

PREVENTING REPRISALS AGAINST HUMAN RIGHTS DEFENDERS THROUGH EFFECTIVE DUE DILIGENCE LEGISLATION



Consultations on community land use planning, Gambella, Ethiopia, ILRI

Briefing and key recommendations for EU policymakers outlining the importance of addressing reprisals against human rights defenders as part of effective human rights and environmental due diligence.

The European Union legislative initiative on mandatory human rights and environmental due diligence is an opportunity for the EU and its member states to step up and play a leading role globally in implementing the United Nations Guiding Principles on Business and Human Rights, as well as to significantly impact the safety of human rights defenders in the context of business activities around the world.

This briefing outlines the importance of addressing reprisals against human rights defenders as part of effective human rights and environmental due diligence, and our key recommendations for how the EU must address these risks in prospective legislation.

Throughout 2021 Front Line Defenders and partners consulted with human rights defenders and civil society from the Americas, Asia and Africa on this topic, and this briefing draws on the result of those consultations.

Table of Contents

The European Union and human rights defenders.....	4
Assessing and addressing reprisal risk.....	5
Meaningful engagement.....	8
Safe human rights and environmental due diligence.....	9
Recommendations.....	11
Annex 1 – Key international standards and research.....	14
International.....	14
UN Guiding Principles on Business and Human Rights and associated guidance.....	14
The Guiding Principles on Business and Human Rights: Guidance on ensuring respect for human rights defenders.....	16
European Union.....	18
European Parliament JURI report.....	18
EU Directive on the protection of persons who report breaches of Union Law.....	19
Annex 2 – Results of consultations with human rights defenders.....	21
Annex 3 – Further resources from Civil society and the UN.....	24

The European Union and human rights defenders

“Support for human rights defenders is already a long established element of the European Union’s human rights external relations policy”

- EU Guidelines on Human Rights Defenders

The European Union (EU) has made serious high level commitments on the protection of human rights defenders in its external human rights policies including through the EU guidelines on Human Rights Defenders and the EU Action Plan on Human Rights and Democracy.

The guidelines, first adopted in 2004, outline a clear commitment to supporting human rights defenders through EU missions (EU delegations and member States embassies) around the world. The overall objective is to “bring about an environment where human rights defenders can operate freely”¹. The guidelines outline practical support to be provided to human rights defenders at risk by EU missions, as well as commitments to promote respect for the work of human rights defenders.

In the most recent EU Action Plan on Human Rights and Democracy covering 2020-2024,² the EU commits to supporting and protecting human rights defenders including through EU protection mechanisms, as well as working to ensure the positive recognition of their important role.

The legislative initiative on mandatory human rights and environmental due diligence (HREDD) will be a critical opportunity for the EU and its member states to greatly impact the safety of human rights defenders globally. As discussions on the initiative move forward, it is important that the EU consider how to align this legislation with its foreign policy commitments on the protection of human rights defenders.

1 https://eeas.europa.eu/sites/default/files/eu_guidelines_human_rights_defenders_en.pdf

2 https://eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf

Assessing and addressing reprisal risk

It is a dangerous world in which to stand up for your rights and the rights of others. At least 331 human rights defenders were killed in 2020, an average of over 6 per week.³ Human rights defenders face brutal consequences globally for standing up to corporate human rights abuses. The Business & Human Rights Resource Centre (BHRRC) documented over 600 attacks against defenders working on business-related human rights issues in 2020.⁴ The types of attacks ranged from arbitrary arrest and judicial harassment, intimidation, surveillance and death threats to violent attacks and killings.

Human rights defenders working on business-related human rights issues are a diverse group. They work on subjects ranging from land rights and the rights of Indigenous Peoples, to women's rights, children's rights, the rights of LGBTIQ+ peoples, and workers rights, to digital rights and the right to privacy. The types of threats they face are also diverse and often vary according to the focus of their activism and their intersecting identities. For instance, indigenous defenders are disproportionately represented in statistics on killings. Of the 331 killings of human rights defenders in 2020, 26% of that overall total were working specifically for the rights of Indigenous Peoples, despite only around an estimated 6% of the global population being indigenous. Women human rights defenders are more likely to experience violence of a gendered nature and to be targeted by smear campaigns.⁵ Trade unionists and those defending the rights of workers may be more likely to face retaliation through job loss. The impacts of these reprisals can be devastating; physically, psychologically and financially.

