



Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

February 2020

“The businesses, national or international, which harm the Amazon and fail to respect the right of the original peoples to the land and its boundaries, and to self-determination and prior consent, should be called for what they are: injustice and crime. When certain businesses out for quick profit appropriate lands and end up privatizing even potable water, or when local authorities give free access to the timber companies, mining or oil projects, and other businesses that raze the forests and pollute the environment, economic relationships are unduly altered and become an instrument of death. They frequently resort to utterly unethical means such as penalizing protests and even taking the lives of indigenous peoples who oppose projects, intentionally setting forest fires, and suborning politicians and the indigenous people themselves. (14)

The interest of a few powerful industries should not be considered more important than the good of the Amazon region and of humanity as a whole. (48) In this regard, we cannot fail to praise the commitment of international agencies and civil society organizations which draw public attention to these issues and offer critical cooperation, employing legitimate means of pressure, to ensure that each government carries out its proper and inalienable responsibility to preserve its country’s environment and natural resources, without capitulating to spurious local or international interests.” (50)

Pope Francis, Post-Synodal Apostolic Exhortation [“Querida Amazonia”](#), February 2020.

There is a **growing momentum** for the UN Treaty. 90 States from across the different regions participated in the 5th session of the intergovernmental working group (IGWG), with an increasing number of countries expressing support for the process and instrument.

Support by other key actors is also growing: in November 2019 the European Economic and Social Committee, a key consultative body, adopted an [own-initiative opinion](#) on a "Binding UN treaty on business and human rights" with a tripartite majority of workers, employers and "diversity group" representing a large spectrum of stakeholders. The report is favorable towards a Treaty and an active EU engagement in the negotiation process.

In October, the [Pan-African continental bishops conference SECAM](#) together with the [Kenyan Conference of Catholic Bishops](#) called on governments and the international community to ensure corporations respect human rights for the common good and to support a strong Treaty that will address the global governance gap and ensure prevention of abuses. In February, the [West African regional bishops conference RECOWA](#) further called on governments to work together to establish a Treaty to regulate corporate activities and ensure the right to free, prior and informed consent, with a view towards social cohesion.

Over 200 civil society representatives were present in Geneva from across the world, while liaising with many more in home countries. Growing numbers of victims of corporate abuse, human rights defenders and civil society are calling for a UN Treaty to help close clear global accountability and protection gaps and put a stop to continuing corporate human rights abuses.

CIDSE agencies have been actively involved in the development of National Action Plans (NAPs) on business and human rights in states such as Belgium, France, Germany, Ireland, Italy, Switzerland and the UK. NAP processes have raised awareness in the public, within governments and parliaments, and some contain positive elements. At the same time, current NAPs have clear gaps, limits and shortcomings, when it comes to concrete measures to advance binding human rights due diligence, improve access to justice, recognize extraterritorial State obligations and the primacy of human rights over trade and investment agreements. For example, the UK was the first country to publish a National Action Plan on Business and Human Rights but has not updated its NAP since May 2016. A Treaty covering the points highlighted in the revised draft text would significantly enhance national policies and processes to date to implement the UN Guiding Principles.

The 5th session's conclusions and recommendations confirmed the next steps towards a second revised draft text, including written submissions and consultations. Recent developments demonstrate that global action is urgently needed, highlighting how the Treaty can contribute in the following ways:¹

1. Protect women and men defending human rights and the environment

In December, the UN Special Rapporteur on Human Rights, Hazardous Substances and Wastes, Baskut Tuncak, conducted a visit to Brazil. In his preliminary findings,² the Special Rapporteur highlighted the collapse of the two mine tailing dams in 2015 (Mariana) and 2019 (Brumadinho). The first was operated by a joint venture of Vale and BHP Billiton: its collapse killed 18 people and impacted the lives of more than three million others, including indigenous and other communities. The second, also involving Vale, killed nearly 300 people. "After years of denial by the Government and the firms involved, the impacts of exposure to the toxic mud from the 2015 disaster are now visible and continue to be linked to health problems, and yet the companies continue to abuse their influence to prevent health and safety information from

¹ See also the comprehensive [CIDSE submission for the 5th session](#), October 2019.

