Defining 'Modern Slavery' and Identifying Corporate Responsibility

This brief has two purposes, namely to:

1. *provide clarity as to what constitutes forced, bonded and child labour (as a subset of modern slavery), and*
2. *lay out the formal legal basis on which companies are held responsible for human and labour rights abuses.*

This paper should be read alongside the Background Briefing document 3 where corporate reporting requirements and corporate benchmarking activities in the area of human and labour rights are presented. This brief also supports Task Force I as it seeks to integrate the findings of the risk map. The risk map supports SeaBOS members due diligence processes by identifying where labour abuse might be present and provides knowledge about the effectiveness of voluntary actions, which include remedies for forced labour. The brief on Slavery in Marine Fisheries from the Amersfoort working meeting in May 2018 provides further background on modern slavery in seafood.[1]

1. Defining modern slavery

SeaBOS companies have committed to "eliminate any form of modern slavery, including forced, bonded and child labour" from their supply chains. Each of these terms is described below:

- **'Modern slavery'** is an umbrella term that describes a number of abuses, all of which have the common feature of people being treated in ways that are similar to slavery (see Table 1). The preface of 'modern' is used to distinguish these forms of slavery from chattel slavery (where humans were owned and traded) and to reflect the need for new language to describe new practices. Each form of modern slavery in Table 1 is subject to political and legal frameworks while the umbrella term modern slavery has tended to be used for overarching action programmes and reporting frameworks.
- **Forced labour** is defined in the 1930 Forced Labour Convention as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself voluntarily". Forced labour includes both bonded and child labour.
- **Bonded labour** is a form of forced labour in which workers are compelled to work to pay off debts incurred in gaining and sustaining employment and (critically) where the terms for repaying these costs are such that these debts are virtually impossible to pay off. As this constitutes forced labour, there is no separate definition of bonded labour. Sometimes this is also called 'debt bondage'.
- **Child labour** is defined as work undertaken by children under the age of 18 that is mentally, physically, socially and/or morally dangerous or harmful and that interferes with their schooling (set out in International Labour Organisation convention 138 on minimum working age). Child labour and forced labour are often found in the same settings and are driven by similar dynamics. International Labour Organisation convention 182 sets out State obligations to eliminate the worst forms of child labour.

These definitions and distinctions are more complex than they seem and subject to contestation. Two examples of the complexity are offered here:

Table 1: Modern slavery terms and global incidence (based on 2017 estimates and definitions from the International Labour Organization)[2]	
Modern slavery elements	**Description**
Forced labour *Estimated to affect 24.8 million people*	Three forms are distinguished: 1. Forced labour exploitation found in commercial supply chains. This accounts for 64% of the forced labour category (approximately 16 million people). 2. State imposed forced labour, including forced military services by adults and children as well as forced agricultural work (approximately 4 million people). 3. Forced sexual exploitation of adults and commercial sexual exploitation of children (approximately 4.8 million people).
Forced marriage *Estimated to affect 15.4 million people*	This is made up of unfree forms of marriage including: women being promised or given in marriage on payment of money (or value in kind) without the right to refuse; a husband, his family or clan transferring a woman to another for value received; and/or a situation where a women is liable to be inherited by another person on the death of her husband.

- Although prison labour in the United States fits the definition of state imposed forced labour, the appropriateness of having prison labour is disputed by the United States. This is an example of 'state sovereignty': that is, that ultimately countries have the power to determine what happens inside their borders. In the United States the term 'labour abuse' is a more acceptable term to use (and this nuance is reflected in the risk mapping work).
- The child labour prohibition is complex because it relates to work that is harmful and/or interferes with schooling. Child or adolescent participation in work is not necessarily harmful, especially if it includes helping their family (thereby contributing to the welfare of poorer families) and this form of labour is often found in small scale fisheries. Likewise, working outside of school hours and during holidays may well provide skills and experience for later life. It is also possible to address the harmful aspects of child labour. For example, "if hazardous working conditions are addressed, it is possible to turn child labour into decent employment for rural youth, including those in the 15–17 age group. Additionally, as most child labour is a result of economic dependency, it is important to consider improving economic opportunities for youth and adults"[3] in addressing this problem.

Another important point to note is that forced labour does not necessarily mean that no payment is made for work (although this can be the case). For example, credit bondage (a form of forced labour) can arise when a worker is due wage payments which will be forfeited should they stop working for an employer without their permission. In this case, the worker is constrained from doing what they might otherwise wish to and hence has not voluntarily offered themselves to the work.

