

Business and Human Rights: Misconceptions and Recommendations for Trade Union Actions

On 16 June 2011, the United Nations (UN) Human Rights Council unanimously endorsed the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (UNGPs), developed by Professor John Ruggie of Harvard University – the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.^[1] On the 10th anniversary of the UNGPs, the International Trade Union Confederation-Asia Pacific (ITUC-AP) would like to take the opportunity to clarify the misconceptions about business and human rights and propose recommendations for trade union actions to promote human rights in global supply chains (GSCs).

Misconception 1: Freedom of association and the right to collective bargaining are excluded from the spectrum of human rights.

No. Some people mistakenly believe (or claim ignorance) that the responsibility of businesses to respect human rights does not extend to freedom of association and the right to collective bargaining. Principle 12 of the UNGPs clearly requires businesses to respect the “entire spectrum of internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.” The International Bill stipulates that everyone shall have the right to form and join trade unions and to bargain collectively, while the ILO Declaration provides that all members, even if they have not ratified the conventions in question, have the obligation to respect, promote, and realise core labour standards, including freedom of association and the effective recognition of the right to collective bargaining.

Misconception 2: Human rights are internal affairs in which other governments should not interfere.

No. Among the four areas of ILO’s core labour standards,^[2] freedom of association and the right to collective bargaining have often been considered to be more controversial than others. Some governments have refused to allow other governments or intergovernmental institutions to intervene in dealing with human rights violations in their respective countries because of the principle of non-interference in internal affairs. However, as stipulated in the Vienna Declaration and Programme of Action of 1993,^[3] the promotion and protection of human rights is unquestionably a matter of high priority for the international community.

Violations of human rights in many cases occur in cross-border trade and economic activities. States themselves, particularly undemocratic ones, often restrict the collective rights and individual liberties of their own people in order to oppress democratic voices and remain in power. Therefore, we need global cooperation and actions to protect and respect human rights and to ensure that those affected by human rights violations have access to remedy.

For example, the Committee on the Application of Standards of the ILO annually examines the application of international labour standards and draws up conclusions recommending that governments take specific steps to remedy particular problems. During the 109th session of the International Labour Conference in 2021, there were discussions of individual cases pertaining to the application of Convention 87 concerning Freedom of Association and Protection of the Right to Organise in Belarus, Cambodia, China-Hong Kong, Colombia, Ethiopia, and Kazakhstan. The session provides a space for representatives of workers, employers, and governments not only from the country under discussion, but also from other countries, to examine the cases in question. This internationally recognised process clearly refutes the misconception that human rights are internal affairs that should not be subjected to interference from other governments.

Misconception 3: Corporate responsibility can replace the duty of the state.

No. The UNGPs framework clarifies the distinction between a state's duty to protect against the corporate responsibility to respect human rights. These are different from and independent of each other. The state has the duty to ensure that business enterprises operating within their jurisdiction are respecting respect human rights. Such duty cannot be circumvented by transferring authority to enterprises themselves. Moreover, even when states fail to perform their duty, enterprises must continue to fulfil their responsibility to respect human rights.

Corporate responsibility to respect human rights does not mean replacing state's duty to protect them or acting as if the state's role is not important. Today, many multinational enterprises engage with external auditors who help them manage and improve human rights due diligence in GSCs. This "social audit" takes the form of supply chain "codes of labour practices" by sourcing enterprises. When an enterprise passes a social audit, it will be certified as human rights-compliant.

It is important to note that, social audits are increasingly being used by multinational corporations to comply with human rights due diligence. Although some social audits were able to document and monitor human rights abuses in the supply chain, others failed to capture and expose human rights violations.

Meanwhile, in some cases, the certificate given to a "human rights-compliant" enterprise would state, "Freedom of association is respected throughout the supply chain", even in countries where freedom of association is restricted by the authorities. It is meaningless to certify that an enterprise respects freedom of association in a country where it is not protected by the state.

Even with social audit certification, business enterprises must avoid investing in or withdraw their investments from countries that have been found to clearly violate human rights, such as in Myanmar following the coup on 1 February 2021. Otherwise, the social audit only has the effect

of redefining human rights, mainly for the purpose of convincing the public, especially its target consumers, that the enterprise in question is not responsible for any violations.