² [End-of-visit statement](#) by the United Nations Special Rapporteur on human rights and hazardous substances and wastes, Baskut Tuncak on his visit to Brazil, 2 to 13 December 2019. See also <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25430&LangID=E>.

seeing the light of day.” He also condemned the criminalization and attacks on people who are bravely fighting to defend their rights to life, health and a clean environment.

Local people who peacefully oppose large scale investment projects which would harm their environment, culture and livelihoods, including access to land and water, are being threatened and killed. In 2018 alone, at least 247 people globally were killed for protecting their land, environment and communities from global industries like mining, logging and agriculture.³ Many of these defenders are indigenous defenders. We also know that women human rights defenders are targeted in gender specific ways.

As Catholic development agencies, we remain extremely concerned by the current threats to partner organizations and communities in resource-rich regions. We therefore welcome Articles 4.9 and 4.15 in the revised draft which enhance the recognition of the role of human rights and environmental defenders, essential to the implementation of the Sustainable Development Goals and Agenda 2030.

- **Adequate and effective measures** to protect defenders should be further specified, for example adopting legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any person who seeks to exercise his or her right to peacefully protest against and denounce abuses linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work, including gender-specific violence; and fully, promptly and independently investigating and punishing attacks and intimidation of human rights defenders. The specific threats and harms experienced by **women** human rights defenders should be further elaborated in Article 4.9.

2. Protect the rights of workers and communities, preventing disasters due to corporate negligence

Only four months prior to the 2019 Brumadinho dam failure, German auditor TÜV SÜD confirmed the dam’s safety when its Brazilian subsidiary issued a stability declaration. In October, five of those affected, the European Center for Constitutional and Human Rights (ECCHR) and MISEREOR filed [complaints](#) against TÜV SÜD and one of its employees, for negligent homicide, private bribery, causing a flood by negligence, and violating supervisory duties. The claim is supported by Brazilian organizations Associação Comunitária da Jangada and International Articulation of People Affected by Vale. In January, Brazilian state prosecutors charged the former chief executive of Vale and 15 other people (10 who had worked for Vale and five for TÜV SUD) with homicide. In addition, Vale and TÜV SUD were charged with environmental crimes. There are 87 other highly risky upstream tailings dams in Brazil, 10 of them owned by Vale. This design is used by many companies all over the world, including in Canada and Australia.

Experience shows that it is very difficult to build international cases involving multiple companies which relate to human rights abuses. Even when a single case reaches the courts, it can take many years to reach a verdict. If we are serious about protection of human rights defenders, we have to address impunity, especially when crimes are linked to the activities of corporate structures which reach across national boundaries. All businesses need to be accountable if their investments and operations put people at risk. If businesses and investors know there is a clear framework for legal liability, whatever country they operate in, this will

³ Frontline Defenders Global Analysis 2018.

ensure that they give environmental and human rights risks appropriate consideration. As debates around global value chains show, the emphasis on **transnational activity** of enterprises remains important, as experience shows that this is where we face the biggest challenges and accountability gaps: complex business structures, jurisdictional restraints, divergent legal systems and levels of enforcement resulting in corporations being able to avoid legal liability.

Around the world, policy makers, business leaders, Church leaders, academics, campaigners and citizens are supporting legislative change to end irresponsible corporate practices. There is a growing momentum in Europe and beyond towards introducing mandatory human rights and environmental due diligence for businesses in their global operations and value chains: legislative reforms and debates are advancing in the Netherlands, Germany, Finland, Spain, Belgium, Luxembourg, Sweden, Denmark, Austria and at EU level; Switzerland, Norway, the United Kingdom as well as in Canada. These national and regional developments should provide increased political support for advancing in parallel with the related work on the Treaty.