The risk of forced labour (created by debt bondage) is increased when workers incur costs to access jobs (e.g. through recruitment fees and/or travelling to take up work). Debts can also be incurred through having to pay costs associated with work settings (e.g. for food and accommodation). Sometimes, these costs are not knowingly incurred (forced labour is often created and sustained through deception) and often arise where workers move countries to take up employment (defined as being trafficked: i.e. transported across country borders for work). Risk of forced labour and debt bondage increase where migrant workforces predominate. In all of these settings those in forced labour are subject to violence or intimidation. Language and cultural barrier (as well as the remoteness of work places in aquaculture or at sea) also often result in workers finding it difficult to ask and obtain help.

2. The legal landscape

Slavery and slavery type practices (such as forced labour) are illegal under international law as well as the domestic laws of all countries. The prohibition against slavery is especially strong and is known as *jus cogens* or 'compelling law'. This means that although States have sovereignty over their domestic law, it would be against international law for any state to make slavery legal. This makes slavery an illegal practice of the same standing as crimes such as genocide, crimes against humanity, war crimes, piracy and torture.

International human rights obligations arise from agreements between countries that become binding when ratified by States and translated into domestic law. With good governance, there is also a need for States to create processes for the identification and punishment of any abuses (e.g.: labour legislation, labour inspection and enforcement bodies). If a company breaches

domestic legislation focused on human and labour rights, the State has the power and responsibility to prosecute the perpetrator. Critically, corporate breaches in a country should, in the first instance, be dealt with within the legal framework of that country.

The landscape of responsibility becomes more complex because transnational companies (headquartered in one country but operating in many others) might impact human rights through their direct operations and via supply chains. As before, companies can be prosecuted for breaking domestic human rights laws (if they exist and if they are effectively enforced) in the country where the human rights violations have taken place: usually through the prosecution of a subsidiary.

There are a few, however, (limited) situations where legal action can be taken against the head office of a company for actions that happen in a country where they have subsidiaries. This 'transnational tort litigation' has increased in common law countries (such as the United States, the United Kingdom and Canada), where victims of human rights abuse by subsidiaries of multinational corporations may sue the parent company of the subsidiary where the company is headquartered (even if the victims are from another jurisdiction themselves and if the harm was inflicted in another country): though the success of these cases varies depending on the circumstances on each setting. In a recent case (March 2020), the Supreme Court of Canada found a Canadian company (Nevsun Resources Ltd) could be sued in Canada by workers who were forced into labour by Nevsun's local sub-contractor (Nevsun did not own the sub-contractor). These workers; complaints are yet to be heard in court, the importance of this ruling is that these cases can be taken in Canada.

Globalisation (where corporations have impacts beyond their country of incorporation) and relative weaknesses in governance in some countries have raised concerns that there is "ample room for corporate human rights violations to go entirely unchallenged and often even unnoticed".[4] In order to address this challenge, a hybrid approach has developed, mainly through two sets of non-binding guidelines that seek to make companies that negatively impact upon human rights responsible for those breaches (see Box 1). These are called 'soft law' and often enshrine more ambitious outcomes than can be agreed upon presently. These frameworks, however, are widely accepted by States and create strong expectations about corporate responsibilities for human rights behaviour.

The first of these frameworks to be developed is the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises that set out expectations about human rights obligations (see Box 1). Should a company breach these guidelines, those affected are able to submit complaints about the company's conduct to 'National Contact Points' in the countries where companies are headquartered. Subsequent investigations and dispute resolution processes then follow (the process is designed to be consensual and to realign business practice with the guidelines). In this way, company head offices can be involved in remedying human rights breaches in other countries through action taken by their 'home' Government. While the OECD developed these guidelines, other countries can adopt the principles and use these processes and there are 50 countries who have done this, including all SeaBOS member countries (with the exception of Thailand).

The second, and globally applicable, approach is the United Nations Framework on Human Rights and Business, created under the guidance of John Ruggie (the United Nations' Special Representative of the Secretary General on Human Rights and Business). The Ruggie framework has three elements, namely:

1. a State **duty** to protect human rights;
2. a corporate responsibility to **respect** human rights; and
3. provision of access to an effective **remedy** by those whose human rights have been affected (jointly a State and company responsibility).

Box 1: Business and human rights international frameworks

The OECD Guidelines for Multinational Enterprises (http://mneguidelines.oecd.org/) reflect OECD member Government expectations about what constitutes responsible businesses. They bring together all standards related to human rights and labour rights, as well as information disclosure, environment, bribery, consumer interests, science and technology, competition, and taxation. The most recent update OECD (2011), OECD Guidelines for Multinational Enterprises can be found here http://dx.doi.org/10.1787/9789264115415-en and guidance on specific aspects are published from time to time.

