

Newsletter

# Business and human rights



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## Editorial

Despite the COVID-19 pandemic we have seen in the last few weeks many activities and developments related to human rights and responsible business conduct.



The work on a binding treaty on business and human rights continues, GRI undertakes human rights revisions to the GRI Standards, OHCHR published guidance on access to remedy as well as on mandatory human rights due diligence, the UN Working Group on Business and Human Rights presented its report on linking the human rights and anti-corruption agenda to the UN Human Rights Council, the German government announced the launch of mandatory supply chain legislation and the Swiss government decided that the popular vote on a Swiss supply chain law will take place on 29 November. You will read more about these developments in this newsletter.

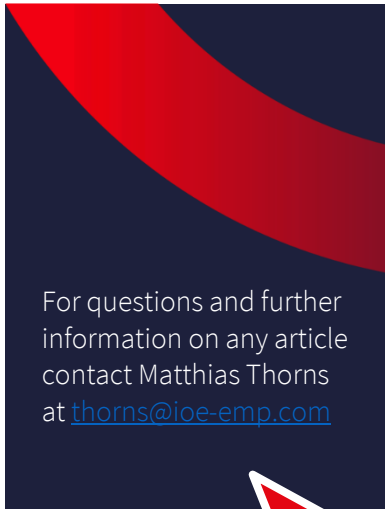
A lot of attention in the last weeks was also given to the vote on the proposal of the French Standardisation Organisation AFNOR to update ISO 26000 and to establish an ISO Technical Committee on Social Responsibility to develop all kinds of guidance on this topic. IOE together with ITUC, the European trade union organisation ETUC, the ILO as well as human rights NGOs and Think Tanks publicly called for the rejection of the proposal. The rationale for its rejection was that it would not make a positive contribution to the field of human and labour rights and, instead, would risk creating divergence with existing standards and absorbing resources away from current implementation efforts. **It is a known fact and has become trite that when all stakeholders – business, trade unions, civil society and think tanks as well as the ILO follow a common course on an issue, that there are good reasons for this.**

The outcome of the vote, which ended on 15 July, shows that more than two thirds voted in favour of the AFNOR proposal. This means the AFNOR proposal has been approved. However, it is at the end the TMB, the highest ISO decision making body, who will take the ultimate decision on this. **What comes out of this vote is that the ISO members, the national standardisation organisations, are highly divided on this issue.** This is not a solid basis for ISO to move ahead and create extensive work streams on this topic. What is needed instead are more and coherent efforts to implement the UN Guiding Principles on Business and Human Rights and other authoritative frameworks and guidance. We strongly call on the ISO TMB to follow the call of the leading international stakeholders and the international human rights community not to establish a Technical Committee on Social Responsibility, but to develop a much more aligned and coherent approach to this topic.

The UN Working Group initiated a project to develop a roadmap for action which will be published on the tenth anniversary of the UN Guiding Principles next June. IOE is one of the main business partners in this

project and I was personally involved as the voice of business in the high-level launch of the project on 7 July. It needs to be crystal clear: It is due to our very strong belief and passion for human rights and responsible business conduct that we rejected the AFNOR proposal, because we are in favour of better implementation, and utilisation of the authoritative instruments with stronger impact on the ground. Everyone that has been working on building back better during this pandemic has been calling for a collaborative and joint response by all partners and it is in this regard that we call on the ISO TMB not to go on a silo approach.

**Mthunzi Mdwaba** – Chair of the IOE RBC and Human Rights Policy Working Group



## UN Working Group develops roadmap for better implementation of the UN Guiding Principles on Business and Human Rights

In 2011, the Human Rights Council endorsed anonymously the UN Guiding Principles on Business and Human Rights (UNGPs). It is the authoritative framework that clarifies the rules and the responsibility of all actors.

The UN Working Group on Business and Human Rights, which was established to promote the implementation of the UN Guiding Principles, is using the tenth anniversary of the UNGPs to launch a project to develop a roadmap for action on the UNGPs over the next decade. This roadmap would set out clear goals and targets to help drive action to scale up responsible business conduct based on respect for human rights.

