

Privacy International’s response to the call for input for a report by the UN Working Group on business and human rights on the responsibilities of Development Finance Institutions to respect human rights

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Introduction

Privacy International (PI) welcomes the opportunity to provide input to a report by the Working Group on the issue of human rights and transnational corporations and other business enterprises on “Development Finance Institutions and Human Rights”, which will examine the responsibility of Development Finance Institutions (DFIs) to respect human rights in line with the UN Guiding Principles on Business and Human Rights (UNGPs). The report will be presented to the Human Rights Council at its 53rd session in June 2023.

Privacy International (PI) is a non-governmental organisation that researches and advocates globally against government and corporate abuses of data and technology.¹ It exposes harm and abuses, mobilises allies globally, campaigns with the public for solutions, and pressures companies and governments to change. PI challenges overreaching state and corporate surveillance so that people everywhere can have greater security and freedom through greater personal privacy. Within its range of activities, PI investigates how peoples’ personal data is generated and exploited, and how it can be protected through legal and technological frameworks. It has advised and reported to international organisations like the Council of Europe, the European Parliament, the Organisation for Economic Cooperation and Development, the UN Office of the High Commissioner for Human Rights and the UN Refugee Agency.

The following sections provide PI's information and analysis of some of the topics listed in the call for submission.² We recommend the Working Group on Business and Human Rights to include the following recommendations to DFIs and states in its report:

- ensure that all development projects are carried out in accordance with international human rights standards, including the United Nations Guiding Principles on Business and Human Rights;
- ensure that human rights impact assessments are conducted prior to the approval of any development project and that they are updated throughout the project's lifecycle;

¹ <https://privacyinternational.org/>

² Call for inputs for the Working Group's report on development finance institutions and human rights, <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-working-groups-report-development-finance-institutions-and-human>

- develop clear and consistent guidelines for human rights due diligence, including the identification, prevention, and mitigation of potential adverse human rights impacts of development projects;
- increase transparency and disclosure in their activities, including project assessments and due diligence processes;
- establish clear and accessible mechanisms for affected communities to provide feedback and file complaints regarding the potential negative impacts of their projects on human rights.

On the obligation to conduct prior human rights impact assessments and transparency

The example provided below concern the European Union (EU)'s aid and assistance programme. We believe that can be helpful in informing the Working Group's work on DFIs. While DFIs are primarily focused on providing finance, while the EU's aid and assistance programmes offer a broader range of support, including grants, technical assistance, and policy dialogue, all these programmes aim to address poverty reduction, economic growth, social development, and environmental sustainability in developing countries.

EU bodies, such as the European Commission, as well as, most notably, the European Border and Coast Guard Agency (Frontex), the European Union Agency for Law Enforcement Training (CEPOL) and the European External Action Service (EEAS), have been providing development aid and cooperation programmes to authorities of non-EU countries.³ This surveillance support from several EU bodies and institutions includes among others direct transfer of surveillance equipment to third countries; training of third country intelligence and security forces; facilitating of exports of surveillance equipment by industry and promoting legislation which enables surveillance. Most notably, it also includes financing of law enforcement and other public authorities operations as well as financing the procurement of surveillance technologies.

Our research into EU surveillance cooperation suggested that in most of these cases no human rights risk and impact assessments seem to have been carried out prior to the engagement of the aforementioned bodies with authorities of third countries. Together with 5 other civil society organisations, we submitted a complaint before the European Ombudsman – the EU independent authority charged with investigating instances of maladministration by EU agencies – to launch an investigation into the allegations of these activities.⁴

PI believes that EU institutions are under an obligation to conduct human rights risk and impact assessments prior to engaging in any form of surveillance transfer. Prior risk and impact assessments are needed to ensure that any surveillance transfer will not result to serious violations of the right to privacy or facilitate other serious violations of human rights. We believe that DFIs have also a responsibility to conduct human rights impact assessments, including data protection impact assessments, prior and at every step of the implementation of the projects they fund or support and where their activities take place.

³ PI, Surveillance Disclosures Show Urgent Need for Reforms to EU Aid Programmes, November 2020 <https://privacyinternational.org/long-read/4291/surveillance-disclosures-show-urgent-need-reforms-eu-aid-programmes>

⁴ PI, Complaint on EU surveillance transfers to third countries, 19 October 2021, <https://privacyinternational.org/legal-action/complaint-eu-surveillance-transfers-third-countries>

Last year decision by the European Ombudsman on PI's complaint concluded that EU institutions, specifically in this case the European Commission, are under an obligation to conduct human rights risk and impact assessments prior to engaging in any form of (surveillance) transfer. In her decision, on 28 November 2022, the European Ombudsman emphasized the importance of human rights impact assessments in their inquiry into the European Union's transfer of surveillance capabilities to partner countries under the European Union Trade Facilitation Agreement. The Ombudsman found that prior assessments could help prevent negative human rights impacts and improve transparency and accountability.