The United Nations Framework on Human Rights and Business is hosted by the United Nations Human Rights Office of the High Commissioner (or UN OHCHR, see https://www.ohchr.org/EN/pages/home.aspx) and the framework can be found here - https://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx. This framework applies to all companies, regardless of where they are headquartered. The UN OHCHR is a different body than the Human Rights Council.

This framework means that the primary responsibility for human rights still rests with States, but that corporations have a role to play in ensuring human rights are realised in their business activities (the duty-respect-remedy principle can also be found in the OECD Guidelines for Multinational Enterprises). The duty-respect-remedy principles were unanimously endorsed by the Human Rights Council in 2011. The Human Rights Council is an inter-governmental body within the United Nations system and is responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them.

Two elements are required for a company to be said to respect human rights under these frameworks. First, a company has to create a context in which rights are recognized and incorporated into business practice regardless of where that business takes place globally. This may require developing policies, alongside training for policy implementation, and provision of remedy processes, should company policy be breached. The second element requires that due diligence is exercised to ensure actions are in line with policy (this is seen as a continuous process). That is, information should be gathered on performance, assessment of impacts of operations by specific human right categories, as well as checking to ensure that control systems are robust. There is no requirement to publish these assessments (but see Briefing 3 for emerging reporting requirements). In addition, there is emerging evidence that 'standard' audit and/or certification processes will not uncover activities such as forced labour.[5] This makes due diligence difficult to achieve by business-as-usual approaches (due diligence is a complex area and beyond the scope of this briefing).

Challenges to effective due diligence also arise from the context in which operations take place, as well as the need to specify what is under the direct control of a company (where the company is directly responsible for human rights breaches) versus under the control of business partners and/or suppliers (where responsibility is more complex to determine). The actions of subsidiaries are deemed to be under the direct control of a parent company in this context.

The Ruggie Framework makes clear that for a company:

> "Responsibility is determined by the human rights impact of its activities: whether it causes or contributes to an adverse impact, or its operations, products or services are directly linked to adverse impact through a business relationship. Its influence—here understood as leverage— then becomes relevant in identifying what it can reasonably do to address that impact and will normally vary in these contexts. If a company has not caused the impact itself, the leverage it has over the perpetrator will shape its range of options to prevent or mitigate the impact, but it does not affect the scope of the responsibility itself. If it is necessary to prioritize actions to address human rights risks, companies should be guided by the severity of the potential or actual impact identified, including whether a delayed response may make the impact irremediable."[6]

Moreover, a corporation has a responsibility to respect human rights, even in places with weak governance. As Ruggie[7] observes, corporations are "expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent". This means that companies with power and control should undertake due diligence reviews and seek to remedy any human rights impacts they identify in their own operations and along the value chain (critically, including suppliers).

Finally, while extra-territorial jurisdiction is not the norm, this is slowly changing. For example, under the United Kingdom Bribery Act (2011), a UK company can be charged with bribery in the UK, regardless where the crime was committed. Similarly, in the case of the United States, Dodd-Frank Act (2010), US companies and non-US companies on US stock exchanges that use conflict minerals can be prosecuted (the Act focuses on activities in the Democratic Republic of the Congo or any adjoining country). In both these cases, to avoid prosecution a company has to demonstrate that it exercised due diligence along its supply chains.

In summary, while there are numerous international agreements relating to human and labour rights (including those focused on fishers), the formal duty to comply with these agreements rests with nation states. Companies have no legal 'standing' in international law and only become formally liable for human rights violations if they break domestic legal standards in countries in which they operate. This has created a governance gap, which has been somewhat resolved through the Ruggie framework and its requirement that companies respect human rights regardless of the ability or willingness of states to implement or enforce laws. In addition, both states and companies are jointly responsible to provide remedies where human and labour rights are breached.

3. Using human and labour rights approaches to understand forced labour

Box 2 summarises two key international processes that are currently underway that address both human and labour rights issues specifically in the seafood sector. Both of these are likely to generate guidance and support in the next 12 months.

Box 2: Seafood related human rights initiatives

The **Food and Agriculture Organisation (FAO)**, sub-committee on Fish Trade is running project on Social Responsibility in Fisheries and Aquaculture Value Chains (see here for the formal meeting document: http://www.fao.org/3/nb389en/nb389en.pdf). This project started in 2018 when FAO members (countries) asked the FAO to bring together human and labour rights standards as they related to seafood supply chains. The outcomes from the FAO Committee of Fisheries specifically highlights the relevance of collaboration with SeaBOS on developing guidance on responsible business: http://www.fao.org/3/MX179EN/mx179en.pdf. The relevant standards were assembled together in a draft guidance document and were due to be 'approved' by states in November 2019. Some member governments, however, are not yet ready to approve the guidelines, so the process is ongoing and is also one with which SeaBOS members can engage.