- **European Union:** In February the EU Commission published its study on due diligence requirements through the supply chain, with options including regulation. Related discussions and initiatives are also underway in the European Parliament. In January, the European Trade Union Confederation (ETUC) published its [position](#) for a European Directive on mandatory human rights due diligence. And last October, the Commission of the Bishops' Conferences of the European Union (COMECE) [called](#) on the EU to adopt binding and effective human rights due diligence legislation.
- **France:** An evaluation is underway to assess the state of implementation of the duty of vigilance law after one year.
- **Netherlands:** Following the passage of a child labour due diligence law in 2019, the government has established a policy development process aimed at redesigning its Responsible Business Conduct policy, including broad mandatory due diligence measures. There are also discussions underway in Parliament to propose initiatives for such a law.
- **Germany:** The Ministries for Labour and for Economic Cooperation & Development have jointly committed to developing a proposal for a German supply chain law. The announcement came after not even 20% of companies surveyed under the NAP monitoring procedure so far were found to be undertaking due diligence measures.
- **Finland:** The government is conducting a survey and judicial study with the goal of adopting a national law, and has committed to promoting legislation at the EU level, highlighted in its December EU Presidency Agenda for Action.
- **Italy:** In November, Human Rights International Corner (HRIC) and FIDH issued the [study](#) "*Italian Legislative Decree No. 231/2001: a model for mandatory Human Rights Due Diligence legislation?*" which analyses the Italian Legislative Decree 231/2001 as it provides criminal and administrative liability for corporations.
- **United Kingdom:** An independent review of the 2015 Modern Slavery Act concluded in May 2019 that reporting requirements hadn't driven sufficient change within supply chains and recommended that the UK Government should strengthen and extend the law and increase the penalties for non-compliance. Civil society and trade unions have launched a campaign for a legal duty for companies to respect human rights and the environment.
- **Switzerland:** Discussions are continuing on a Parliamentary legal proposal and a popular Responsible Business Initiative, with Parliament's final decision scheduled for March 2020.
- **Canada:** The Canadian government has led [consultations](#) with businesses and civil society on possible new due diligence legislation. Canadian civil society and trade unions are [advocating](#) for comprehensive mandatory human rights due diligence legislation.

- **Norway:** In November, a government-appointed expert committee published a [draft act](#) on supply chain transparency focused on consumers' rights, the duty to know and due diligence.

As organizations strongly involved at national as well as European level, CIDSE and its members have experienced how national and European developments can be greatly strengthened by steps forward at global level on the UN Treaty. National and European legal measures already in place, or under development, also point to the types of provisions that the UN Treaty could help to extend worldwide, creating a level playing field for business, and improving the level of protection of human rights for all.

The revised draft text Article 5 on Prevention is an essential part of the instrument setting out minimum requirements on businesses for mandatory human rights and environmental due diligence. This will underpin efforts which states have already made in relation to the UN Guiding Principles and will make them much more effective, providing clear requirements for action by businesses globally, as well as supporting local and regional protection measures.

There is a need to explicitly strengthen the wording on **human rights and environmental due diligence** in the text of the draft instrument. Human rights due diligence shall not be limited to contractual relationships: the language of “business relationships” would better reflect the nature of corporate activities and also the approach in the UN Guiding Principles. The remedy aspects of human rights due diligence also need to be much clearer.

References to both human rights and environmental impact assessments should be maintained and the environmental aspects of human rights due diligence strengthened. The mention of **environmental aspects** is essential, as many of our partner organisations experience threats while working to ensure protection of human rights related to the environment. Protection of our Common Home and its people are fundamentally linked and should be reflected in this legally binding instrument.