The strategic aim is to set out an implementation strategy focused on five key areas:

- Align business and human rights agenda more concretely within climate change and sustainable development discussions.
- Strengthen convergence around the UNGPs at a global governance level.
- Step up State action to advance implementation of a smarter (and aligned) mix of measures by governments around the world.
- Scale up approaches with potential to drive wider and deeper change.
- Make tangible progress in promoting effective remedy for affected people as a critical component for sustainable development.

The UN Working Group plans to present the roadmap to the Human Rights Council in June 2021.

More information on the project can be found under this link: <https://ungps10plus.org/>

IOE is the key business interlocutor in this project, aiming to ensure that the business perspective is taken fully on board in the development of the roadmap. The Chair of the IOE Human Rights and Responsible Business Conduct Working Group, Mthunzi Mdwaba, represented the global business community in the launch of the project on 7 July. During his presentation he made several key points:

- The UN Guiding Principles have been a “Game-changer”. They have clearly established the roles and responsibilities of the different actors and created a common understanding for what companies need to do. The UN Guiding Principles are a great success story.

Remaining gaps and challenges are:

- To give more attention to SMEs since they are the backbone of all economies,
- To elaborate sufficiently the role of governments,
- To focus on the root causes for human rights challenges,
- To have a less narrow approach reflecting European or American developments in order to focus truly globally.
- To promote partnerships between companies, governments and other actors in order to address systemic issues, and
- To have a more mature debate around human rights challenges, particularly in supply chains.

Most importantly, the project must focus on the scaling up and better implementation of the UN GPs. **The aim cannot be to re-negotiate or review the UN Guiding Principles themselves.**

## UN Working Group presents report on connecting the business and human rights and anti-corruption agendas

The UN Working Group on Business and Human Rights presented a report on the issue of human rights and anti-corruption at the 44th session of the Human Rights Council on 9 July 2020.

The report focuses on:

- clarifying how corruption impacts rights holders and is linked to, causing or contributing to human rights abuses;
- examining what measures and good practice can be taken by States, business and civil society to address corruption when it does negatively impact human rights;
- examining how the business and human rights agenda and anti-corruption efforts relate to each other, and to demonstrate how measures to drive responsible business practice along these two dimensions can reinforce policy coherence, and consider what this implies for government, civil society and business action;
- addressing how the anti-corruption field can be further strengthened and aligned with the “Protect, Respect and Remedy” pillars of the UN Guiding Principles;
- better integrating human rights due diligence in anti-corruption and anti-bribery measures, moving from a risk-to-business to a risk-to-people approach.

For the report itself, click on the following [link](#).

IOE shares with the UN Working Group the need to better interlink the human rights and anti-corruption agenda. Together with Business@OECD, IOE has developed guidance for Employer Organisations and companies on how to connect the anti-corruption and human rights agendas, which will be launched soon. However, the UN Working Group`s report draws a too negative picture about the implementation efforts of companies. It also neglects the demand-side of corruption and necessary action to address poor governance and administration. The observations on regulatory and corporate capture are not nuanced enough. IOE will

continue to engage with the UN Working Group to ensure that the important topic of human rights and anti-corruption is properly addressed.

## German government announces the launch of German supply chain legislation before the end of this legislative period

On 14 July, Hubertus Heil, Federal Minister of Labour and Social Affairs, and Gerd Müller, Federal Minister of Economic Cooperation and Development, announced the launch of a German supply chain legislation before the end of this legislative period in autumn 2021.

The background for this legislation was a review of company compliance with the German [National Action Plan on Business and human rights](#). The NAP was adopted in 2016 and sets out the expectation for at least 50% of German companies with more than 500 employees to have introduced human rights due diligence elements into their business processes by 2020. According to its coalition agreement on implementing the NAP, the government has committed to take legal action on national and European level if this target is not reached. According to the results of the second and final monitoring survey, which were presented on 14 July 2020, significantly less than 50% of companies would engage in proper human rights due diligence.