The **Danish Institute of Human Rights*** (with funding from the Swedish International Development Cooperation Agency) has a project on human rights in aquaculture focusing on two case study countries: Bangladesh and Chile (for project details see here: https://www.humanrights.dk/projects/promoting-human-rights-fisheries-aquaculture). The project will develop insights into how to effectively address human rights issues in aquaculture, including connections to the feed industry and through partnership with banks and investors. The Institute has also arranged roundtables on the salmon industry (December 2019 in Bergen) which included SeaBOS company participation.

* Human Rights Institutes are national level bodies whose primary focus is country human rights performance (in this case Denmark). Some institutes also undertake project work to promote human rights. The Danish Institute has the most expertise of any of these Institutes in seafood related issues.

To better understand these projects, it is important to realise that human and labour rights are distinctive but connected areas of concern in public international law. Human rights include issues such as indigenous people's rights to food security from fishing; land rights and rights to clear water and sanitation (which might be impacted by processing plant siting); as well as rights that are associated with employment relations (such as health and safety, working hours, discrimination, freedom of association and forced/child labour issues). Labour rights are also part of public international law but have been developed in relative isolation from human rights work.[8] Both areas, however, are important for companies. The distinctions between them[9] also impact on what might be seen as remedy for those identified in forced labour.

A human rights approach has a strong link to the International Covenant on Civil and Political Rights while labour rights are more closely associated with the International Covenant on Economic, Social and Cultural Rights (these two documents, along with the Universal Declaration on Human Rights, are the core of the international framework for states adherence to human rights and are collectively administered by the United Nations Human Rights Office of the High Commissioner). Human rights, therefore, seek to ensure the civil and political rights of individuals, with these rights being guaranteed and governed by States. Civil and political rights are important in the context of States being concerned with the maintenance of their borders and the rights of those who reside within them. In the context of forced labour, such an approach might, for example, lead to States seeking to return trafficked fishers (workers who have moved across national borders for work) to their country of origin (rather than allowing them to remain in the country where they have been in forced labour and/or securing decent employment for them in that State).

In contrast, labour rights emerge from ideas about class struggle and are concerned with social and economic issues. This is reflected, for example, in employment law having a stronger focus on companies and their activities. Using this lens, economic immigration and working across borders could be seen as arising from the same dynamic: that of globalized companies seeking an international workforce with potential exploitation of workers as an risk associated with this dynamic. With this perspective, a country might not seek to return trafficked forced fishers to their home county but might seek to ensure that work undertaken in their jurisdiction is 'decent' (echoing Sustainable Development Goal 8). Supporting workers through labour organisations might also be an appropriate response in this context.

To some extent these distinctions are legal and 'academic', but they also have consequences for any company that uncovers labour abuse in their own operations or supply chains. In keeping with the assumption within SeaBOS (that it is better to stay and work to correct problems in the first instance) a labour rights approach would be to strengthen workers' voice,

support workers' rights organisations (noting that these are illegal for migrant fishers in some countries) and provide clear remedy processes for workers caught in forced labour. This also suggests that poor labour practices (that fall short of forced labour) are also something to be concerned about. In general, and in line with section 2, if there is poor governance of labour rights, companies are viewed as still having a responsibility to support workers. Likewise, undertaking supply chain human and labour rights mapping (one aspect of the voluntary actions) would be a good due diligence activity.

4. Closing observations/recommendations

The purpose of this document was to provide a legal background to corporate responsibilities to uphold human and labour rights. Human rights are all those rights which are believed to belong to every person (these have been codified in the United Nations Universal Declaration on Human Rights, agreed in 1948). Labour rights are the legal and human rights that relate to labour relations between workers and employers. Central to both of these sets of rights is the right not to be subject to forced labour (itself a subset of the wider category of modern slavery).

Given the wider set of practices encompassed by the term modern slavery, some of which is beyond the remit of seafood companies, we recommend that 'forced labour' is used to describe the practices that SeaBOS companies are likely to encounter in their supply chains. Likewise, it should be noted that bonded and child labour are examples of forced labour.

Companies have a legal obligation to adhere to the legislation in the countries in which they operate, including any prohibition against forced labour. In addition, where legal frameworks are absent and/or are weak, companies have duties (arising from 'soft law' frameworks) to respect human and labour rights and remedy any abuses identified. In addition, these obligations extend along supply and value chains. Central to this process is the Duty-Respect-Remedy framework developed by John Ruggie.

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