- Article 5.3d on **prevention** should not be limited to contractual relationships, but cover all human rights impacts that corporations may cause, contribute to or be directly linked to through their operations, products or services. Article 5.3b should include special attention to those defending human rights and the environment, and 5.3a should include **assessments** of gendered impacts.
- Art. 6.6. on **liability** should explicitly refer to all **established business relationships**, including those related to supply, export, services, insurance, finance and investment; rather than only contractual relationships. Liability should also apply when abuses result from the failure to **comply with due diligence requirements**. **Administrative liability** is needed for offenses other than criminal offenses.

3. Ensure trade and investment can support human rights and a healthy environment

*Eight months after the “Agreement in Principle” on a **trade agreement** between the **EU and Mercosur** was published in June 2019, the Sustainability Impact Assessment is still not available, though the agreement is to be presented to the EU Council and European Parliament for approval in October 2020. The agreement would boost Mercosur exports of beef, ethanol based on sugar cane and soy, by increasing import quotas and reducing export tariffs for soy. This could lead to increased risks of land grabbing, human rights abuses, clearing of forest and fires in the Amazon, to the detriment of indigenous peoples. Switzerland and Norway have also*

concluded substantial negotiations on an agreement with Mercosur, while talks with Canada are advancing as well.

At international level, the UN Commission on International Trade Law (UNCITRAL) Working Group III held its resumed 38th session between 20 and 24 January in Vienna to discuss reform of investor-state dispute settlement (ISDS). In parallel, the year-long “Rights for People, Rules for Corporation – Stop ISDS” campaign by civil society groups, trade unions and social movements concluded with 847.000 EU citizens having signed a petition calling on EU leaders to enact new rules for corporations to respect human rights and environment; to promote a strong UN Treaty to end transnational corporate impunity; and to withdraw the EU’s proposal for a Multilateral Investment Court and end ISDS privileges for investors.⁴

Trade and investment agreements are reinforcing a power and legal imbalance, including privileged access for corporate actors to arbitration tribunals through the Investor-State Dispute Settlement Mechanism, allowing corporations to drive decisions on national regulation on labor rights, health and environmental standards, while communities whose rights have been abused struggle to have access to justice.

Article 12.6 of the revised text improves the requirement that **other relevant agreements by States must be compatible with human rights obligations** under the Treaty. However, it fails to clearly establish the primacy of human rights over trade and investment rules. Moreover, CIDSE supports the call to abolish Investor-State Dispute Settlement mechanisms. The treaty should clarify that as long as ISDS exists, it must respect the primacy of human rights over investors’ interests.

➤ **A specific clause on the primacy of human rights obligations, notably in trade and investment agreements,⁵** would better clarify this relationship, adding to regulatory certainty and a stable legal environment. Such a clause should, *inter alia*, require human rights and sustainability impact assessments prior to the start of trade negotiations, and a clear obligation to secure the primacy of human rights obligations in Investor-State Dispute Settlement (ISDS) mechanisms, as long as they exist.

We call on all States to consider the revised draft and to **formulate constructive proposals for further elaboration** in the second revised draft. We believe that it is essential to move forward the negotiations on the text for the Treaty, making significant advances in line with the urgency of numerous situations. The ultimate benchmark must be the potential of the Treaty’s provisions and their effective implementation to help put a stop to corporate-related human rights abuses.

We call on States to **constructively engage**, with a spirit of determination and a sense of responsibility for the common good, to advance **until the “mandate to elaborate an international legally binding instrument” established by UN Human Rights Council Resolution 26/9 is fulfilled.** As Catholic development agencies actively involved in the development of policies and laws on business and human rights, we will continue to offer advice and support to our governments and other members of the Human Rights Council to help them to meet this important objective.

⁴ www.stopisds.org. Campaign members published an ad in the *Financial Times* Europe edition on 6 February: “847.000 citizens demand action from EU leaders and President Von der Leyen,” with the campaign’s demands.

⁵ [Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights](#), Prof. Markus Krajewski, University of Erlangen-Nürnberg, 2017.