The Confederation of German Employers' Associations (BDA) alongside with other leading business organisations has stressed that no proper stakeholder consultation prior to the launch of the second survey has been carried out. Furthermore, the deficiencies with the first survey's criteria and measurement methods have been repeated in the second survey. The survey did not correspond 1:1 to the requirements set out in the NAP. Moreover, if only one out of over 30 questions of the survey were answered uncompleted, then the company is automatically classified as noncompliant at all, although all the other criteria have been fulfilled. A compliance rate of 95% was not sufficient to pass the test.

The German Business organisations therefore reject a national German supply chain legislation. In a joint statement they stress, that the debate on business and human rights should focus on the practicability for companies and the consequences for local partners. Companies want to inform about their human rights due diligence measures and, in cooperation with government, make their contribution to improving the human rights situation. In this sense, it could be useful for European companies to supplement existing reporting obligations with the aspect of human rights due diligence processes. The business community would be prepared to play a constructive role and to participate in the practical design of such a regulation.

## New UN Global Compact Executive Director



Sanda Ojiambo has been appointed as the new Executive Director of the UN Global Compact, following the departure of Lise Kingo. She started in her new role on 17 June 2020. Sanda Ojiambo previously served as Head of Sustainable Business and Social Impact, Safaricom Plc, Kenya.

Sanda Ojiambo took over her role at the 20th Anniversary Leaders' Summit of the UN Global Compact, bringing together more than 20,000 participants online. <https://www.unglobalcompact.org/news/4578-06-16-2020>

IOE is a founding member of the UN Global Compact and the Global Compact board. We are committed to working closely with Sanda Ojiambo to promote human rights, responsible business conduct and the Agenda 2030. Sanda Ojiambo already participated in her new role in the IOE-KAS high-level digital forum on "A decade of action on SDG delivery" on 16 July.

## Global Reporting Initiative (GRI) consultation on human rights revisions to the GRI Standards

A public comment period is underway until 9 September 2020 to gather feedback on an [exposure draft](#) that revises the GRI Universal Standards.

The GRI Universal Standards, which apply to all organisations reporting in accordance with the GRI Standards, are being revised in order to:

- embed mandatory human rights disclosures for all organisations using the GRI Standards;
- integrate reporting on due diligence and remedy – for human rights impacts but also for impacts on the environment;

- review key concepts, such as ‘materiality’ and ‘stakeholder’, to align them with key authoritative intergovernmental instruments.

These revisions have been developed by a multi-stakeholder [Technical Committee](#) of human rights experts, which included the participation of IOE, the UN and the OECD, among others. These revisions aim to increase alignment between the GRI Standards and the [UN Guiding Principles on Business and Human Rights](#), and the [OECD’s guidelines and tools on responsible business conduct](#), and to better support the thousands of organisations using the GRI Standards to more effectively report on how they meet their responsibility to respect human rights.

To learn about these and other proposed revisions to the GRI Universal Standards, and to provide your feedback, please visit this [page](#).

IOE will also consult with members and give consolidated feedback to the revisions.

## Update on the work on a legally binding UN treaty on business and human rights

The work on a legally binding UN Treaty on business and human rights continues.

The Chair of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, the Permanent Representative of Ecuador, Emilio Rafael Izquierdo Miño, held two consultations with missions and stakeholders on 29 May and 25 June in view of developing the next version of the draft treaty. IOE represented the global business community in both consultations and raised the main concerns as outlined in the response to the revised treaty from last October.

