

Towards mandatory due diligence in global supply chains



DUE DILIGENCE



ITUC CSI IGB

International Trade Union Confederation

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INTRODUCTION

The Covid-19 pandemic has once again exposed the fragility of global supply chains and the enormous risks to human and labour rights in a highly interconnected global economy that is not governed by the rule of law.

With the global drop in demand as a result of the pandemic, many companies have resorted to abruptly ending the procurement of goods and services and even to defaulting on prior commitments made – with the consequence of a disastrous impact for workers in global supply chains. In Bangladesh, more than half of the garment suppliers¹ reported that they had their in-process or completed production cancelled, which has led to massive job losses and workers getting furloughed. More than 98.1% of buyers refused to contribute to the cost of paying the partial wages to furloughed workers required under national law. 72.4% of furloughed workers were sent home without pay.²

As the economic consequences of the pandemic have spread, years of voluntary corporate social responsibility promises by companies have vanished overnight. In the absence of an appropriate regulatory framework, global companies have been able to evade responsibilities for the workers who produced the goods and provided the services that allowed them to generate enormous profits.

Today, 94% of workers producing goods and providing services to global companies are hidden workers and not directly hired by their economic employer. Instead, the majority of these workers are exposed to precarious working conditions without access to remedy due to an obscure web of a global network of operations and businesses designed to protect companies from accountability.

To ensure that the global economy is not only resilient but also conducive to social progress, governments must now take decisive legislative steps to regulate the behaviour of companies with regard to their entire operations and activities.

The introduction of mandatory due diligence in domestic legislation would for the first time give workers a legal framework for redress wherever their employer resides and prevent companies from evading their responsibilities towards not only their workers but also society and the planet. Within multinational groups of companies, the “parent company” would be required to deploy its best efforts to ensure that the subsidiaries comply with certain requirements; and within global supply chains, the “lead company” would be required to ensure that by imposing its conditions on the sub-contracted seller or service-provider, human rights are fully complied with across the whole chain.

¹ 45.8% of suppliers report that ‘a lot’ to ‘most’ of their nearly completed or entirely completed orders have been cancelled by their buyers; 5.9% had all of these orders cancelled.

² Mark Anner, Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains, Center for Global Workers’ Rights, 27 March 2020 (<https://www.workersrights.org/wp-content/uploads/2020/03/Abandoned-Penn-State-WRC-Report-March-27-2020.pdf>).

International frameworks for human rights due diligence

The duty to practice human rights due diligence in order to ensure that corporate entities act proactively to prevent the risks of human rights violations in their business relationships is not new. It was first introduced in the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011,³ as a component of the responsibility of business enterprises to respect human rights. Since then, it has been incorporated in a number of processes and fora, including the OECD Guidelines on Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the Sustainability Framework of the International Finance Corporation, which is the private sector lending arm of the World Bank Group.

In 2018, the OECD adopted the Due Diligence Guidance for Responsible Business Conduct providing a detailed step-by-step guide on how companies should avoid infringing on the rights of others and address adverse impacts with which they are involved by identifying, preventing, mitigating and accounting for how they address their impacts on human rights:

- embed responsible business conduct into their policies and management systems;
- identify and assess actual and potential adverse impacts associated with their operations, products or services;
- cease, prevent and mitigate adverse impacts;
- track implementation and results;
- communicate how impacts are addressed; and
- provide for or cooperate in remediation when appropriate.

50% of companies assessed did not have an effective due diligence process. Corporate Human Rights Benchmark.

Yet, despite the fact that clear guidance on how to practice human rights diligence exists and that many companies have expressed their commitment to it publicly, business practices have regrettably not sufficiently changed with non-binding instruments alone.

The Corporate Human Rights Benchmark, which relies on public reports of companies with regard to their human rights practices, found that half of the companies⁴ assessed did not fulfill any of the steps outlined in the UNGPs and the OECD's Guidance and 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.

Only 1/3 of business respondents say they take some form of due diligence. European Commission.

