms (levels of sub-contracting, orders by volume or specialist tucks etc.) are contributing to harm. A list of routes that indicate hot zones, volumes being transported on these specific routes and cost/pricing model or defined prices should be assessed for their risk to potential harm.