At the beginning of the consultations, the Chair gave a preview of the changes that can be expected in the next draft. He stressed that he and his team took good note of the requests during the last meeting of the open-ended intergovernmental working group particularly for:

- including specific references to the Agenda 2030, the ILO MNE Declaration as well as the ILO Fundamental Principles and Rights at Work; the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;
- the introduction of the right to development, the right for self-determination, the principles of permanent sovereignty of natural resources, a gender-perspective;
- the need of clearer definition of victims, claimants and the families of victims;
- including references to state-owned enterprises;



- the use of the concept of “business relationships” in line with the UN Guiding Principles on Business and Human Rights;
- better definition of the term “all human rights”;
- the obligation for states to ensure that courts have the capacity to reverse the burden proof under specific circumstances;
- including a reference to the right of free, prior and informed consent of indigenous people

The Chair took note of the support of many stakeholders for including the concept of “business activities undertaken by electronic means” and environmental rights. He also acknowledged differences in views with regards to the scope of the draft treaty (focusing only on transnational businesses versus all businesses). According to the chair, the scope will be one of the last elements to be agreed on in the negotiation of the draft treaty.

In conclusion, main concerns of the business community, such as the scope, the reversal of proof, the inclusions of environmental rights and unclear concepts such as “business activities undertaken by electronic means”, have not been addressed and will be most likely to be found also in the next version of the draft treaty, which the chair aims to launch at the end of July.

The sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights will take place from 26 to 30 October 2020.


## Office of the United Nations High Commissioner for Human Rights released guidance on mandatory human rights due diligence

The Office of the United Nations High Commissioner for Human Rights (OHCHR) released two guidance documents on mandatory human rights due diligence.



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The background for the papers are developments at EU-level as well as the intentions by several national governments to develop mandatory due diligence legislation. In the papers, OHCHR welcomes these developments, claiming that: “Mandatory human rights due diligence regimes have a potentially vital role to play as part of a ‘smart mix’ of measures to effectively foster business respect for human rights, as called for in the UN Guiding Principles on Business and Human Rights (‘UNGPs’). These regimes are also likely to be a key component of global efforts to Build Back Better”.



**OHCHR has released two documents on the subject:**

[mHRDD Issues Paper](#): Recognising that there is not one single model of mHRDD legislation, this paper seeks to unpack some of the main choices, complexities and policy trade-offs that policy-makers and legislators considering mandatory human rights due diligence legislation will be confronted with, and covers some of the advantages and disadvantages of different courses of action; and According to its coalition agreement on implementing the NAP, the government has committed to take legal action on national and European level if this target is not reached.

[mHRDD Key Considerations](#): This shorter document provides a summary of some key considerations to be taken into account when thinking about mHRDD, with more of a focus on the EU context.

OHCHR neither discussed or consulted with IOE, nor with governments about these papers. Transparent and broad consultations would have been of crucial importance particularly in view of the fact that mandatory human rights due diligence legislation is an extremely controversial topic.

## **Responsible Business Initiative: Swiss vote this fall will decide between this initiative or accept a strong counter proposal**

**Erich Herzog, Member of the Executive Board economiesuisse, the federation of Swiss business**

After a long and intense debate in the Swiss Parliament, it is now confirmed that the popular vote on the so-called Responsible Business Initiative (RBI) will take place on November 29, 2020.

The RBI was launched by a broad alliance of non-governmental organisations (NGOs) in April 2015. It calls for the world's strictest liability regulations for businesses to prevent and control non-compliance with human rights and international environmental standards.

The Swiss Federal Council (Switzerland's executive branch) as well as both Chambers of Swiss Parliament reject the initiative. The RBI's instruments would merely focus on civil liability and not on a smart mix of incentives. The assessment is that it would result in a counterproductive "juridification" of the discussion around human rights violations and environmental protection. This would lead to far-reaching legal, political and economic problems for Swiss companies and their business partners on a national and international

level. Further, Switzerland as a small country, would be in no position to bring forward risky and untested regulation in a very complex context.

**Switzerland should instead focus its efforts on leading international development efforts.** While it rejected the RBI, the parliament adopted a convincing counterproposal to the initiative.

### **The RBI: A unique experiment with unclear consequences**

Whereas the RBI is part of a wider international trend to embed corporate respect for human rights into hard law since the launch of the UN Guiding Principles on Business and Human Rights in 2011, it is more far reaching compared to other existing and proposed laws.