In a study conducted for the European Commission on options for regulating due diligence, only one-third of business respondents indicated that they currently undertake some form of due diligence. In the same study, 70% of European businesses agreed that an EU-level regulation on mandatory due diligence for human rights and environmental impacts could provide benefits for business.⁵

And on 25 March 2019, the Investor Alliance for Human Rights on behalf of a group of investors representing \$1.3 trillion in assets called for enhanced investor due diligence to address environmental, social and governance risks, including human rights risks, throughout the investment lifecycle. It specifically called on governments to support investor due diligence through better regulation of financial systems.⁶

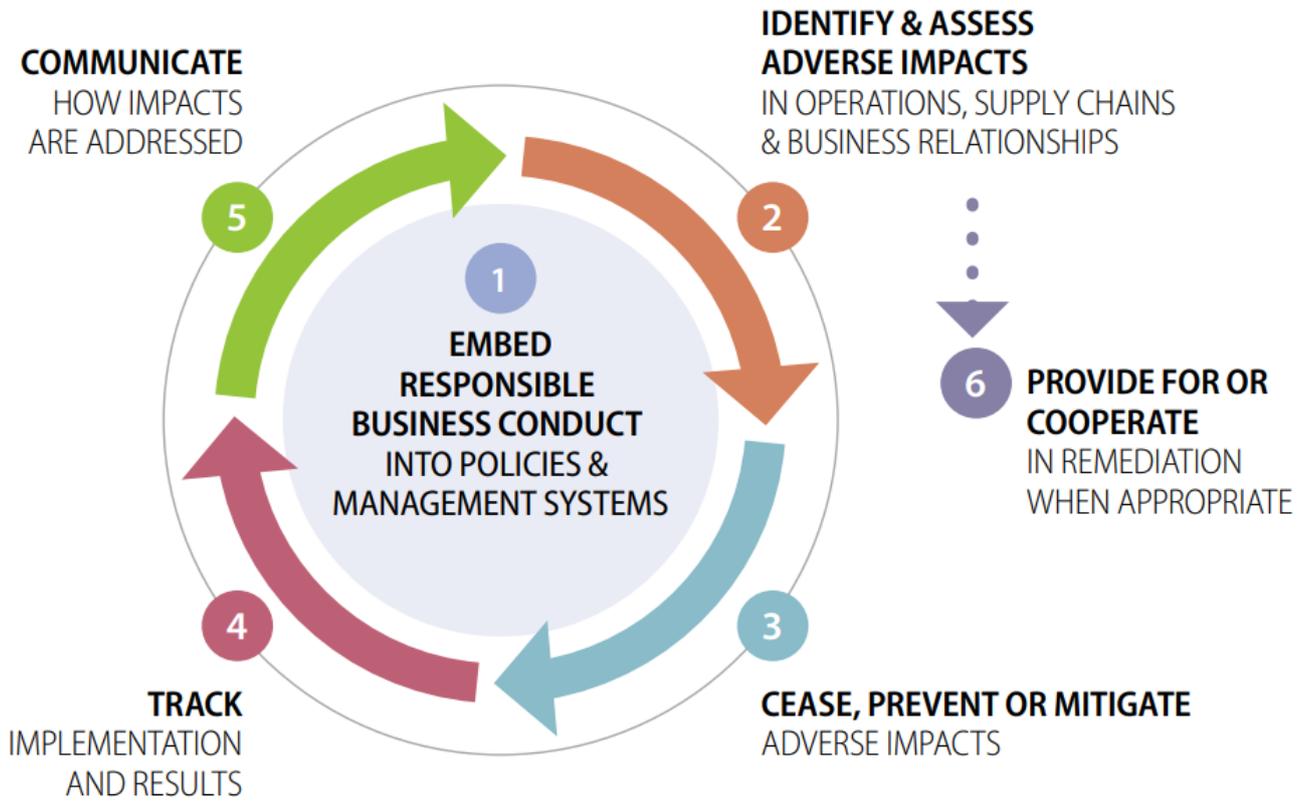
³ Principles 15-24

⁴ 49% score 0 across all indicators related to the process of human rights due diligence, 2019 Key Findings Report, Corporate Human Rights Benchmark (<https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>).

⁵ European Commission Directorate General for Justice and Consumers, Study on due diligence requirements through the supply chain, 20 February 2020 (<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>).