The UN Guiding Principles on Business and Human Rights (UNGPs) Reporting Framework requires that businesses focus on their most salient human rights issues when reporting on human rights and environmental due diligence.⁶ In other words, businesses should take into account likelihood, severity and urgency of potential or actual impacts on human rights when assessing which human rights impacts to focus on. Given the severity of the nature of threats against human rights defenders,

3 https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf

4 <https://www.business-humanrights.org/en/from-us/briefings/line-fire-increased-legal-protection-needed-attacks-against-business-human-rights-defenders-mount-2020/>

5 https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf

6 https://www.ungpreporting.org/wp-content/uploads/UNGPreportingFramework_withguidance2017.pdf

particularly killings and violent attacks, reprisals against human rights defenders are often one of the most salient human rights concerns businesses must consider. This is true across sectors but particularly true for businesses with links to the extractive and agribusiness sectors – which are regularly found to be the sectors most often related to reprisals against human rights defenders.⁷

In their recent report, ‘*The UN Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*’ the UN Working Group on Business and Human Rights notes the obligation, under the UNGPs, of States and business enterprises to protect and respect human rights defenders respectively. For business enterprises this requires that “*their activities, actions and omissions, do not lead to retaliation, violence, death, legal harassment or any other form of silencing or stigmatisation of human rights defenders, and they need to address adverse impacts on human rights defenders with which they are involved, either through their own activities or as a result of their business relationships.*”

Mary Lawlor, the United Nations Special Rapporteur on the Situation of Human Rights Defenders has also publicly noted the importance of businesses addressing risks of retaliation against human rights defenders linked to in their operations. She recently called for the inclusion of provisions related to human rights defenders in the EU directive on mandatory human rights and environmental due diligence noting that “[*human rights defenders*] stand to see their security greatly improved if businesses are obliged to take into account any potential negative impacts or risks for persons defending human rights that they might contribute to through their activities and business relationships.”⁸

It is crucial that the EU explicitly requires business enterprises to assess and address risk of retaliation, including against human rights defenders, as part of the HREDD process in their legislation on mandatory HREDD. This should include instances where the business causes the reprisal through its own actions, as well as when it contributes to or is directly linked to the reprisal through the actions of its suppliers, clients, services providers and/or other business relationships. **The legislation must therefore include a negative obligation for the business enterprise to refrain from conducting reprisals against human rights defenders, as well as a positive obligation to prevent reprisals linked to its operations and value chain.**

7 <https://www.business-humanrights.org/en/from-us/briefings/line-fire-increased-legal-protection-needed-attacks-against-business-human-rights-defenders-mount-2020/>

8 <https://srdefenders.org/resource/position-paper-concerning-human-rights-defenders-and-the-eus-mandatory-due-diligence-initiative/>

The UNGPs state that “*the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure*”⁹. Links between business and human rights risks are often complex. For many companies, human rights risks are deep into their supply chains and this is particularly true for reprisals against human rights defenders; many reprisals are linked to the extraction of natural resources¹⁰ for example, which may be several tiers removed from the European company which ultimately benefits from the production of products linked to the violation of human rights. **Legislation on mandatory HREDD must therefore require companies to assess and address risks throughout their supply chain as well as cover small and medium sized enterprises, which may be small in terms of their European footprint, but still have significant risk of retaliation against human rights defenders linked to their supply chains.**

The legislation should also cover investors. Under the UN Guiding Principles on Business and Human Rights, investors with State connections, such as development finance institutions, have an obligation to protect human rights. Private investors, such as commercial banks and institutional investors, have a responsibility to respect human rights, including through conducting HREDD. The reach and impact of European investors is significant; the European Investment Bank alone invested €7.2 billion outside of the EU in 2021.¹¹ The EU’s aggregated net assets in direct investment outside the EU amounted to over €1 400 billion in 2020.¹² **In order to align legislation on mandatory HREDD with the UNGPs, and given the large reach of European investors, it is critical that the directive explicitly include investors.**

