The OECD's draft Due Diligence Guidance for Responsible Business Conduct (draft 2.1)

Amnesty International's Observations and Suggestions
9 February 2017

Amnesty International welcomes the opportunity to provide its observations and suggestions on the OECD's draft Due Diligence Guidance for Responsible Business Conduct (Due Diligence Guidance or Guidance). This submission focuses primarily on standards and principles in relation to human rights. We have chosen to focus only on key priority issues raised in the draft Guidance. However, we would be happy to provide further inputs on these points and others upon request by the OECD.

General Comments

1. Reflecting the highest Responsible Business Conduct (RBC) standards

We welcome the stated intention of the OECD to draw from the due diligence approaches contained in sector-specific guidance already developed by the organisation.[1] In doing so, the Guidance should reflect the highest existing standards in these documents. Not doing so would create inconsistencies across OECD instruments and lead to a confusing and unwarranted divergence in expected standards of conduct depending on the document that is being consulted or the industry sector.

We also agree that the Guidance should be consistent with the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the UN Guiding Principles on Business and Human Rights (UNGPs). However, while maintaining consistency with these instruments, the Guidance should also seek to clarify, expand or further elaborate concepts and standards in these documents, in line with relevant external developments and guidance in the fields of human rights, transparency and corruption.[2] This is critical to ensure the Guidance is relevant, up-to-date and effective in dealing with present-day human rights challenges (for example, in

[1] http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm

[2] The author of the UNGPs himself, Professor John Ruggie, noted in his presentation of the principles to the UN Human Rights Council in June 2011 that the principles marked *"the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step…"* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, paragraph 13.

relation to standards for due diligence, transparency, reporting, participation and meaningful consultation and the right to information).

The Guidance should also draw from and be fully consistent with international human rights laws and standards. Both the OECD Guidelines and the UNGPs refer to "internationally recognised human rights" as the standards companies should seek to respect and be guided by in the design and implementation of human rights due diligence. The draft Guidance itself currently states that, in relation to human rights impacts, it is intended to be aligned with the UNGPs (Basis for this Guidance, p1). It is critical that the Due Diligence Guidance draw from international human rights standards and that the advice given to companies on human rights due diligence is fully in line with these standards.[3]

2. Transparency in the development of the Guidance

We welcome the steps taken by the OECD to ensure the process of development of this Guidance is participatory and inclusive. However, the OECD should also publicly request and ensure that all comments, observations and recommendations in relation to the Guidance are made in writing. All contributions should then be published on the OECD website, in line with common practice among UN Human Rights Treaty Bodies.[4] This is to ensure that all stakeholders taking part in this process can see all viewpoints presented to the OECD and assess the extent to which they are considered, adopted or rejected in the final text. Please note that this submission will be made publicly available on our website at: www.amnesty.org.

Specific Comments

1. The Two-page Summary (p5)

Capturing the "essence" of due diligence (p5)

We would recommend eliminating this section.

[3] For example, many UN Special Rapporteurs have recently addressed the human rights responsibilities of business in relation to certain groups of rights-holders, specific human rights or in specific contexts. See for example: Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/29/25 (28 April 2015); Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, A/HRC/30/40 (8 July 2015), Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, A/71/281 (3 August 2016).

[4] See for example: http://ohchr.org/EN/HRBodies/CESCR/Pages/Submissions2017.aspx

The list of features and elements under this heading is problematic. Firstly, it fails to indicate that the main purpose and function of due diligence is to avoid or prevent harm. In the human rights field, this is to prevent human rights abuses, consistent with the corporate responsibility to respect human rights. This section should articulate clearly and prominently that due diligence in general (and human rights due diligence in particular), should be designed and implemented with the principal aim of avoiding harm (or human rights abuses).

In connection to this point, the last bullet point of the list addressing remediation is also problematic. In the absence of a clear principle that establishes prevention as the main purpose of due diligence, this bullet seems to suggest that remediation is just as acceptable and outcome of due diligence as prevention. For a company causing or contributing to harm, the responsibility to remediate is critical, but it should only come into the picture when, despite all genuine efforts to avoid it, harm still occurs. As currently drafted, this statement can be read as suggesting that companies are free to choose *a priori* between prevention and remediation of harm depending on what might suit their activity or project best.