⁶ Investor Alliance for Human Right, 25 March 2019 (<https://investorsforhumanrights.org/news/investors-representing-1.9-trillion-voice-support-legislation-main-stream-esg-risk-management>)

Fig. 1. Due diligence process & supporting measures.



Source: OECD Due Diligence Guidance for Responsible Business Conduct (2018).

Legislative progress towards national due diligence laws

The introduction of mandatory due diligence is being debated in at least 18 jurisdictions, in addition to the commitment made by the European Union to adopt EU-level legislation.⁷

Country	Name of Legislation	Content of Legislation	Stage of Legislation
Austria	Proposed “Social Responsibility Law” 2018	Specific due diligence for companies, such as risk analysis, is intended to prevent clothing and shoes from being sold that have been produced by child labour or forced labour. Law provides for injunctive relief and the annexation of profits made from suspect goods for up to five years to fund corporate social responsibility goals.	Parliamentary Bill drafted
Australia	Modern Slavery Bill 2018	The proposed Act would require Australian entities with annual revenue >AU\$100 million to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks. This requirements also applies to government corporate entities.	Passed and in effect
Belgium	No specific legislation	In April 2019, civil society organisations published an open letter calling for a Belgian law mandating companies to conduct human rights due diligence. In December 2019, Belgium’s Deputy Prime Minister and Minister of Finance and Development Cooperation voiced support for an EU-level MDD Law.	Civil society movement
California	Transparency in Supply Chains Act 2010	Retailers and manufacturers with gross revenue of US\$100 million must disclose on their websites or through written disclosures actions taken to “eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale”.	California state senate Bill 657 was signed into law in 2010 and came into effect in 2012.
Canada	Order in Council (2019-1323)	The 2018 Canadian Ombudsperson for Responsible Enterprise (CORE) had a mandate to investigate human rights issues in supply chains. The Canadian federal government ordered Export Development Canada and the Canadian Commercial Corporation to take measures to comply with Canada’s commitments in BHR and implement human rights due diligence of commercial transactions that they support.	In place
Denmark	Parliamentary Motion B82 2019	January 2019: three Danish political parties put forward a parliamentary motion to introduce a bill on human rights due diligence for all large companies and high-risk work sectors. The motion is supported by more than 100 NGOs, FH Danish Trade Union Confederation, the Danish Consumer Council as well as the Danish pharmaceutical company Novo Nordisk.	Civil Society movement resulting in a parliamentary motion which is under +consideration

⁷ Sharan Burrow and Phil Bloomer, Something for Europeans to celebrate – a new social contract begins to emerge? Open Democracy, 4 May 2020 (<https://www.opendemocracy.net/en/can-europe-make-it/something-for-europeans-to-celebrate-a-new-social-contract-begins-to-emerge/>)

Country	Name of Legislation	Content of Legislation	Stage of Legislation
European Union	No specific legislation	The European Commissioner for Justice, Didier Reynders, envisions mandatory, horizontal due diligence legislation with possible sectoral guidelines. He indicated that subject to the results of consultations with stakeholders, the Commission would table legislative proposals in 2021.	European Commissioner for Justice, Didier Reynders, announced that the Commission commits to introducing rules for mandatory corporate environmental and human rights due diligence. The announcement was made during a high-level online event hosted by the EU Parliament's Responsible Business Conduct Working Group.
European Union	Directive 2014/95/EU of 22 October 2014 on the disclosure of non-financial information by certain large undertakings and groups	Large companies must include "a non-financial statement on the impact of company activity on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. This includes due diligence policy undertaken and their outcomes, and risks. This directive impacts approximately 6,000 large EU companies including banks, insurance companies and others.	Passed
Finland	No specific legislation	The Social Democrat-led Finnish government has committed to mandatory human rights due diligence in the official programme. The government will conduct a survey with the goal of adopting a national law on human rights due diligence.	In development
France	Law of 27 March 2017 on due diligence	French companies must adopt a 'vigilance plan' identifying risks to human rights, health, safety, and environment caused by their activities. This includes the activities of subcontractors and permanent suppliers. A company is liable if a victim shows that the company could have prevented harm by adopting a vigilance plan.	Passed and in effect
Germany	2016 National Action Plan on Business and Human Rights	The German government established due diligence as an expectation for business in 2016: German businesses to implement human rights due diligence, structured around five core elements based on the UN Guiding Principles. If less than half of all German-based companies have not voluntarily implemented human rights due diligence by 2020, the government will consider further action, such as legislation.	Interim report revealed only 17-19 % of companies practicing due diligence.
Germany	A draft law on Human Rights and Environmental Due Diligence by the Ministry of Development and Cooperation was leaked in February 2019.	The bill would require companies to conduct HRDD. Non-compliance with the law could lead to fines of up to five million euro, imprisonment and exclusion from public procurement procedures in Germany.	In December 2019, the Ministers for Labour and Development jointly committed to developing a supply chain due diligence law .
Italy	Law 231/2001 on the administrative liability of legal entities	Introduced corporate criminal liability for crimes committed in the interest or advantage of the company, including human rights violations. Corporate liability may also accrue for human rights abuses committed by Italian enterprises operating abroad, especially if part of violations occurred in Italy. In order to avoid liability, companies shall demonstrate that they implemented compliance programs.	In effect. Under the National Action Plan on Business and Human Rights, the government has committed to review Law 231/2001 on the administrative liability of legal entities to introducing human rights due diligence for companies.