9 https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

10 See for example Front Line Defenders Global Analysis 2020

https://www.frontlinedefenders.org/sites/default/files/fl_d_global_analysis_2020.pdf

Global Witness Last Line of Defence <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>

Business & Human Rights Resource Centre In the line of fire

<https://www.business-humanrights.org/en/from-us/briefings/line-fire-increased-legal-protection-needed-attacks-against-business-human-rights-defenders-mount-2020/>

11 <https://www.eib.org/en/index.htm>

12 <https://ec.europa.eu/eurostat/statistics-explained/index.php?>

[title=International investment position statistics#EU is a net lender in direct investment](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=International_investment_position_statistics#EU_is_a_net_lender_in_direct_investment)

Meaningful engagement

In her 2021 report on the killings of human rights defenders, the UN Special Rapporteur on the Situation of Human Rights Defenders notes that “[*human rights defenders*] *objecting to Governments that are imposing business projects on communities without free, prior and informed consent, are particularly vulnerable to attack*”¹³ In fact, a significant number of attacks against human rights defenders are linked to a lack of meaningful engagement by corporations with affected-communities. Of the 604 attacks recorded by the BHRRC in 2020, more than a third stemmed from a lack of consultation or the failure to secure free, prior and informed consent of affected communities.

In an important step, the European Parliament Committee on Legal Affairs’ (JURI) recommendations to the European Commission on corporate due diligence and corporate accountability in January 2021 – adopted as a resolution by the European Parliament in March 2021 – included the recommendation that companies undertake stakeholder engagement in a meaningful way as part of the human rights due diligence process.¹⁴ However, although stakeholder engagement is important for HREDD, **it is critical that human rights defenders are named as a key stakeholder group**. Consulting with wider civil society – regional or international NGOs for example – although important, is not a replacement for consulting directly with local and independent human rights defenders, and is unlikely to provide companies with the detail needed to truly identify the impacts associated with their value chain, as well as the potential solutions. Consulting with non at-risk stakeholders, such as suppliers, should also not be amalgamated with engaging with rights-holders, given the risks human rights defenders may face for participating in consultations (see section ‘Safe human rights and environmental due diligence’ for further information).

Human rights defenders are crucial sources of information for business enterprises aiming to understand their potential or actual human rights impact and therefore have a key role to play in HREDD. The UN Working Group on Business and Human Rights encourages businesses to think of human rights defenders as ‘critical friends’ .As they are close to the ground, they are essential eyes and ears for

¹³ Human Rights Council (2021) “Final warning: death threats and killings of human rights defenders” <https://undocs.org/en/A/HRC/46/35>

¹⁴ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

businesses to understand what impacts the business has, or could have. Many members of affected communities actually become human rights defenders after seeing the negative impact of businesses on their local community, local environment or fellow workers. Therefore, the very existence of human rights defenders working on business-related impacts should serve as a red flag for involved companies that there are concerns related to the project that warrant further investigation. **It is important therefore that stakeholder engagement be undertaken throughout the HREDD process, including as part of the identification of risk phase.**

Acknowledging that engagement with human rights defenders is an important component of conducting effective HREDD points to a further reason to address reprisal risk. Where human rights defenders fear reprisal, they will be unlikely to engage with a business looking to find out more about the human rights impacts of its operations and value chain. When there is a reprisal risk, businesses miss out on the opportunity to gain a true picture of their impacts. **Addressing reprisal risk is therefore a precursor to meaningful engagement, and given that meaningful engagement is critical for the effective HREDD, it is important that the EU requires businesses to conduct engagement with human rights defenders in a safe and meaningful manner.**