In this regard, the role of national trade unions as responsible stakeholders of the state and partners of business enterprises is crucial. More than external auditors, trade unions understand the situation of workers in the enterprises and the state of labour and human rights in their countries.

Misconception 4: Corporate responsibility is voluntary.

Yes and no. The UNGPs are classified as “soft law”, without any legally binding force. While some progress has been made in recent years with the establishment of “hard laws” in Europe and the United States (which will be discussed later), most countries in the Asia-Pacific region do not have such hard laws. In this regard, corporate responsibility is voluntary.

However, many may recall the case in the late 1990s, where a multinational sporting goods maker was criticised for its practice of using child labour in Southeast Asian countries, resulting in a worldwide boycott of its products. Having learned a lesson from this experience, the sporting goods brand became a pioneer in corporate responsibility.

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As seen in this case, the management of an enterprise is responsible for maximising the profits of the enterprise, for example, by improving its competitiveness and brand power in the market. Corporate laws in many countries stipulate that if an enterprise suffers damage due to misconduct and if decisions made by the management are not prudent, rational, or appropriate, then the management is to be held responsible for compensation for damages incurred. Respecting human rights is a must, not a voluntary initiative, and management must fully commit to this if it wants to enjoy the confidence of the enterprises involved.

Misconception 5: There is little room for trade unions when it comes to protecting human rights.

No. The international trade union movement worked together with willing governments and civil society organisations in order to conceive the UNGPs. The ITUC-AP, as well as the ITUC, Global Union Federations (GUFs), and the Trade Union Advisory Committee to the OECD (TUAC), are strongly committed to ensuring that the UNGPs are well known by all relevant stakeholders, particularly, governments and business enterprises, and are realised in all workplaces through GSCs.

Furthermore, human rights apply to workers. Trade unions at all levels, including global, national, industrial, enterprise, and community levels, are responsible for protecting the rights of workers and trade unions themselves. The role of trade unions is important in creating a stable political climate where social partners can operate without fear of reprisal, on the basis of full recognition of trade unions, and in compliance with the relevant international labour standards.

Here are some recommendations for trade union actions.

Recommendation 1: *Make the NAP work.*

All UN member states are strongly encouraged to develop, enact, and update a national action plan (NAP) for business and human rights, as part of states' responsibility for disseminating and implementing the UNGPs. According to the Office of the High Commissioner for Human Rights (OHCHR), in Asia and the Pacific, Thailand and Japan have produced a NAP, while Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Myanmar and Pakistan are in the process of developing or have committed to developing a NAP.[4]

The ITUC affiliates must make the NAP work. They are encouraged to contact their governments – ministries of foreign affairs, economy, trade, industry, and/or labour – to find out the status of their NAPs and request that trade unions be involved in the process of developing, enacting, and updating NAPs.

Many NAPs have referred with keen interest to a National Contact Point (NCP) of the OECD Guidelines for Multinational Enterprises. All OECD members and non-members adhering to the Guidelines are requested to establish a functioning NCP, whose main role is to “further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to resolution of issues that may arise from alleged non-observance of the Guidelines in specific instances.” [5]

NCPs are functioning well and are effective in some countries, but not in many others. NCPs must be strengthened so as to contribute to promoting the UNGPs.

Recommendation 2: *Advance legislations for human rights.*

In recent years, hard laws regarding businesses and human rights have been rapidly advancing in the West. Examples include the California Transparency in Supply Chains Act (CATSCA),[6] the Modern Slavery Act in the United Kingdom, [7] and Australia [8] and the French Corporate Duty of Vigilance Law 2017.[9] The Dutch Child Labour Due Diligence Law of 2020 [10] contains strict provisions (with criminal penalties) for officers of enterprises that provide goods or services to Dutch end users, regardless of the country in which the company operates.

On the other hand, negotiations for a UN Treaty on Business and Human Rights are underway, with the aim of developing a legally binding instrument to regulate the activities of transnational corporations and other business enterprises. Traditional international human rights laws oblige states and do not venture to provide a means for forcibly resolving violations, even if states do not comply with their obligations under the law. In other words, it is premised on the idea of emphasising the sovereignty of each nation and making it easier to tolerate responses according to the political and economic circumstances of each country. In addition, the obligations of the state do not clearly include the obligation to prevent human rights violations in other countries by business enterprises that have their head offices in that country.