The second and third bullet points in the list seem to suggest that the probability and severity of impacts should define the due diligence process from the outset. This misses the critical point that a due diligence process must be general and continuous and capable of identifying all potential and actual impacts (see more comments on this in point 3 below).

Two additional concepts currently missing in this section relate to the ongoing, proactive nature of due diligence and its importance to enable companies not only to comply with the recommendations in the Guidelines but also with national and international law. Some of the missing elements highlighted here are adequately addressed elsewhere in the text. However, given their centrality for an adequate due diligence process, they should not be missing from a section that is intended to describe the essential features of due diligence.

As a whole, given the various omissions and the overall risk of over-simplification, we would recommend eliminating this section altogether.

Summary of "Key Actions" (p6)

We would also advise against listing the "Key Actions" under each of the due diligence steps in a short summary section at the beginning of the Guidance. There is a risk that with time this becomes the only reference point for companies and other stakeholders. This is concerning because much of this Guidance's critical advice and explanations is provided elsewhere in the text. Many principles and explanations contained in the "Explanation of Key Actions" under each of the due diligence steps are just as critical as the "Key Actions" and should be read in

conjunction. Read in isolation the "Key Actions" are over-simplified and can be highly unclear and misleading. The risks of having this summary outweigh the benefits and the overall objective of this document would be better served by removing it from the final document.

2. "Directly linked" vs "Contribute"

As currently drafted, the Guidance is too simplistic in the way it addresses responsibilities under "directly linked" scenarios (for example, in **Core Concept 10**). The text fails to acknowledge and warn that a company that may initially only be "directly linked" to abuses can swiftly move to a "contributing" scenario depending on the adequacy of its own due diligence practices and nature of its trading relationships.

Recently, Amnesty International published the report "The Great Palm Oil Scandal".[5] The report documents serious labour abuses in plantations in Indonesia that belong or provide palm oil to Wilmar, the world's largest processor and merchandiser of the product. Amnesty traced palm oil from plantations owned by Wilmar and its suppliers to nine global food and household goods companies. None of Wilmar's buyers had taken measures to identify, prevent, address or account for the severe labour abuses documented by Amnesty International before being contacted by the organisation.[6] This is despite labour abuses being well-known risks within the industry and most of them being long term buyers. The report concludes that these companies were contributing to and benefiting from these abuses in their palm oil supply chain.

As this example illustrates, a company that may initially only be seen as "directly linked" to an abuse can in fact be contributing to that abuse because of the nature of the trade relationship (for example, length, high degree of leverage, proximity, membership in collaborative initiatives, etc.) and their failure to do adequate due diligence in the circumstances. In these cases, the company will share in the responsibility to remediate the harm.

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[5]Amnesty International, Indonesia: "The Great Palm Oil Scandal: Labour abuses behind big brand names", Executive Summary, 30 November 2016, Available at: https://www.amnesty.org/en/documents/asa21/5243/2016/en/

[6] Wilmar's buyers include well-known companies such as: Unilever, Nestlé, Procter & Gamble, Reckitt Benckiser and Kellogg's. All of the severe labour abuses documented by Amnesty International constituted breaches of Indonesian law and ILO standards. These included: use of child labour, forced labour, the non-payment of the minimum wage, use of exceedingly high targets and piece rate payments and abuse of casual workers. Amnesty International: "Palm Oil: Global brands profiting from child and forced labour", 30 November 2016, available at: https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/

The draft attempts to note these dynamics in some parts. For example, it warns that the distinction between "cause", "contribute" and "directly linked" *"may not always be crystal clear"* (e.g. fifth bullet point of **Section C.1, "Developing response steps" under Part II.B**). This is insufficient without further explanation. The Guidance should avoid being overly simplistic and offer more nuanced, practical advice to companies in this regard.

In addition, it would be useful if the Guidance warned against a common assumption that because a company is in a value/supply chain relationship, it will only ever be "directly linked" to an abuse. This assumption often results in companies not identifying or understanding the way in which they themselves are contributing to an abuse.

The clarifications suggested above could be made in **Core Concept 10**, in **Part III** (especially **Section C.1, "Enable remediation for harms caused or contributed to**") and in the **Annex** addressing "cause", "contribute" and "directly linked".