The call for the inclusion of safe and meaningful stakeholder engagement in HREDD is not only coming from civil society and the UN special procedures. In November 2021, 43 investors and businesses issued a statement in support of meaningful and safe stakeholder engagement as a crucial aspect of EU legislation on mandatory HREDD. The statement recognised that human rights defenders are important partners in identifying potential or actual adverse impacts in their investments, operations and global value chains, and that meaningful engagement with rights-holders is critical to an effective due diligence process.¹⁵

Safe human rights and environmental due diligence

Unfortunately there is a very real risk that conducting HREDD poorly, exacerbates the risk of reprisal faced by human rights defenders. Defenders are particularly

¹⁵ <https://www.business-humanrights.org/en/latest-news/mhredd-stakeholder-engagement/>

vulnerable to reprisals after voicing their opposition or criticism to a project and/or business, and legislation on HREDD encourages human rights defenders to voice concerns both through direct engagement with business enterprises e.g. consultations or use of grievance mechanisms, as well as through indirect channels such as bringing lawsuits against companies, or engaging with bodies overseeing the implementation of HREDD legislation.

If information regarding human rights defenders is poorly handled by business enterprises and State bodies responsible for the enforcement of a law on mandatory HREDD and/or it falls into the wrong hands, they may face further reprisals. It is therefore critical that companies conducting HREDD consider strategies to mitigate these risks throughout the process, and that the government bodies overseeing the implementation of legislation also address reprisal risks related to complaints/lawsuits.

The European Union has recently recognised risks faced by whistleblowers in the 2019 directive on the protection of persons who report breaches of Union Law (henceforth the ‘Whistleblower Directive’) which outlines detailed requirements for member States as to how to create channels for whistleblowers to report concerns which are independent and safe, and acknowledges that the protection of whistleblowers enhances the enforcement of union law. Provisions for the protection of human rights defenders would similarly enhance the implementation of a law on mandatory HREDD. Similarly to the whistleblower directive, **the EU directive on mandatory HREDD should make reference to requirements for developing safe, independent and effective measures for protecting complainants, including human rights defenders, who highlight details about human rights abuses linked to companies operating in the EU.** While implementing the legislative initiative on mandatory HREDD, EU member states can also reference the mechanisms built for whistleblowers, and the lessons learnt during implementation, to strengthen their implementation of avenues for keeping human rights defenders safe while raising concerns regarding business-related human rights impacts.

The European Parliament has also recognised the importance of addressing the safety of those being consulted by business enterprises. In the stakeholder engagement section of the European Parliament resolution on mandatory HREDD it states “*undertakings shall ensure that affected or potentially affected stakeholders are not put at risk due to participating in the discussions*” . **We strongly recommend that a similar requirement to ensure the safety of participants in**

consultations and other forms of engagement is included in mandatory HREDD legislation.

When consulting¹⁶ with human rights defenders on how HREDD should be conducted in order to keep them safe from reprisals, several specific practical recommendations about how business enterprises should engage with defenders in a safe manner were outlined. For example, businesses should use strong digital security practices to handle data, limit the number of employees with access to sensitive information about the participants in consultations or users of grievance mechanisms. Before consultations, defenders should be asked about their security needs, and the consultation plan adapted accordingly e.g. the location of the consultation may be moved or there may need to be separate consultations for different groups (see further details in Annex 2: Results of consultations with human rights defenders).

Much of the practical detail about how to keep defenders safe during HREDD will fall outside the scope of the directive, however **we strongly recommend that the EU develops guidance in consultation with human rights defenders for businesses on conducting safe and meaningful engagement with human rights defenders and assessing and addressing reprisal risks throughout their operations and value chain.** The guidance should outline topics such as the types of risks faced by human rights defenders, how to assess reprisal risk in value chains, and methods for mitigating reprisal risk related to consultations and grievance mechanisms. This guidance, which should also be referenced in the legislation itself, will support business enterprises in how to implement the requirement to not put stakeholders at risk due to their participation in stakeholder engagement and thus ensure HREDD is successful and effectively protects human rights defenders from reprisals.