The decision was informed by previous decisions in relation to EU's free trade agreements:

The Ombudsman has said, in her inquiries concerning free trade agreements, that human rights impact assessments can identify the sources of risks at each stage. Such assessments can be preventive since, if negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into.⁵

The UN Guiding Principles on Business and Human Rights (UNGPs) call for companies to carry out human rights due diligence to identify, prevent, mitigate, and account for adverse human rights impacts.⁶ This process should cover impacts that the institution may cause or contribute to through its activities or business relationships.

Further, it is important to emphasise that human rights impact assessments should take place before a project starts and prior to operations, as this can help prevent negative impacts on human rights and allow for mitigating measures to be put in place. The European Ombudsman decision mentioned earlier also recognises the importance of prior assessments in preventing human rights violations. The decision states that:

prior human rights impact assessments can be preventive since, if negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into.⁷

The decision also notes that "the goal should instead be to prevent such violations, and prior human rights impact assessments can play an important role to this end."⁸

This approach is also in line with the UNGPs, which call for human rights due diligence to be carried out before a project begins, and for businesses to assess and address potential and actual human rights impacts that may be directly linked to their operations, products, or services by their business relationships.⁹ By conducting human rights impact assessments before a project starts, DFIs and their

⁵ Decision on how the European Commission assessed the human rights impact before providing support to African countries to develop surveillance capabilities (case 1904/2021/MHZ), 28 November 2022, <https://www.ombudsman.europa.eu/en/decision/en/163491> (hereinafter 'European Ombudsman decision'), para 22.

⁶ Notably, Principles 13(b) and 17, UN Guiding Principles on Business and Human Rights (hereinafter 'UNGPs').

⁷ European Ombudsman decision, para 22.

⁸ European Ombudsman decision, para 26.

⁹ Notably, Principle 17 and commentary UNGPs.

investees can identify and address human rights risks early on, leading to more sustainable and responsible investments that respect and protect human rights.

The obligation to conduct human rights impact assessments occurs in every country where DFIs operate and it is not limited to obligation of national state receiving or implementing a project. The European Ombudsman has highlighted in her decision:

The EUTFA projects covered by the inquiry are implemented in countries with major governance issues and, in many cases, with poor human rights records. This increases the risk of human rights violations in the context of EUTFA projects. If the surveillance technologies and capacity transferred are used by the partner countries for purposes not foreseen under the project, there is a risk for human rights of individuals in these countries, as well as for the ability of the EU to fulfil or realise its human rights obligations.¹⁰

In particular, we draw attention to Principle 13(b) of the Guiding Principles, which states that companies should assess and address any adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships. This means that DFIs should not only assess the human rights impacts of their own operations but also of the projects they finance and the companies they invest in. By doing so, DFIs can prevent and address adverse human rights impacts caused by irresponsible development financing practices, especially those that pose specific risks to groups in the most vulnerable situations, such as women and girls, indigenous communities, human rights defenders, persons with disabilities, persons with different sexual orientation or gender identity, older persons, persons living in poverty or migrant workers.

Transparency is also a critical aspect of the work of DFIs to ensure that they are accountable for their actions and that they respect human rights in their operations. In this regard, the European Ombudsman's decision¹¹ noted the responsibility to ensure that they carry out human rights impact assessments before starting a project, and to make the results of these assessments publicly available. This is in line with the UNGPs, which emphasize the need for companies and institutions to be transparent about their human rights impacts and the steps they are taking to address them. By being transparent about their operations, DFIs can build trust with local communities, civil society, and other stakeholders and ensure that they are held accountable for their actions. Ultimately, transparency is essential for ensuring that DFIs contribute to sustainable development and respect for human rights.

Therefore, DFIs should proactively disclose relevant information about their investments, including but not limited to: the identity of the ultimate beneficiaries, the social and environmental risks and impacts of their investments, and the steps taken to mitigate these risks and impacts. DFIs should also ensure that affected communities and stakeholders have access to relevant information in a timely and accessible manner. This would enable affected communities and stakeholders to participate meaningfully in decision-making processes, as well as hold DFIs accountable for their investments.

We equally believe that states have an obligation to take effective legal and policy measures requiring that DFIs respect human rights and the environment. It is therefore crucial for states to ensure that human rights risk is integrated into the due diligence processes of DFIs. By requiring human rights impact

¹⁰ European Ombudsman decision, para 25.

¹¹ European Ombudsman decision, para 24.

assessments, states can harness the potential of DFIs to achieve important policy objectives, such as gender equality, protecting human rights and the environment, mitigating climate change, and realizing the Sustainable Development Goals.