Country	Name of Legislation	Content of Legislation	Stage of Legislation
Luxembourg	No specific legislation	The 2018 coalition agreement commits the government to supporting initiatives to strengthen the human rights responsibilities of companies.	Civil society movement
Norway	Proposed human rights due diligence act 2018	The Act would apply to enterprises that offer goods and services in Norway, creating additional human rights due diligence and disclosure obligations. The act as currently proposed applies to both public and private operations. Larger enterprises would be required to exercise due diligence in order to identify, prevent and mitigate any adverse impacts to fundamental human rights and decent work.	First draft published
Sweden	No specific legislation	In March 2018, the Swedish government Agency for Public Management released a report recommending that the government look into the possibility of mandatory human rights due diligence.	Civil society movement
Switzerland	Parliamentary proposal	Under the proposal, companies based in Switzerland must carry out human rights and environmental due diligence. The proposal holds companies liable for harm caused by subsidiaries in some cases.	Discussed at House of Representatives level
The Netherlands	The Dutch Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid - WZK) 24 October 2019	The law applies to all companies that sell goods or provide services on the Dutch consumers, whether or not they are registered in the Netherlands. All the companies concerned should provide a declaration that they have practiced due diligence with a view to preventing child labour in the supply chain.	Passed in both houses of parliament and is due to be implemented by royal ratification after 1 January 2020.
United Kingdom	2015 Modern Slavery Act	Under Section 54 “Transparency in supply chains etc”, companies doing business in the United Kingdom, at 36 million GBP+ (including subsidiaries) must prepare an annual “slavery and human trafficking statement”.	Passed and in effect. In April 2019, a group of civil society organisations launched a campaign calling for a broad mandatory human rights due diligence law.
USA	Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019	The bill would apply to all publicly listed companies filing annual disclosures with the SEC. These companies would be required to undertake annual analysis of human rights risks and impacts in their operations and value chain and include a human rights section in their annual reports to the SEC. The bill would also mandate significant clarity about supply-chain structure.	Draft Bill has been opened for debate in the House of Representatives Committee on Financial Services.
Ireland	No specific legislation	Ahead of the Irish elections in 2020, Irish civil society called on all political parties to introduce mandatory due diligence and support a UN binding treaty.	Civil society action

Eight components of effective mandatory due diligence legislation

The ITUC has collaborated with Professor Olivier de Schutter on an analysis of the respective strengths and weaknesses of various related laws in order to recommend eight components for effective mandatory due diligence laws. Mr de Schutter is a Professor of Law at the University of Louvain and at the College of Europe. In May 2020, he was appointed as the United Nations Special Rapporteur on extreme poverty and human rights. Previously, he was a member of the Committee on Economic, Social and Cultural Rights where he also acted as the Co-Rapporteur for General Comment No. 24 on State obligations in the context of business activities.

1. All companies covered

The obligation to conduct human rights due diligence should be imposed on all companies, regardless of their size, structure, or ownership.