16 Front Line Defenders conducted consultations in collaboration with the Business & Human Rights Resource Centre, ProDESC and Indigenous Peoples Rights International. These consultations were funded by the Alliance for Land, Indigenous and Environmental Defenders (ALLIED).

Recommendations

Throughout 2021, Front Line Defenders alongside the Business & Human Rights Resource Centre, ProDESC and Indigenous Peoples Rights International consulted with human rights defenders around the world regarding the legislative initiative at the European Union on mandatory HREDD. In particular we consulted defenders and civil society on what should be required of business enterprises conducting HREDD to prevent reprisals against defenders exposing business-related human rights abuses, and ultimately how the EU can bring the proposed legislation into line with their commitment to the protection and support of human rights defenders at risk.

These recommendations are not an exhaustive guide of what is necessary to include in legislation on human rights and environmental due diligence, but instead intends to highlight the components most crucial to preventing reprisals and keeping defenders safe.

Firstly, this briefing should not be taken as a proxy for direct engagement with human rights defenders about the development of legislation on mandatory HREDD. The EU – and EU member States who will eventually implement the legislation – must ensure they meaningfully engage with human rights defenders throughout the development and implementation of the law.

Secondly, the final legislation on mandatory human rights and environmental due diligence should include the following:

1. An obligation for business enterprises to refrain from retaliatory actions against those raising business-related human rights concerns, including human rights defenders
 - The definition of retaliation should include any action taken (physical, legal, through the media etc.) seeking to harm or silence anyone who has expressed comment, criticism or opposition to the company's activities, or is working to empower community members to know, and exert, their rights;
2. An obligation for business enterprises to prevent retaliation throughout their value chains against those raising business related human rights concerns,

including human rights defenders, by conducting effective HREDD including by:

- Developing a statement and policy committing to zero tolerance of reprisals against defenders speaking out critically about their business activities throughout the value chain;
 - Including risk of reprisals as a focus area during the risk analysis phase of HREDD where applicable, including assessing contextual factors (project type, location, laws limiting civic space etc.) which may impact the likelihood of reprisals;
 - Implementing preventative measures where a risk of reprisals is identified;
3. An obligation for business enterprises to meaningfully and safely engage with key stakeholders – naming human rights defenders as a key stakeholder group – throughout the HREDD process including in the identification of risk, the development of mitigation/prevention measures stages and during monitoring the implementation;
 4. Refer to forthcoming guidance on how business enterprises should manage risk of retaliation against those raising business related human rights concerns, including human rights defenders throughout the HREDD process;
 5. A strong liability regime including:
 - A provision for criminal liability where business enterprises have caused serious retaliation against human rights defenders such as in instances of killings;
 - A provision for civil liability in cases where defenders have faced retaliation;
 6. A requirement for business enterprises to assess and address human rights risks (including of reprisals) throughout their value chain;
 7. A requirement for investors to conduct human rights and environmental due diligence in relation to their investments;
 8. A requirement for all business enterprises including small and medium sized enterprises to conduct HREDD, particularly those with links to sectors where there is a high risk of reprisals against human rights defenders;
 9. A requirement for the oversight body established, or instructed, to oversee the implementation and enforcement of the legislation, to manage risk of retaliation against those raising business related human rights concerns with the agency, including human rights defenders, either through informal/formal complaints and/or through legal avenues where they have been established including:

- Having a public policy regarding how they identify and address risks of reprisals related to complaints, whistleblowing, lawsuits etc.
- A commitment to sufficiently resource the agency to handle reprisal risk including recruiting staff knowledgeable on handling reprisal risk.