Under the provisions of the second revised draft of the working group of the UN Human Rights Council, published on 6 August 2020,[11] state parties “shall take all necessary legal and policy measures to ensure that multinational and other enterprises that undertake business activities within their territory or jurisdiction (or otherwise under their control) respect human rights and prevent and mitigate human rights abuses throughout their operations.”

The ITUC supports the earliest adoption of a UN treaty and a new ILO convention on supply chains, as well as global frameworks that uphold core labour standards for cross-border negotiation and collective bargaining. It will take some time before the draft UN treaty is finalised; therefore, it is recommended that trade unions, particularly those in countries/territories where multinational enterprises locate their head offices, negotiate with their governments, lobby parliamentarians, and increase public awareness on the need for a business and human rights law.

Recommendation 3: Synchronise the UNGPs and the SDGs.

The days when many business people thought that the concept of “human rights” had nothing to do with corporate activities or corporate legal affairs are coming to an end, with the growing international awareness on sustainability.

More than 90 per cent of the 169 targets of the Sustainable Development Goals (SDGs) adopted by all UN member states in 2015 correspond to human rights obligations.^[12] The 2030 Agenda for Sustainable Development and the SDGs require strong commitment (on the part of business enterprises) to labour rights, along with relevant international standards, such as the UNGPs and the labour standards of the ILO. In particular, building effective, accountable, and inclusive institutions at all levels is a prerequisite to putting the UNGPs into practice. Goal 16 requires UN member states to:

- 16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all;
- 16.6 Develop effective, accountable, and transparent institutions at all levels;
- 16.7 Ensure responsive, inclusive, participatory, and representative decision-making at all levels;
- 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; and
- 16.b Promote and enforce non-discriminatory laws and policies for sustainable development.

The society as a whole is becoming more aware of issues such as gender equality, anti-corruption, transparency, and freedom of association in GSCs. It is necessary to utilise the UNGPs as a common language and to promote human rights in dialogue among governments, trade unions, employers' organisations, individual business enterprises, civil society organisations, and other relevant stakeholders.

The ITUC-AP, together with the ITUC, has been working to support its affiliates to effectively participate in the process of planning, implementing, and reporting on the progress of the SDGs. Trade unions must synchronise the UNGPs with the SDGs so that they can be mutually supportive and supplement each other, particularly in cases where governments are addressing them separately.

Recommendation 4: Ensure policy coherence.

Human rights must be realised in all policy areas and institutions. Both the UNGPs and the SDGs call for the establishment of effective institutions to ensure that human rights are respected by business enterprises in all economic activities. In particular, the UNGPs provides that “states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts.”

Together with the ITUC and the ITUC-AP, trade unions must advocate that trade agreements, generalised systems of preferences, investment and competition policies, and official development policies include strict compliance with human rights, most importantly, freedom of association and the right to collective bargaining. Human rights should be enforceable in trade, investment, and official development institutions through effective grievance and settlement mechanisms, with the application of economic sanctions in the case of violations, where appropriate.

Recommendation 5: *Promote constructive industrial relations.*

Another important legal framework for holding businesses accountable is the system of industrial relations. The UNGPs recognises industrial relations as an important element of non-state grievance mechanisms. For instance, there are global framework agreements between GUFs and multinational enterprises that provide mechanisms to address problems in accordance to the ILO Declaration on the Fundamental Rights at Work.

While some corporations are exploitative in their operations throughout their GSCs, mainly in developing countries, others are applying social dialogue in their corporate governance. They cooperate with trade unions to improve their business and to share the profits with all relevant stakeholders, and they use social dialogue as a wellspring for their competitiveness and brand power.

The model of corporate greed and corruption must be replaced with constructive industrial relations, in compliance with ILO labour standards. Social dialogue and collective agreements provide an unrivalled method for promoting social justice and achieving inclusive social and economic progress.

Constructive industrial relations can provide an effective mechanism, through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The ITUC-AP must remain in pursuit of constructive industrial relations in order to push for the establishment of effective grievance and settlement mechanisms throughout the GSCs that can remediate business-related human rights violations.

Ninety-four per cent of supply chain workers make up the hidden workforce. They contribute to massive global growth but do not get a fair share of the dividends of production or the wealth that they help create. Many of them are engaged in the informal economy as well as the gig economy, with little job security and limited or no access to comprehensive systems of social protection. The COVID-19 pandemic has highlighted and exacerbated the vulnerability of these workers. Trade unions must continue to organise those in non-standard forms of employment and bargain with their employers to promote standardisation of employment.

Recommendation 6: *Be united globally.*

There must be cooperation between and among trade unions across a business enterprise's supply chain. For example, if Company X violates its workers' freedom of association in Thailand, and Company Y in Japan has indirect business relations with Company X at the end of its global supply chain, then cooperation between trade unions in Thailand and Japan may help solve problems in Company X. This could lead to the improvement of the human rights due diligence of Company Y.

The reciprocal relationship between industrial relations in developing countries and in industrialised economies is growing stronger through GSCs. As a result, industrial relations in a multinational enterprise's home country can potentially affect not only the industrial relations in overseas-operating enterprises but also the overall systems of industrial relations and business attitude towards human rights in the host country itself.

Cooperation between trade unions in home and host countries must be strengthened bilaterally or throughout the ITUC, the ITUC-AP, and the GUFs. This can improve awareness on the significance of constructive industrial relations in promoting human rights due diligence and preventing violation and non-observance of human rights among governments, businesses, and society as a whole in both economies.

To this end, international trade union organisations must develop their work with such a perspective in mind. Enabling cross-border solidarity among trade unions throughout the GSCs can strengthen national trade unions' sense of ownership of the international trade union movement and engagement in global action.

Conclusion

Global trends are increasingly influencing our daily lives and work. Due to the development of GSCs, fewer and fewer workplaces remain disconnected from global corporate trends and overseas economies. In this context, violations and abuses of human rights in business and economic activities need global approach and cooperation.

A global approach is, of course, part of the heritage of the trade union movement in world history. Trade unions value relationships that extend beyond borders. Global workers' solidarity provides courage and inspiration to people at times when the world is facing great difficulties. The trade union movement also sends a message about how important it is to bring together people's strengths and build collective power. Its way of thinking has gradually come to influence a number of transborder movements, not only in relation to human rights but also to further the cause of peace, democratisation, and environmental protection, among others.

At present, in both domestic and international politics, the role of trade unions is more important than ever in building a sustainable, inclusive, and resilient post-COVID world of work. For this, we need stronger political will and commitment of states to fulfil their duty, stronger corporate responsibility, and stronger trade unions.

Endnotes

[1] More details on the UNGPs can be found at [OHCHR | OHCHR and business and human rights](#).

[2] The ITUC is requesting that health and safety be included as the fifth area.

[3] [OHCHR | Vienna Declaration and Programme of Action](#)

[4] [OHCHR | State national action plans on Business and Human Rights](#)

[5] [National Contact Points for the OECD Guidelines for Multinational Enterprises - OECD](#)

[6] CATSCA legislation became effective on 1 January 2012. This legislation requires that manufacturers doing business in California (\$100M+) disclose the steps they take to ensure that product supply chains are free of slave labour and human trafficking.

[7] The UK's Modern Slavery Act 2015 is designed to combat modern slavery in the UK and consolidates previous offences relating to trafficking and slavery.

[8] The Modern Slavery Act 2018 requires large Australian entities and foreign entities conducting business in Australia to report annually on the risks of modern slavery in their operations and supply chains and the actions taken to address those risks.

[9] The 2017 French Corporate Duty of Vigilance Law has established a legally binding obligation for companies which employ at least five thousand employees in France, or ten thousand within the company and its subsidiaries, to prepare, publish and implement a vigilance plan.

[10] The Dutch Child Labour Due Diligence Law of 2020 is designed to give enterprises more responsibility for preventing goods and services which have come into existence through child labour from hitting the Dutch market.

[11] [OHCHR | WGTTransCorp IGWG on TNCs and Human Rights](#)

[12] UNDP, <https://www.rolhr.undp.org/content/ruleoflaw/en/home/2018/stories/story-2.html>