All companies, regardless of their corporate structure and size, can potentially have an adverse impact on human rights. Exempting certain companies from any responsibility would therefore be tantamount to a blank check to abuse human rights and a denial of remedy for victims.

The UNGPs make it clear that while policies and processes will necessarily have to vary in complexity depending on the size of the business enterprise, all companies are required to carry out human rights due diligence.⁸ The size and structure of a business enterprise should only affect the modalities of implementation of due diligence. This is particularly relevant when it comes to microenterprises, small- and medium-size enterprises, which should be provided with additional capacity support and implementation guidelines. Moreover, their reporting requirements should correspond to the size of their operations and activities.

2. Obligations throughout corporate structures and business relationships

The obligation to practice human rights due diligence should extend to entities to which business enterprises are connected through investment and contractual relationships.

Limiting the obligation to practice human rights due diligence to the “own operations” of a business enterprise would fail to grasp the reality of the structure of multinational groups of companies in today’s globalized economy.⁹ Multinational companies are not comprised of single entities but consist of and act through a network of separate legal entities across jurisdictions with varying degrees of control between the entities. Currently, there are enormous legal and practical obstacles that shield parent companies within a multinational group from any responsibility with respect to the harmful acts of their subsidiaries. Lead companies are typically immune from any responsibility when it comes to harmful acts committed by their suppliers. The resulting accountability gap has forced states into a competition to drive down regulation. To improve the competitiveness on global markets of the firms domiciled under their jurisdiction, governments resort to lowering standards applying under their jurisdiction or to poorly enforcing whatever standards nationally imposed, even where this may be in violation of their international human rights obligations. The transformative potential of human rights due diligence as a tool to counteract these problematic aspects of the transnationalization of business therefore hinges on its reach to the entirety of the operations and activities of multinational groups of companies.

Furthermore, due diligence obligations with regard to subsidiaries and suppliers should also not be conditional upon the parent company being effectively involved in the subsidiary’s day-to-day operations or exercising a sufficient degree of control on the subsidiary, or to make it conditional on the lead company in global supply chains being able to exercise decisive influence on the sub-contractor. Such conditionalities would incentivize companies to remain at arm’s length from the operation of the

subsidiary or from the practice of the supplier, in order to reduce the scope of their due diligence obligations.

3. Internationally recognized human and labour rights

The obligation to practice human rights due diligence should extend to all internationally recognized human rights, including labour rights, without distinction. Companies should also be expected to carry out due diligence with regard to their environmental impact, including climate impact.

A regulatory approach to human rights due diligence should address one of the key weaknesses of prevailing private initiatives, which concerns the self-selection of human rights that become subject to due diligence processes. Companies often choose to conduct due diligence with respect to those human rights whose breach may expose them to reputational risks or those that may be more easily detectable. This means that even where companies do have robust due diligence processes in place, they may not cover critical issues, potentially exposing workers and communities to serious human rights abuses. Indeed, business enterprises can potentially have a negative impact on the entire spectrum of internationally recognized human rights. The Universal Declaration of Human Rights is established on the basis of the recognition of the indivisibility and interdependence of all human rights and makes it clear that the denial of one right invariably impedes the enjoyment of other rights. The business responsibility to respect must therefore apply to all internationally recognized human rights.¹⁰

The UNGPs highlight an authoritative list of the core internationally recognized human rights:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- ILO Declaration on Fundamental Principles and Rights at Work

Taken together, this list of instruments embodies numerous labour rights, such as freedom of association and collective bargaining, equality and non-discrimination, forced labour, and child labour, wages, health and safety, social security and the limitation of working hours.

¹⁰ Principle 12 of the UNGPs

In view of the challenges to guarantee these rights in the informal economy and with regard to workers in insecure or disguised employment relationships, the ILO Centenary Declaration for the Future of Work has called on governments, workers and employers to ensure adequate protection for all workers. In this regard, the Centenary Declaration highlights the importance of the employment relationship as a means of providing certainty and legal protection to workers. To ensure respect for the human rights of all workers, companies should therefore refrain from business practices that perpetrate disguised or insecure employment within their own operations as well as their business activities.