3. Risk-based approach and prioritisation of severe risks

Severity should not be the starting point, but one way for companies to prioritise action

Severity should not be the starting point for designing and developing due diligence policies and processes. Companies should have in place adequate measures that are capable of identifying and assessing all risks. As a result of doing this properly, a company should be in a position to know where potential and actual human rights impacts exist, and their severity. Severity is relevant once a company has identified all of its risks and in case it needs to prioritise its responses.[7] However, even at a more advanced stage of prioritisation, a company's systems and procedures should still be able to capture evolving or new risks.

The draft Guidance is inconsistent in its advice in this regard. Although parts of the text correctly indicate that due diligence policies and systems should be wide or general and capable of identifying and managing all levels of risk, other parts appear to suggest that "severity" is the starting point. This is the case for example in relation to the definition of **"risk-based"** in the **Key Terms Section** (p4), the references to a "**risk-based approach**" and "**prioritisation**" under "**The "essence" of due diligence"** (p.5), the first sentence under **Core Concept 8, "RBC due diligence is risk-based and therefore involves prioritisation**" and subsequent **Core Concept 9, "Prioritising RBC due diligence…**".

[7] Consistent with UNGPs, Principle 24 and its Commentary.

The text should clearly and consistently state that due diligence policies and systems should be capable of identifying all risks to and abuses of human rights at all times. This is consistent with both the UNGPs and OECD Guidelines,[8] and Step 1 of the due diligence process under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Minerals Guidance). The definition of "risk-based" and all other relevant parts of the text should be revised and adjusted to ensure this advice is consistent and unequivocal throughout the text.

Companies are responsible for all risks and harms arising from their operations

Also in relation to human rights due diligence, the text should be clear that the need to prioritise responses according to the severity of the risks or harms is relevant only in so far as companies are genuinely unable to deal with all risks simultaneously, and that companies nevertheless remain responsible for all of their risks and harms. There is an attempt to clarify this in some parts of the text (for example, in **Section C.2, "Prioritising prevention and the most severe impacts"**) but not in others where it would be useful to do so (for example, in **Core Concept 8**, **"RBC due diligence is risk-based…"** and in **Section II.A Due Diligence: Identify and assess adverse RBC impacts**). To avoid misinterpretations on such a critical issue, the text should be revised and adjusted so it is clear at all times that, despite the possible need for prioritisation, companies remain responsible for all of their risks to and impacts on human rights.

4. RBC policy and management systems

The draft Guidance correctly advises companies to "devise and adopt an RBC policy" in **Key Action 1** under **Section I. Embed responsible business conduct into policy and management systems**. However, the Guidance suggests that companies "can" but not "should" adopt this policy.[9] In relation to human rights, this is inconsistent with both the UNGPs and the OECD Guidelines which clearly state that companies "should" adopt a human rights policy.[10]

In addition, the Guidance must indicate that the policy should, at a minimum, meet the standards in the OECD Guidelines. This includes international human rights law and standards which the OECD Guidelines refer to in its Human Rights Chapter. This clarification will avoid misinterpretation and undermining the effectiveness of the Guidance as a whole.

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[8] UNGPs, Commentary to Principle 12, and OECD Guidelines, Commentary on Human Rights, p.30, both indicating that "all human rights should be the subject of periodic review".

[9] The use of "can" instead of "should" is a problem with regard to all "Key Actions" in the current draft.

[10] UNGPs, Principle 16 and OECD Guidelines, Chapter IV on Human Rights, paragraph 4.

5. Transparency and disclosure

Provisions on transparency and disclosure throughout the text should be significantly strengthened. In addition, given the importance of transparency and its cross-cutting nature, it should be added as a **Core Concept** in **Part I** of the draft Guidance.

Transparency and disclosure of information are critical in at least three areas: (i) as a key component of an adequate human rights due diligence process; (ii) to enable meaningful stakeholder participation and, in particular, consultation with individuals affected by corporate activities and; (iii) as a means of respecting specific human rights. The Guidance should elaborate further on what companies should disclose, when and how to help them meet standards and expectations in all three areas.