Annex 1 – Key international standards and research

International

UN Guiding Principles on Business and Human Rights and associated guidance

The UN Guiding Principles on Business and Human Rights (UNGPs) and associated guidance documents, outlines clearly what is meant by stakeholder engagement:

“Stakeholder engagement is understood to be ‘an ongoing process of interaction and dialogue between a company and its potentially affected stakeholders that enables the company to hear, understand and respond to their interests and concerns, including through collaborative approaches” - UN High Commissioner for Human Rights, the Corporate Responsibility to Respect Human Rights: An Interpretative Guide¹⁷

As well as referencing the importance of stakeholder engagement at several key moments; When identifying and assessing actual and potential human right impacts:

“18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- a) Draw on internal and/or independent external human rights expertise;*

¹⁷ <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/Shift-Workshop-Report-3-Bringing-a-Human-Rights-Lens-to-Stakeholder-Engagement.pdf>
https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf

- 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.”*

When tracking and reporting on company efforts to prevent and manage these impacts,

“20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

- a) Be based on appropriate qualitative and quantitative indicators;*
- b) Draw on feedback from both internal and external sources, including affected stakeholders.”*

and in designing effective grievance mechanisms and remediation processes.

“Operational-level mechanisms should also be:

- h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.”*

The UNGPs also acknowledge that commercial communications can pose risks to stakeholders if released with due care:

“21. In all instances, communications should:...
(c) In turn not pose risks to affected stakeholders.”

Although the UNGPs accept that stakeholder engagement may be a challenge for some small and medium size enterprises, the implication is that larger enterprises or those that have significant human rights risks linked to their supply chains should consult with affected stakeholders:

“The Guiding Principles also recognize that small or medium-sized enterprises may not need to engage directly with affected stakeholders if they have limited human rights risks... The key to human rights due diligence is the need to understand the perspective of potentially affected individuals and groups. Where possible and appropriate to the enterprise’s size or human rights risk profile, this should involve direct consultation with those who may

be affected or their legitimate representatives” - UN High Commissioner for Human Rights, the Corporate Responsibility to Respect Human Rights: An Interpretative Guide¹⁸

The Guiding Principles on Business and Human Rights: Guidance on ensuring respect for human rights defenders

In 2021 the UN Working Group on business and human rights issued guidance for ensuring respect for human rights defenders through the UNGPs. The guidance includes several relevant recommendations including the working group advocating that States should ensure that legislation on human rights due diligence also serve as a vehicle to safeguard defenders:

“(States should) require business enterprises to continually assess, address and mitigate risks to human rights defenders in their supply chains, including by making accessible, safe and respectful consultation with human rights defenders mandatory at all stages of due diligence processes”

The working group also advocates that business enterprises take into account adverse impacts to human rights defenders as part of their human rights due diligence including recognising the centrality of meaningful engagement with human rights defenders:

“engag(ing) early, and in good faith, with human rights defenders as “critical friends” , and enable them to raise concerns about potential and actual impacts because genuine consultation with human rights defenders is one of the best ways to identify human rights risks and prevent harm”

In terms of how defenders are thought of by companies, the working group advocates an important re-framing of how human rights defenders are viewed:

“Defenders need to be seen as key partners, who can assist businesses in identifying key human rights impacts, and should be part of a business

¹⁸ <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/Shift-Workshop-Report-3-Bringing-a-Human-Rights-Lens-to-Stakeholder-Engagement.pdf> https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf

enterprise’ s stakeholder engagement, and due diligence processes, instead of being seen as annoyances, troublemakers, obstacles or threats to be disposed of.”

The report also emphasizes the centrality of human rights defenders to the HREDD process,:

“The Guiding Principles recognise the critical role of human rights defenders as part of the business and human rights “ecosystem” , including their role in human rights due diligence and enabling businesses to understand the concerns of affected stakeholders, and in facilitating access to justice and remedy.”

The need for businesses to be specifically asked to assess and address risks to defenders, otherwise it might be overlooked,:

“Business enterprises should develop due diligence processes in relation to all areas in which it may cause, contribute to, or be directly linked to, human rights abuses. This includes anticipating impacts on human rights defenders. 101 Awareness of the issue is critical, as general human rights due diligence may overlook specific harms faced by defenders, including criminalisation of their lawful activities, reprisals, and other attempts to silence them.”

And the need for States to develop guidance for business on how to address risks to human rights defenders:

“(States should) accompany mandatory human rights due diligence legislation with practical guidance for business enterprises on the steps they need to take to meet their responsibilities concerning human rights defenders.”