Even though environmental issues are not specifically addressed in the UNGPs, it is clear that internationally recognized human rights necessarily entail environmental aspects, such as the rights to health, water, or food, or the rights of indigenous peoples. This is also recognized in the OECD Guidelines, which in Chapter VI define the conduct that multinational enterprises should adopt to take due account of the need to protect the environment.

4. Workplace grievance and remedy mechanisms

Business enterprises should be required to establish or participate in effective operational-level grievance mechanisms with a view to identify and remediate adverse human rights impacts.

Effective operational-level grievance mechanisms are critical to conducting human rights due diligence. They support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. Moreover, these mechanisms can make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.

Legislative provisions on the establishment of operational-level grievance mechanisms should be built on the effectiveness criteria laid out in Principle 31 of the UNGPs and the recommendations of the OHCHR Accountability and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse. These include but are not limited to the following requirements:

- Workers and other users of operational-level grievance mechanisms should be protected from retaliatory and intimidatory behaviour connected with their actual or possible use of the grievance mechanism. This requires the enactment and implementation of law, policies and processes that effectively deter such behaviour.
- Remedy seekers should retain the ability to alter a remedial course of action in response to evolving circumstances, including by choosing to pursue a remedy using a State-based mechanism as well as (or instead of) a non-State-based grievance mechanism.
- It should be prohibited to require remedy seekers to waive their rights to seek a remedy using judicial mechanisms as a condition of access to operational-level grievance mechanisms.
- Operational-level grievance mechanisms should make provision for affected people to seek collective redress for human rights harms.
- In case of non-implementation of the remedial outcomes, remedy seekers should be able to seek enforcement through judicial mechanisms. Public authorities should monitor and impose sanctions against companies for failure to implement remedial outcomes.

5. Monitoring and sanctions

Enterprises' human rights due diligence obligations should be monitored by a competent public body, and violations of such obligations should carry effective and dissuasive sanctions.

A robust monitoring mechanism is necessary to ensure that measures adopted by enterprises to discharge their human rights due diligence obligations are effective in preventing violations from occurring and not merely cosmetic or formalistic. Therefore, governments should either expand the mandate of an existing public body or create a new body with the competence to oversee the implementation of due diligence obligations.

To enable the public body to make comprehensive assessments, companies should be required to:

- Regularly report on the steps undertaken to discharge their due diligence obligations;
- Disclose the extent of their operations and activities, including the number of workers at each

worksite as well as the contractual arrangements under which they are employed;

- Disclose the instances where abuses were identified and the remedies that were provided; and
- Disclose relevant auditing reports (where companies choose to work with government licensed auditing firms).

The assessments of the public body should not only rely on the company reports. Individuals and communities (potentially) impacted by human rights abuses, as well as trade unions and civil society organizations, should have access to the public body. Moreover, the public body should be vested with the mandate, capacity and resources to carry out on-site visits and investigations.

Where companies fail to produce regular reports or produce reports that fail to meet minimum requirements or have not taken the necessary steps to address human rights risks, the public body should be empowered to impose dissuasive sanctions, including fines and exclusion from participation in schemes linked formally or informally to the State, such as public procurement schemes, or products or services provided by export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions; and/or in relevant contracts with the State.

The public body should also have competence to oversee the activities of private auditors providing services to companies in support of their due diligence practices. Private auditors should only be licensed for such services if they comply with integrity standards (to be adopted in implementing guidelines) and should be held to account for negligent practices.

6. Liability

The requirement to practice human rights due diligence and the requirement to remedy any harm resulting from human rights violations should be treated as separate and complementary obligations.

Arguments have been made that where companies have put in place robust due diligence systems, they should be “rewarded” with a guarantee of immunity from legal claims alleging their liability for violations in their supply chains or own operations as a means to incentivize companies. However, it is critical that the discharge of due diligence obligations does not provide companies with immunity from legal liability claims for human rights abuses.

