

Submission by Iveta Cherneva¹ before The UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises

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Dear Working Group Experts,

Allow me to congratulate you on your recent appointment as distinguished experts to the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, tasked with developing a set of internationally accepted UN Guidelines to provide a first time global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. My submission to the Working Group is two-fold and contains 1) comments on scope and substance; 2) suggestions for adopting a “business case” and “compliance-based” approach, which is more likely to resonate with the private sector and lead to a more effective implementation.

1. Comments on scope and substance

There are two industries that should not be omitted from the scope of the Working Group and the UN Guidelines, namely the private military industry and the finance industry.

Private military industry. The industry is partly already treated under the mandate of the UN Working Group on mercenaries. However, the majority of the industry consists of strictly non-armed businesses such as transport, logistics, construction, maintenance firms. There have been numerous reported instances of labor trafficking and forced labor issues, which are much like the problems experienced by regular non-military enterprises. The issue of human rights abuses linked to the private military industry would not be done justice, if for the sake of the 10% security companies, which are the minority, the whole industry is excluded from the mandate of the Working Group on business and human rights.

¹ Iveta Cherneva is Executive Director of ICWords Ltd., author of *Trafficking for Begging: Old Game, New Name* (2011), co-author of *Beyond Market Forces: Regulating the Global Security Industry* (2009) and editor of *The Business Case for Sustainable Finance* (2012). In 2007 Iveta Cherneva originated and developed the first human trafficking compliance program for private military companies in cooperation with the US State Department, the US Defense Department, the US Justice Department and the congressional sponsors of the US anti-trafficking bill, Congressman Chris Smith and Senator Sam Brownback. As a result, nine military companies established corporate anti-trafficking policy for the first time.

Most of the industry consists of companies like any other and the issue belongs under the mandate of this Working Group.

The finance industry. Respect for human rights by businesses starts (or withers away) already at the stages of financial analysis across the various sectors of the finance industry (asset management, investment, insurance, banking, microfinance, etc.). The WG Guidelines should go a step further and establish a link between financial responsibility and failure to account for human rights at the financial analysis stage (i.e. “human rights due diligence”) in cases where financial decisions *de facto* constitute, or contribute to, disrespect for human rights. Furthermore, finance institutions should develop clear steps and procedures with regard to engagement and divestment as human rights compliance techniques (Ch.7, *The Business Case for Sustainable Finance*, Routledge, 2012).

Obligations of companies contracted by States. Difference is to be made between businesses, and businesses operating on a contract awarded by a state authority. In the latter case, the human rights obligations imposed on businesses can be more stringent, including cases when the contracted enterprise performs a public function. An example is the US Federal Acquisition Regulations governing the procurement procedures of US federal contracts, which include *inter alia* human rights related obligations for contracting businesses.

US FAR Case 2005-12, Combating Trafficking in Persons ², is the final rule implementing the U.S. government's authority to terminate contracts (among other punitive remedies) if the recipient or sub-recipient of a federal contract (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the contract is in effect, or (ii) uses forced labor in the performance of the contract [TVPA § 106(g); 22 U.S.C. § 7104(g)]. The final FAR rule encourages contractors to establish trafficking awareness programs and directs contractors to the US government website on trafficking where examples of such programs are posted. Since August 2007, an interim FAR rule has been in effect; both the interim and final rules apply to all federal government contracts - domestic and overseas to include services, supplies, and commercial items. The UN Guidelines should take into account the distinction between the obligations of a business and the obligations of a business contracted by a state authority.

Extraterritorial jurisdiction. In order to address the contemporary challenges of globalization, the trans-border nature of TNCs’ operations and the challenges to enforcing human rights in a global context, the Guidelines should, at minimum, urge states to include in national human rights legislation clauses stipulating that national laws apply extraterritorially to government contractors and their regional subcontractors operating in foreign countries.

²US FAR Case 2005-12, Combating Trafficking in Persons:
<http://edocket.access.gpo.gov/2009/pdf/E9-548.pdf>

Government regulations applicable extraterritorially with regard to business-related human rights abuses exist. The US Trafficking Victims Protection Reauthorization Act of 2005 effectively put all US government contracting businesses under the TVPA by extending the scope of the human trafficking law to apply to all individuals *'employed by or accompanying the Federal Government outside the United States'*. Under Sec. 103 *'Whoever, while accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute a [trafficking in persons] offense if the conduct has been engaged in within the United States ... shall be punished as provided for that offense.'*

2) Adopting a “business case” and “compliance-based” approach

In order to ensure respect of human rights by businesses, I hope the Working Group would adopt a “business case” approach to human rights, where the WG work is underpinned by identifying and communicating the commercial incentives for human rights compliance from the point of view of businesses. This is ultimately the more convincing approach, which is more likely to resonate with and bring on board various industries, as far as implementation is concerned. Compare: “You should work to eradicate human trafficking” to “Don’t engage with traffickers who supply you with cheap labor because they demand extra broker fees, which cost you more”. The message that achieving human rights compliance is commercially sensible should underpin the work on the UN Guidelines.

In order to ensure the relevance and practicality of the phrase “respect for human rights”, the Working Group should take a business compliance approach to issues of business and human rights where the foremost concern is not naming and shaming but working with the industry on issues of human rights compliance, fixing issues, creating capacity and helping businesses in understanding human rights-related regulations. As an example from my practice in training private military contractors on human trafficking, guidelines have to be linked and accessibly phrased in terms of every day operational language. It is not enough to state that companies should not engage in human trafficking. The more specific directive is to explain what that means in real life (i.e. withholding employees’ passports can constitute human trafficking); to explain that when regional subcontractors, working on a project awarded by the prime, engage in that practice, that means the prime contractors is *de facto* engaging in human trafficking; to suggest ways in which companies should monitor the issue (i.e. instituting a hotline with different languages); and to address immediately non-compliance cases (i.e. investigate, suspend regional subcontractor, etc.).

In conclusion, I would like to thank the Working Group Secretariat who has been both responsive and transparent as regards the process through which civil society and experts working on these issues are invited to contribute to the work of the newly formed Working Group. I wish the Working Group members every success in this challenging task and remain at your disposal for any further assistance that may be required.

Thank you.