Finally, the working group also outline the crucial elements this guidance should contain including background information on risks to defenders and measures in place to protect them, the need for their inclusion in stakeholder engagement and how to consult with them in safe manner, the need to assess risks to human rights defenders throughout the HREDD process, and information on potential measures to prevent and address harm (see report for full details).

European Union

European Parliament JURI report

In March 2021 the European Parliament adopted a resolution developed by the Committee on Legal Affairs (JURI) on mandatory corporate due diligence and accountability. This report recommended the inclusion of stakeholder engagement in the forthcoming European Commission proposal under article 5 ‘stakeholder engagement’¹⁹.

Crucially the report recommended that companies undertake stakeholder engagement as part of the human rights due diligence process in a meaningful way:

“Member States shall ensure that undertakings carry out in good faith effective, meaningful and informed discussions with relevant stakeholders when establishing and implementing their due diligence strategy”

And that such engagement should be undertaken in a manner that is safe for participants:

“Undertakings shall ensure that affected or potentially affected stakeholders are not put at risk due to participating in the discussions”

The report also recognising the prevalence of threats against human rights defenders.

“According to the United Nations High Commissioner for Human Rights, a large number of human rights defenders are under threat because they raise concerns about adverse human rights impacts of business operations;”

And the need to address reprisal risk in grievance mechanisms.

“Considers that a grievance mechanism at the level of an undertaking can provide effective early-stage recourse, provided they are legitimate, accessible, predictable, equitable, transparent, human rights-compatible, based on engagement and dialogue, and protect against retaliation”

¹⁹ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

EU Directive on the protection of persons who report breaches of Union Law

In 2019, the EU adopted a directive on the protection of persons who report breaches of Union Law (‘whistleblower directive’) which acknowledges the importance of whistleblower protection to enhance the enforcement of Union law (including on public procurement, financial services, safety of products in internal markets, transport safety and several other areas of law) as well as laying down minimum standards for the protection of whistle-blowers.

This directive is designed to protect whistleblowers who are workers including civil servants, the self-employed, shareholders, contractors, subcontractors and suppliers and is not broad enough to cover human rights defenders who are not employees of the company, however, the directive does provide a comprehensive framework and understanding of how to protect whistleblowers, much of which can be extrapolated in order to develop a similar framework for the protection of human rights defenders. Article 19 of the directive specifies that “*Member States shall take the necessary measures to prohibit any form of retaliation against persons referred to in Article 4, including threats of retaliation and attempts of retaliation*”

The directive also gives detailed requirements for member states to ensure whistleblowers have access to support measures as well as recognising the full range of retaliation whistleblowers can experience, which overlaps significantly with the types of retaliation often experienced by human rights defenders.

- “(a) suspension, lay-off, dismissal or equivalent measures;*
- (b) demotion or withholding of promotion;*
- (c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;*
- (d) withholding of training;*
- (e) a negative performance assessment or employment reference;*
- (f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;*
- (g) coercion, intimidation, harassment or ostracism;*
- (h) discrimination, disadvantageous or unfair treatment;*
- (i) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;*

- (j) failure to renew, or early termination of, a temporary employment contract;*
- (k) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;*
- (l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;*
- (m) early termination or cancellation of a contract for goods or services;*
- (n) cancellation of a licence or permit;*
- (o) psychiatric or medical referrals.”*

Annex 2 – Results of consultations with human rights defenders

Annex 2 outlines the key components of human rights and environment due diligence for human rights defenders as identified in consultation with human rights defenders and civil society.