If a company may escape legal liability by invoking as a defence that it has put in place an adequate due diligence mechanism, it will be tempted to take a minimal approach: sufficiently perhaps to comply with the requirement to put in place a human rights due diligence mechanism, and thus to obtain a legal defence if faced with a legal claim alleging liability, but not going beyond that minimum. This risks human rights due diligence becoming a sophisticated “box-ticking” exercise: the incentive, in other terms, would be for the company to do the minimum required, but not to be proactive beyond that minimum. This would not be consistent with the idea that human rights due diligence is an ongoing practice, to be permanently updated and improved, as set out in the UNGPs and OECD Guidelines. Moreover, provided the obligation to put in place a satisfactory due diligence mechanism is adequately monitored (see component above), there is no need, in order to further incentivize the company to comply with such obligation, to “reward” it with legal immunity. The monitoring itself should be sufficient as an incentive, if dissuasive sanctions are attached to a failure to comply with the due diligence obligations stipulated in legislation.

Therefore, the requirement to practice human rights due diligence and the requirement to remedy any harm resulting from human rights violations should be treated as separate and complementary obligations. There should be a duty to prevent the risk of human rights violations occurring within the corporate group or in the supply chain: this is the human rights due diligence obligation. There should also be a duty to remedy any violation where the preventative measures adopted, if any, appear to have failed: this is the duty to remedy the damage caused where the duty of care was not properly discharged, and it should be the role of courts, when faced with legal claims, to assess on a case-by-case basis whether the company could have been expected to do more to prevent the violation from occurring.

This approach is also coherent with the UN Guiding Principles on Business and Human Rights (Principle 17), which clearly state that the duty of care a company owes to those who may be affected by its activities, including indirectly (through the acts of its subsidiaries or business partners), is not absorbed by a company discharging its due diligence obligations:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully

absolve them from liability for causing or contributing to human rights abuses.

7. Burden of proof

The burden should be on the company’s shoulders to prove that it could not have done more to avoid the causation of harm, once the victim has proven the damage inflicted and the connection to the business activities of the company.

The reversal of the burden of proof in favour of the victim is necessary given that the relevant information concerning the operations of the company and the organization of its relations with its subsidiaries or business partners resides with the company, and is generally not easily accessible to the victim. This disadvantage is only partly compensated for in some countries by a “discovery” procedure, allowing the claimant to obtain from courts an injunction ordering the disclosure of information in the hands of the defendant. However, it would be more appropriate – and certainly more dissuasive – to impose on the company that it prove that it could not have done more to avoid the causation of harm, once the victim has proven the damage inflicted and the connection to the business activities of the company, whether the damage was caused directly by the operations of the company or whether it has its immediate source in the conduct of a subsidiary or of a business relationship.

8. Role of trade unions

Human rights due diligence should be informed by meaningful engagement with trade unions.

Meaningful stakeholder engagement is an important element for the entire due diligence process. The OECD Due Diligence Guidance for Responsible Business Conduct specifies that meaningful stakeholder engagement must be characterized by two-way communication and depend on good faith. Companies should be required to elicit the views of those likely to be affected by their decisions. It is important to engage potentially impacted stakeholders and rightsholders prior to taking any decisions that may impact them. This involves the timely provision of all information needed by the potentially impacted stakeholders and rightsholders to be able to make an informed decision as to how the decision of the enterprise could affect their interests. It also means there is follow-through on implementation of agreed commitments, ensuring that adverse impacts to impacted and potentially impacted stakeholders and rightsholders are addressed including through provision of remedies when enterprises have caused or contributed to the impact(s). Ongoing engagement means that stakeholder engagement activities

continue throughout the lifecycle of an operation or activity and are not a one-off endeavour. This is particularly important when it comes to the rights of workers who are a part of the company's operations and activities and may therefore at any moment be impacted negatively.

Industrial relations are a form of stakeholder engagement that guarantee an ongoing engagement between companies and trade unions. Companies should therefore partner with or enter directly into agreements with trade unions in order to facilitate worker involvement in the design and implementation of due diligence processes, the implementation of standards on workers' rights and the raising of grievances.

At the same time, it should be made clear that the rights to freedom of association and collective bargaining are rights in themselves that the company is required to respect and conduct due diligence on. Meaningful stakeholder engagement on due diligence does not replace the company's obligation to respect the choice of workers to form trade unions and to engage in good faith collective bargaining over terms of employment and working conditions.

These eight components are based on the report "Towards Mandatory Due Diligence in Global Supply Chains"¹¹ prepared by Professor Olivier De Schutter.

¹¹ https://www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf

