

Mandate of the Special Rapporteur on trafficking in persons, especially women and children

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(Please use this reference in your reply)

16 June 2022

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolution 44/4.

In this connection, I would like to bring to your attention information I have received concerning the Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, and its compliance with the States' obligations under international human rights law. In particular, I would like to raise my concerns concerning limitations in the current Draft Directive, that could lead to a failure to ensure that the human rights of persons victim of trafficking are effectively protected, or that effective prevention action is taken, to combat trafficking in persons.

The proposed European Directive on corporate sustainability due diligence is a welcome development and a critical opportunity for transformative change. The proposal, which complements Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, seeks to combat the use of forced labour by effectively prohibiting the placing on the European Union market of products made by forced labour, including forced child labour. Both domestic and imported products fall within the scope of the proposed Directive, which is expected to ensure a robust, risk-based enforcement framework.

I welcome the references in the Annex to the draft Directive, to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in persons Protocol), and to relevant international human rights, labour rights instruments and environmental law conventions, that must be considered in identifying actual or potential adverse impacts, including core United Nations human rights treaties, ILO core conventions and, importantly, both the United Nations Declaration on the Rights of Indigenous Peoples and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

I also welcome the references in the Annex to specific provisions in the core international human rights instruments and ILO conventions that are relevant to the prohibition of trafficking in persons and elimination of forced labour. However, I would like to draw your attention to relevant regional instruments that are currently missing from the draft, in particular, the Council of Europe Convention on Action against Trafficking in Human Beings, ratified by all EU Member States.

I am concerned that the proposed Directive, as currently drafted, is limited in scope and falls short of ensuring an effective mechanism to combat trafficking for

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and other international organizations in Geneva

forced labour and labour exploitation in supply chains. I am concerned that by reducing the burden on companies below the established threshold, the Directive would fail to align with the Guiding Principles on Business and Human Rights, specifically principle 14, which states that the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.

In this context, I would like to highlight the importance of policy coherence and compliance with international human rights standards and would like to recall the recommendation of the Working Group on the issue of human rights and transnational corporations and other business enterprises, on the importance of expanding the scope of application of the Directive. In the current draft Directive, article 2 (1) (a) sets a minimum threshold of 500 employees and a global net turnover of over 150 million Euros. For higher-risk sectors, including agriculture and forestry, article 2 (1) (b) sets a lower threshold of 250 employees and a global net turnover of 40 million euros.

Regarding the limited scope in relation to small and medium size enterprises (SMEs), I would like to highlight that, in following the Guiding Principles on Business and Human Rights principle 14 mentioned above, measures should be taken to support SMEs to achieve compliance with mandatory human rights due diligence obligations (in line with principle 17 of the Guiding Principles), rather than applying the Directive to large businesses exclusively. In this context, I would like to highlight other risk sectors, which will be potentially excluded from the regulatory scope of the Directive, in particular, the activities of recruitment agencies.

Gender Equality and Elimination of Discrimination against Women

The gendered impact of this restricted scope is also of serious concern. Women, in particular rural women, are more likely to work in smaller enterprises, including in informal work. The gender dimension and specific potential adverse impacts identified in the agriculture sector have been extensively highlighted in my report to the Human Rights Council in 2022, “*Trafficking in persons in the agriculture sector: human rights due diligence and sustainable development*”, including specific risks faced by women migrant workers. In the Report, I noted that: “Submissions received (...) highlight the specific risks of sexual harassment, sexual violence and trafficking for forced labour faced by women migrant agricultural workers.” I also express my concern at reports that women victims of trafficking for forced labour in the agricultural sector, “often lack access to water and sanitation facilities, are frequently at risk of sexual violence and do not have access to sexual and reproductive health services or to assistance and protection measures” (A/HRC/50/33, para. 8).

I recall article 14 of the Convention on the Elimination of All Forms of Discrimination against Women and General Recommendation No. 34 (2016) of the Committee on the Elimination of Discrimination against Women, (CEDAW) on the rights of rural women, which highlights the specific disadvantages and risks faced by many rural women, including by rural migrant women workers, arising from gaps in legislative protection and enforcement and limited access to social protection.

As stated in CEDAW General Recommendation No. 34, “rural women carry most of the unpaid work burden owing to stereotyped gender roles, inequality within the household and the lack of infrastructure and services, including with respect to

food production and care work. Even when formally employed, they are more often engaged in work that is insecure, hazardous, poorly paid and not covered by social protection. They are less likely to be educated and are at higher risk of being trafficked and forced into labour, as well as into child and/or forced marriage and other harmful practices” (CEDAW/C/GC/34, para. 5).

I would also like to recall CEDAW General Recommendation n° 38 on trafficking in women and girls in the context of global migration, which recognises that: “Women and girls continue to be the prime targets of traffickers for specific forms of exploitation, owing to the pervasive and persistent gender and age inequalities that result in an economic, social and legal status of women and girls that is lower in comparison with that which is enjoyed by men and boys” (CEDAW/C/GR/38 para 21).

I recall the specific recommendations set out in CEDAW General Recommendation no. 38, concerning the conduct of businesses, and the prevention of trafficking in all business operations, public procurement, and corporate supply chains by: “ Encourage businesses and public agencies to ensure that a dedicated regulatory body in which workers and their representatives are represented has the power and resources to proactively investigate and monitor compliance with mandatory due diligence laws and sanction non-compliant entities.” (para. 63 (c)). CEDAW has also called for gender-sensitive grievance mechanisms and strengthening of labour rights frameworks (para.54(d)).

Given the gender dimension of trafficking for forced labour, especially in high risk sectors, it is critical that human rights due diligence measures explicitly require and support participation of women, and gender equality measures, in stakeholder engagement.

Rights of the Child

It is critical that a child rights perspective is fully incorporated into the Directive. The current Draft Directive fails to comply with the Convention on the Rights of the Child, and specifically the obligation of child-rights due diligence. In this regard, I would like to draw your attention to the Committee on the Rights of the Child General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. Highlighting the importance of child rights due diligence, the Committee on the Rights of the Child has noted that, “a concentrated number of children are often found in hidden areas of informal work, such as small family enterprises, agricultural and hospitality sectors. Such work frequently involves precarious employment status, low, irregular or no remuneration, health risks, a lack of social security, limited freedom of association and inadequate protection from discrimination and violence or exploitation” (CRC/C/GC/16 para. 35). The Committee has developed recommendations regarding businesses obligations of due diligence that specifically take into account adverse impacts and potential adverse impacts on the rights of the child, stating that: “Where there is a high risk of business enterprises being involved in violations of children’s rights because of the nature of their operations or their operating contexts, States should require a stricter process of due diligence and an effective monitoring system. Where child-rights due diligence is subsumed within a more general process of human-rights due diligence, it is imperative that the provisions of the Convention and the Optional Protocols thereto influence decisions. Any plan of action and measures to prevent

and/or remedy human rights abuses must have special consideration for the differentiated impact on children” (CRC/C/GC/16, para. 62 and 63).

My Report to the Human Rights Council, on *Human Trafficking in the Agriculture sector: human rights due diligence and sustainable development*, (A/HRC/50/33) highlights concerns in relation to the continuing prevalence of the worst forms of child labour, and highlights the many obstacles that child victims face in securing remedies and effective access to justice (A/HRC/50/33, para. 21).

Scope of draft Directive

In this context, I am concerned that failing to extend the scope of mandatory due diligence is a missed opportunity for transformative impact at a critical time. I am concerned that the current Draft Directive repeats the errors of box-ticking corporate responsibility compliance approaches and overreliance on contractual assurances from businesses.

Furthermore, I am concerned that the thresholds established in the draft Directive regarding companies’ turnover, especially concerning companies that are formed in accordance with legislation of a third country, can be eluded through creative financial accounting methods. In this context, I highlight the importance of careful monitoring to ensure that the obligations set out in the Directive, are not avoided.

Regarding the scope of due diligence obligations, as currently drafted, companies are required, within the scope of article 2 (1) (b) and within the scope of article 2 (2) (b), to address only severe potential and actual adverse human rights impacts, which is a deviation from the UN Guiding Principles, and which would, in my opinion reduce the transformative impact of the Directive. The Guiding Principles references, to addressing severe impacts (principle 17 and 21), do not limit the duty of companies to identify and address *only* severe potential or actual adverse impacts, but rather set out *how* these should be addressed. In the context of combatting trafficking in persons, the mandate of the Special Rapporteur on Trafficking in Persons, especially women and children, highlighted labour rights violations that contribute to the risk of trafficking, but which may not be considered, in the context of the application of this Directive, as constituting a “severe impact.” These concerns are highlighted, for example, in the Report “*Access to remedy for victims of trafficking for abuses committed by businesses and their suppliers*”, (2019), (A/74/189), regarding the impact of, “labour abuses, (...), such as delayed payment of wages, excessive overtime, non-paid holidays or payment of recruitment fees to recruitment intermediaries,” (para. 12), in heightening the risk of workers of trafficking in persons for purposes of forced labour.

I also wish to highlight the importance, as recognized in the Guiding Principles on Business and Human Rights, of ensuring that human rights due diligence obligations encompass the entire value chain, both upstream and downstream. As such, references in the draft Directive to “established business relationship”, should not undermine or unduly limit the scope of the due diligence obligation. While tier 1 suppliers may be “established”, this is not necessarily the case for all suppliers at tier 1, or at tier 2 and further beyond. Such a limit in the scope and reach of the due diligence obligations is also inconsistent with the Guiding Principles.

As I have noted in my recent report to the Human Rights Council: “Globally, it is estimated that between 28 and 43 per cent of child labour in global supply chains occurs in the upstream segments.” (A/HRC/50/33, para 46). The ILO and others have recognised that while companies may have less visibility and more limited leverage over suppliers operating in the upstream segments of supply chains, this should not be a reason not to undertake due diligence beyond immediate suppliers. It is critical, therefore, to ensure that human rights due diligence obligations are not limited to relationships with downstream suppliers and should expand to entire value chain.

Finally, I am concerned at the limitation of scope of the draft Directive to “established” business relationships, defined as: “such direct and indirect business relationships which are, or which are expected to be lasting, in view of their intensity and duration and which do not represent a negligible or ancillary part of the value chain,” (EU draft Directive, preamble, para 20). I am concerned that this limitation may encourage companies to increase reliance on temporary arrangements, especially in their relationships with businesses that present a high risk of trafficking for the purposes of forced labour, such recruitment agencies.

Engagement with stakeholders, in particular trade unions

I would also like to express my concern at the limited provision for engagement with affected groups, as expressed in draft article 6 (4), which states that, “Companies shall, where relevant, carry out consultations with potential affected groups including workers and other relevant stakeholders”. I am concerned that the reference to “where relevant” fails to comply with the Guiding Principles, in particular Principle 18, which provides that identification and assessment of actual or potential adverse human rights impacts, should “(a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation”.

Engagement with stakeholders was not optional but necessary, “to assess their human rights impacts accurately”. As the commentary to principle 18 states, “businesses should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society”.

I am concerned that the draft Directive does not include explicit reference to the rights of women, gender equality, the role of human rights defenders or groups that may be particularly adversely affected, such as indigenous peoples. Given the gender dimension of trafficking for forced labour, especially in high risk sectors, it is critical that human rights due diligence measures explicitly require and support participation of women, and gender equality measures, in stakeholder engagement.

Recalling article 35 of the Council of Europe Convention on Action against Trafficking in Human Beings, I would like to highlight the critical importance of mandating engagement with human rights defenders, trade unions and civil society, and of supporting and empowering civil society in the prevention of trafficking in persons and protection of victims.

The failure to ensure the role of workers' representatives in the design and implementation of responses to actual or potential adverse human rights impacts, in both prevention measures and in measures to end adverse impacts, is also of concern. The mandate of Special Rapporteur on trafficking in persons, especially women and children, has repeatedly stressed the critical role of trade unions, and workers' associations, in preventing trafficking in persons and in protecting victims and potential victims.

Also missing from the draft Directive is specific recognition of the risk of reprisals against human rights defenders, including workers' representatives, and an explicit reference to ensuring protection against such reprisals, as a requirement of effective action to combat trafficking in persons and protect trafficked persons.

I would also like to express my concern in relation to the absence of an explicit reference to trade unions or workers' associations or committees in article 26, "Setting up and overseeing due diligence", and elsewhere in the draft Directive, particularly given the importance of trade unions and workers' association, in preventing trafficking for forced labour, and in relation to the prevalence of restrictions on freedom of association globally. Proactive and meaningful stakeholder engagement is an essential element of human rights due diligence, as set out in the Guiding Principles on Business and Human Rights. I would like to highlight the purpose of human rights due diligence as being prevention of human rights violations, including prevention of the serious human rights violation of trafficking in persons.

Third party auditing

I would also like to raise concern at the reliance in the draft Directive on third party auditing. The mandate of Special Rapporteur on trafficking in persons, especially women and children, has previously raised questions as to the effectiveness of such auditing in identifying victims of trafficking or persons at risk of trafficking, noting that: "Auditing, as a way to evaluate the compliance of companies with labour standards, has also been criticized for its lack of capacity to assess the performance of companies in the long term. An audit, even the most comprehensive, i.e., when it includes worker interviews and is supplemented with information from alternative sources, such as local actors, including representatives of civil society and local trade unions, is still a snapshot offering only a partial view of day-to-day working conditions." (A/HRC/35/37, para. 44).

In this context, I am concerned at the weight given to auditing in relation to reporting obligations (article 11 of the draft Directive) and follow-up measures on substantiated concerns (article 19 of the draft Directive). Well-documented limitations of due diligence measures, including the lack of information available to consumers or workers on rights protections and remedies, need to be addressed in the Directive.

Access to remedies and compensation

I recall Human Rights Council Resolution, 44/4, and the obligation on States to "Ensuring for victims and their family members access to justice and safe reporting, and providing trafficked persons with appropriate, relevant and understandable information on their rights, including the right to a remedy, the mechanisms and procedures available to exercise these rights, and on how and where

to obtain legal and other necessary assistance.”

The Special Rapporteur on trafficking in persons, especially women and children, has previously highlighted the difficulties faced by victims of trafficking in ensuring effective access to remedies. (See: “Access to remedy for victims of trafficking for abuses committed by businesses and their suppliers”, A/74/189).

My report on *Trafficking in Persons in the Agriculture sector*, highlights the continuing obstacles encountered by victims of trafficking in the agricultural sector in securing access to remedies. These difficulties include overcoming procedural and jurisdictional barriers, meeting evidential requirements in criminal proceedings, discharging the burden of proof and limited opportunities for collective redress, as well as lack of awareness of domestic and international laws relating to trafficking for forced labour and the rights of victims.

I am concerned that the current draft Directive does not go far enough in removing these obstacles, particularly given the power imbalance between those it is addressing – large companies – and victims of trafficking, or persons at risk of trafficking for forced labour.

I note that ensuring effective regulation of businesses and access to remedies for victims is a legal obligation on States arising from positive obligations to prevent trafficking in persons and ensure protection for victims of trafficking. To effectively protect labour rights and human rights, strengthening judicial accountability is critical, as are expanded avenues for legal recourse and access to free legal assistance and representation. I further note that such mechanisms as the national contact points for responsible business conduct and the OECD Guidelines for Multinational Enterprises have the potential to play a useful role, but are currently limited in their impact. A strengthened legal framework is essential to the effective operation of the mechanisms, ensuring their independence, impartiality and visibility.

I firmly believe that the draft Directive Directive on corporate sustainability due diligence provides an important opportunity to develop a robust human rights due diligence instrument, that will ensure effective prevention of trafficking in persons for purposes of forced labour.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek clarifications on the issues brought to my attention, I would be grateful if you could:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned issues.
2. Please provide any specific information and/or comments on how the draft Directive and its revisions will address specific concerns regarding prevention and protection of victims and potential victims of trafficking in persons and access to remedy.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be

presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children