(i) Transparency/disclosure of human rights risks and abuses as a key component of due diligence

The draft Guidance specifically deals with disclosure of information in **Section II.D. Due diligence: Communicate.** It considers disclosure as the "showing" part of the "knowing and showing" that a due diligence process entails. However, the advice it gives to companies on what to disclose to show they are respecting human rights is unclear and insufficient, and fails to highlight the centrality of disclosure for effective due diligence.

It must be clear that disclosure of this information is not optional or discretional. The use of terms such as "can" in the chapeau line of **Section B, "Key Actions"** or "are encouraged" in the first bullet point of **Section C.2, "Disclose additional information**", suggest that disclosure of this information is discretional and not necessary for an adequate due diligence process. We recommend the Guidance use the term "should" to refer to disclosure responsibilities throughout the text. The Guidance should also highlight the centrality of transparency as a means for stakeholders to measure a company's progress over time and point to the critical role that an adequate flow of information within the supply chain plays in helping other business partners behave responsibly. Finally, the Guidance should acknowledge that the disclosure of certain non-financial information might also be required under domestic law.

A general reference to the Disclosure Chapter of the OECD Guidelines to deal with non-financial reporting, which would include human rights due diligence reporting, is inappropriate, especially since this Chapter provides very little guidance in this regard. The third bullet point of **Section C.2, "Disclose additional information**", attempts to address some of these gaps by specifying certain elements that should be disclosed, but is still insufficient. It misses some critical elements such as actual

risks and impacts. To be of use to companies wishing to demonstrate that they are respecting human rights in practice, this list should be expanded to include, at a minimum:

*A company's policy on human rights, and how this policy is communicated internally and externally and operationalized throughout the enterprise and in relation to business relationships;

*Human rights due diligence systems and procedures to identify and address risks to and impacts on human rights, including those in the value/supply chain;

*Specific risks to human rights identified and measures to prevent/mitigate them;

*Actual impacts on human rights and measures to remediate them and avoid recurrence;

*The methodology to identify risks and impacts as well as to assess their likelihood and severity, and consultations held in this regard.

Note that some of the elements listed above which are not included in the draft Guidance are expressly mentioned in the OECD Minerals Guidance. For example, the OECD Minerals Guidance requires communication of risks identified in the supply chain and risk management plans, including risk mitigation, monitoring and involvement of affected stakeholders.[11]

(ii) Transparency/Disclosure for Stakeholder Engagement

In relation to "stakeholder engagement" and consultation, the draft correctly indicates in **Core Concept 12, "Meaningful Stakeholder Engagement is a core part of implementing the Guidelines, including carrying out RBC due diligence**" that "*information should be provided in a timely manner*". However, given the importance of access to information to enable meaningful consultation, this provision should be considerably strengthened. The Guidance should clarify that meaningful consultation with local individuals and communities requires the timely disclosure of all relevant information concerning the activity or project likely to impact on their human rights. This should be done in an accessible manner, for example, by translating information into relevant local languages and convening meetings at times and locations people can actually attend. Some of this is also recognised in the draft "**Due Diligence Companion**" (fourth bullet point under "**Improving the process through consultation**", pp 14 and 15). However, the language should be strengthened and brought to the main Guidance document. In

[11] Pages 52 and 53 (third edition)

addition, it would be important to list some of the critical information that companies should disclose such as investment and other agreements with governments, the terms of all relevant licences and permits, all risk assessments conducted, risk prevention/mitigation measures and incident reports.

(iii) Transparency/Disclosure required to respect specific human rights

Depending on the nature of the information, its disclosure might be required to ensure respect for certain human right. For example, disclosure of health-related information or information concerning water and the environment are necessary to meet the human rights to health and water.[12] A company that is planning a project with potential impacts on water sources that communities rely on for domestic use will be infringing on their right to water if it does not disclose all information related to its water management plans.

Finally, the draft highlights and overstates the need to consider *"business confidentiality and other competitive concerns"* in relation to disclosure of material information (third bullet point of **Section C.1, "Disclose timely and accurate Information on all material matters"** in **Part II.D**). This need must be overridden by human rights requirements. As stated above, the Guidance should emphasise that companies must disclose information when access to this information is itself a human right or is necessary for the realisation of other human rights. The Guidance should make clear that as a default, companies must disclose all information relevant to human rights impacts. Companies should justify in specific terms what, if any, information with implications for the effective protection of human rights, is not disclosed.