Recommended requirements for business enterprises to effectively identify, prevent, mitigate and account for human rights impacts related to defenders:

- Commit to addressing risks against defenders as part of a human rights policy, human rights due diligence strategy or as a stand-alone statement including:
 - Committing to having zero tolerance of reprisals including outlining in which situations the company will not invest and when they will end operations where reprisals do occur;
 - Referring to the UN definition of human rights defenders, referencing the importance of the work of human rights defenders and outlining the types of risks human rights defenders face, with particular reference to risks linked to the sector of operation;
 - Developing the commitment in consultation with human rights defenders and civil society;
- When identifying human rights risk in their operations, business enterprises should specifically assess reprisal risk including:
 - Looking at contextual risk factors such as the sector, location, civic space in the country of operation, history of marginalisation of potentially impacted communities, corruption etc.;
 - Looking at risks faced by different types of defenders using an intersectional lens in recognition of the fact that gender, sexuality,

- ethnicity, indigeneity, religion, location (urban/rural) etc. will impact the types of threats faced by defenders;
- Input gathered through meaningful, safe, accessible and effective engagement with human rights defenders. Business enterprises should be led by human rights defenders as to how to conduct the consultations in a safe manner including:
 - Using locations (online and offline) which are safe for human rights defenders to use and consult with defenders ahead of the meeting to ensure they feel secure using the chosen system/meeting in the chosen location;
 - Minimise the number of observers to consultations and be transparent about who is at the meeting;
 - Allow defenders to bring their freely chosen representatives to meetings;
 - Consider having separate meetings with different defender groups. Speak with defenders ahead of time to identify if this is necessary;
 - Do not allow government representatives or security services into meetings with human rights defenders;
 - As an ongoing process i.e. not just at the start of the project/engagement with a supplier
 - Looking at the whole supply chain
 - Data associated with the risk assessment and consultations should be handled with good digital security practices so as not to put human rights defenders at further risk including:
 - Limiting who in the business has access to data related to human rights defenders;
 - Hold data in encrypted and secure locations;
 - Anonymise data which will be share internally or publicly;

- Communicate with defenders through encrypted processes such as Protonmail or Signal;
- When preventing/mitigating potential risks to human rights defenders linked to their operations business enterprises should:
 - Plan how the company can use their leverage to both prevent reprisals occurring, and to respond should they occur. Leverage does not just mean financial leverage. For example, a business may also be able to build norms in the sector by requiring certain trainings and/or actions by their business relationships;
 - Business enterprises should also consider how to build leverage where it is lacking. For a small company for example this might mean joining a human rights based coalition;
 - Develop the plan in consultation with human rights defenders;

Other recommendations included:

- A clear pathway to remedy should be established and legal support should be given to human rights defenders who have faced reprisals;
- Grievance mechanisms (and other routes to remedy) should follow the UNGPs effectiveness criteria and be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue;
- Legislation on mandatory HREDD should include criminal liability for gross human rights violations, and civil liability for all forms of retaliation as well as provisions for human rights defenders to bring proceedings against the company in the headquartered country;
- The need for investors to also undertake HREDD to ensure they are not investing in projects which perpetrate human rights abuses. Their risk analysis should also consider factors related to the company they are investing in;

- Providers of Environmental, Social and Governance (ESG) data should improve their data collection and dissemination on topics related to human rights defenders in order to help companies understand these risks better;

Annex 3 – Further resources from Civil society and the UN

Several organisations, experts and coalitions including but not limited to the Business and Human Rights Resource Centre, Global Witness, ProDESC, Indigenous Peoples Rights International, Natural Justice and the Irish Coalition for Business and Human Rights support the call for the inclusion of measures to protect human rights defenders in legislation on mandatory HREDD including meaningful engagement. For further reading please refer to:

- [Hearing the Human: Ensuring Due Diligence Legislation effectively amplifies the voices of those affected by irresponsible business](#) – Business & Human Rights Resource Centre, Front Line Defenders, Indigenous Peoples Rights International, ProDESC, Natural Justice, CEMSOJ
- [Including Human Rights Defenders in the EU Directive on mandatory human rights and environmental due diligence for companies: key points and practical examples](#) – UN Special Rapporteur on the Situation of Human Rights Defenders
- [Make it your business: How Ireland can ensure businesses respect human rights and the environment](#) – Irish Coalition for Business and Human Rights
- [Don't shoot the messenger: Protection against reprisals under the proposed EU due diligence legislation](#) – Tove Holmström
- [EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission](#) – OHCHR