The initiative calls for the creation of an extensive new liability provision in Swiss law for all companies headquartered in Switzerland for wrongful acts of legally or even economically controlled companies (e.g. subsidiaries, suppliers or customers) in Switzerland and abroad. Swiss companies could therefore be held liable for damages caused by such third parties before a Swiss court under the relevant provisions of Swiss law unless they can prove to have respected a far going due diligence with regards to human rights and international environmental standards throughout their whole supply chain.

The concrete consequences of such a strict liability provision are very difficult to foresee in detail. It appears likely that the new instruments and their ease of application for possible claimants would be used not mainly by human rights activists but rather abused by competitors trying to impede the business and CSR activities of Swiss companies abroad. In any case, the initiative would increase legal uncertainty and create strictly legally based incentives for companies managing their international value chains and applying CSR-criteria to their business decisions.

Further, Swiss courts would also get jurisdiction in the event of liability claims, regardless of the existence of effective remedies in another country with a closer connection to the facts and a recognized legal system.

While a majority of Swiss Parliament stated that the RBI was too extreme or the wrong instrument for a just cause there was an intense discussion whether the instruments of the initiative, i.e. a far reaching due diligence obligation combined with a liability provision for third parties and Swiss law to apply also on cases between parties abroad, should be included in a counterproposal to the initiative.

Following back and forth consultations between the two Chambers (Council of States and the National Council) of Swiss Parliament with differences remaining between both until the last round, in the end the supporters of an internationally aligned regulation prevailed. Thus, this Summer the parliament has adopted an internationally aligned counterproposal (Counterproposal).

### **A far reaching, internationally aligned Counterproposal**

In the so called "National Action Plans", different countries have shown how they implement the "Due Diligence" requirement of the UN guidelines on national level. Most countries refer in this context to the standards of the OECD and UN or have - such as the US and UK - introduced additional mandatory transparency rules. The states that go beyond this (in particular France and the Netherlands) differ in crucial points from the RBI: The relevant legal catalogue in the Netherlands, for example, refers to one specific aspect ("child labour") and not an entire legal catalogue. And both countries have introduced a "safe haven" clause in case companies provide satisfactory risk reporting. This solution gives companies legal certainty. Particularly the regulation in the EU and the Netherlands served as a blueprint for the Counterproposal. A closer look shows its extent:

It consists of three pillars.

1. Firstly, a broad non-financial reporting duty in line with the EU Directive 2014/95 on non-financial reporting is introduced. The standards have been adapted to the conditions in Switzerland.
2. Secondly, a mandatory due diligence requirement specific to risks associated with trading of conflict minerals in the value chain in line with the EU Regulation 2017/821 was introduced.
3. And thirdly, a mandatory due diligence requirement specific to risks associated with child labour in the value chain and trading of conflict minerals was introduced. The Dutch Child Labour Act served as a model.

In case company representatives do not comply with these new obligations, the new law provides for criminal sanctions.

As far as liability is concerned, the Counterproposal adheres to the existing and internationally recognized liability provisions. It refrains, however, from introducing new, unclear and counter effective liability provision with a reversal of the burden of proof such as the RBI requires. In any event, Swiss companies that operate in a complex and multinational context should seek guidance as to the new rules and standards that will apply, both in Switzerland and abroad, and should not underestimate the risk of exposure in case of non-compliance.

Whereas the Counterproposal would immediately put Switzerland in the class of the most progressive countries regarding CSR regulation worldwide, it was nevertheless heavily criticized by the RBI Committee and Swiss NGOs. They call it insufficient and worthless. This undifferentiated criticism has to be seen in light of the campaign on the RBI and is also due to the fact that the parliament was not willing to support the Committee's claim to adopt a legislation that would copy the instruments of the RBI. Instead of providing for a Swiss solo, the parliament preferred legislation in line with international developments.

This new regulation, particularly in light of the fact that its new due diligence obligations do not provide for a specific threshold regarding the size of the companies, goes further than the current international standard. Thus, the counterproposal is far going and puts Switzerland on top of the current CSR-regulation. Unlike the RBI, however, it refrains from experiments and thus ensures legal certainty. Last but not least it can be developed in line with international regulations to the extent they should move ahead.