6. Participation in decision making/consultation

Amnesty International welcomes the specific references to consultation with affected stakeholders under **Core Concept 12**. It also welcomes the clarification that consultation with potentially affected stakeholders is part of the due diligence process and distinct from wider stakeholder engagement. However, the draft Guidance fails to acknowledge that participation in decision-making is itself a

[12] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 on the right to the highest attainable standard of health, para 11 and 35 and General Comment No. 15 on the Right to Water, para 48. See also Committee on the Elimination of Discrimination against Women, General Recommendations No. 23 (1997) women in political and public life and No. 24 (1999) women and health. See also Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002 and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. See also the UN Basic Principles and Guidelines on Development-based Evictions and Displacement.

human right in many circumstances,[13] while also necessary for an effective, genuine and robust due diligence process. The language used in the draft suggests that participation and consultation are helpful or advisable, but not, as it should, critical for effective due diligence and often required under international human rights standards. This is somewhat acknowledged in the draft "**Due Diligence Companion**", at the end of the third bullet point under "**Improving the process through consultation**" (p14). However, these principles must be stated clearly and prominently in the main Guidance document and the language used to describe and address consultation should be adjusted to reflect the relevant human rights standards.

7. Remediation

The state has a duty to ensure remedy for human rights abuses, including those caused or contributed to by companies. When state-based mechanisms of redress (judicial or non-judicial) operate as they should, a company's principal responsibility is to cooperate. Amnesty International has shown through its research how lack of remedy is often the result of companies actively evading, obstructing or failing to collaborate with official mechanisms of redress.[14] The **"Key Actions"** under **Part III, "Provide for or co-operate in remediation when appropriate"** must highlight and give pre-eminence to the responsibility of companies to cooperate with state-based accountability and remedial processes.

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[13] Article 25 of the International Covenant on Civil and Political Rights (ICCPR) establishes the right and the opportunity of citizens to take part in the conduct of public affairs without discrimination on any ground. According to the UN Human Rights Committee, the conduct of public affairs *"... is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.*" UN Human Rights Committee, General Comment No. 25 on Article 25: "The right to participate in public affairs, voting rights and the right of equal access to public service", paragraph 5. See also article 7(b), Convention on the Elimination of All Forms of Discrimination against Women. See also rights of specific types of communities to participate in decision-making that affects them: article 27 of the ICCPR, UN Human Rights Committee's General Comment No. 23 on Art. 27; articles 2(2) and 2(3) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and article 15 of the European Framework Convention for the Protection of National Minorities. Indigenous Peoples enjoy enhanced consultation rights under the ILO's Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169) and the UN Declaration on the Rights of Indigenous Peoples. See also right to participate in decision-making in relation to specific rights: UN Committee on Economic, Social and Cultural Rights' General comments No. 23 on the right to just and favourable conditions of work, paragraph 56, and No. 14 on the right to the highest attainable standard of health, paragraphs 11, 17 and 54.

[14] See Amnesty International, "Injustice Incorporated: Corporate Abuses and the Human Right to Remedy" (March 2014), available at: http://www.amnesty.org/en/library/asset/POL30/001/2014/en/33454c09-79af-4643-9e8e-1ee8c972e360/pol300012014en.pdf

In addition, the use of the phrase "be prepared to" in relation to remediation for abuses caused or contributed to in the first bullet point of **Section C.1, "Enable remediation for harms caused or contributed to"** is totally inappropriate. Where a company has caused or contributed to human rights abuses, it *must* remediate the harm caused (and it might be required to do so by state institutions).

8. Remediation in "directly linked" scenarios

The draft text repeatedly states that in "directly linked" cases there is no responsibility to remediate. It also states several times that the expectation placed on companies that are "directly linked" to abuses is "*not intended to shift responsibility from entities that are the source of harm*" (for example, in the second bullet point of **Section C.1, "Enable remediation for harms caused or contributed to"** under **Part III**). The text fails to recognise the practical reality that in many cases the company "directly linked" to the abuse will be the only actor capable of facilitating remediation. For this reason, rather than providing companies in this position with an excuse not to act, the draft Guidance should proactively encourage them to remediate or collaborate with others in remediation.

Ends/