### **A No to the RBI is a Yes to the Counterproposal**

The Swiss will vote this fall on the RBI, a far reaching and unique concept with potentially harmful consequences for Switzerland and its business partners and people abroad. In light of the convincing Counterproposal, rejecting the RBI does not mean rejecting binding regulation in the context of business and human rights. Should the Swiss people reject the RBI, the Counterproposal would take effect almost immediately.

## OHCHR releases report and guidance on non-State-based grievance mechanisms

Following the third and final phase of an Accountability and Remedy Project (ARP III), the Office of the High Commissioner for Human Rights (OHCHR) released guidance on the design, functioning, and use of non-State-based grievance mechanisms.

The report focuses on three main categories of mechanisms:

- a) company-based grievance mechanisms;
- b) grievance mechanisms developed by industry, multi-stakeholder and other collaborative initiatives; and
- c) independent accountability mechanisms of development finance institutions.

The report claims that only a few non-State-based grievance mechanisms are fulfilling their envisaged role. “The remedies that may be obtained from non-State-based grievance mechanisms are usually partial at best, in many cases due to limitations placed on the mechanism’s mandate, available resources, or both. (...) the contribution that such mechanisms make to providing remedy is presently undermined by a lack of policy coherence on the part of States in their approaches to non-State-based grievance mechanisms. Furthermore, a lack of sensitivity and responsiveness of many mechanisms to their legal, regulatory, economic, social and cultural contexts, and a lack of cooperation between developers and operators of mechanisms in specific contexts and cases, results in unclear and incoherent processes, inefficiencies and other barriers for rights holders.”

The report includes an annex containing (1) policy objectives for States and developers and operators of non-State-based grievance mechanisms, and (2) elements to demonstrate different ways that the policy objectives can be achieved in practice. Further explanation as to the various objectives and elements can be found in the addendum to the report, which provides definitions, examples and added context, and which should be read alongside the report.

The report and the annex can be found on the website of the project:

[https://www.ohchr.org/EN/Issues/Business/Pages/ARP\\_III.aspx](https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx)

## World Benchmarking Alliance starts consultation on social indicators

The World Benchmarking Alliance ([WBA](#)) is an independent organisation which is developing and using a series of free, publicly available benchmarks to assess and compare corporate performance on the SDGs.

WBA's benchmarks assess corporate performance and impact across seven areas, namely: food and agriculture, circular, decarbonisation and energy, digital, financial, urban and social transformation. The proposed approach for the social transformation has been set out in a draft [methodology](#) which is open for consultation until 07th September 2020. A major part of the approach is to define and apply a series of core-social indicators covering key societal expectations for responsible business conduct.

In the four-week period from 20th July to 14th August, the WBA social-transformation team is hosting a series of drop-in workshops to discuss aspects of the methodology. The agenda can be found [here](#). The WBA is also encouraging companies to submit written feedback (individually, or through industry associations) to the consultation. If you would like to know more, submit feedback or take part in one of the workshops, please email [info.social@worldbenchmarkingalliance.org](mailto:info.social@worldbenchmarkingalliance.org)

The IOE will develop a joint business input to the consultation.

### The fifteen proposed core **social indicator** topics:

- |   |  |
|---|--|
| <b>1</b> Commitment to respect human rights               | <b>8</b> Discrimination                              |
| <b>2</b> Human rights due diligence                       | <b>9</b> Gender equality and women's empowerment     |
| <b>3</b> Access to remedy                                 | <b>10</b> Health and safety                          |
| <b>4</b> Governance of human rights (board oversight)     | <b>11</b> Living wages and social protection         |
| <b>5</b> Freedom of association and collective bargaining | <b>12</b> Personal data protection                   |
| <b>6</b> Forced labour                                    | <b>13</b> Corporate taxation                         |
| <b>7</b> Child labour                                     | <b>14</b> Anti-corruption                            |
|   | <b>15</b> Lobbying and corporate political influence |