



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

October 2020

“Indigenous communities must be protected from companies, particularly multinational companies, that ‘operate in less developed countries in ways they could never do at home’ (LS, 51), through the destructive extraction of fossil fuels, minerals, timber and agro-industrial products. This corporate misconduct is a ‘new version of colonialism’ (SAINT JOHN PAUL II, Address to the Pontifical Academy of Social Sciences, 27 April 2001, cited in Querida Amazonia, 14), one that shamefully exploits poorer countries and communities desperately seeking economic development. We need to strengthen national and international legislation to regulate the activities of extractive companies and ensure access to justice for those affected.”

Pope Francis, September 2020¹

Human Rights violations remain widespread in the global economy. Hydropower dams have led to forced evictions of indigenous peoples and other rural communities. Mining projects have caused the destruction of forests, land or fishing grounds, contamination of water sources and the environment, negatively impacting local people’s health, livelihoods, culture and human rights. In the garment industry, we have seen the repeated exploitation of workers, child labour and what can easily be defined as modern slavery. In the agricultural sector, land workers have been poisoned through pollutive pesticides. Transnational corporations and other business enterprises often cause, contribute to, or are directly linked to such violations. And in most cases, affected people are denied their right to legal remedy and redress in their own countries, as well as in the very States where these transnational corporations operate from.

In response to this situation, and inspired by the call of Pope Francis, more than 230 Bishops worldwide signed an international declaration to stop corporate abuse and to guarantee global solidarity: “All States should also ensure their constructive and active participation in the UN negotiations for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Such Treaty would prevent any country or company from making use of exploitative models of production and accepting the destruction of the creation to improve their competitive position in the world market.”²

Since the announcement by EU Commissioner Didier Reynders proposing an EU legislation on mandatory human rights and environmental due diligence of business enterprises, Church leaders from

¹ Message for the World Day of Prayer for the Care of Creation, http://www.vatican.va/content/francesco/en/messages/pont-messages/2020/documents/papa-francesco_20200901_messaggio-giornata-cura-creato.pdf.

around the world expect constructive and active participation by governments in moving this process forward. The German government recently announced a national human rights due diligence law (“Lieferkettengesetz”), and France had already enacted such national legislation (“Loi de Vigilance”) in 2017. **With major national economies and the EU imposing due diligence on companies**, there should be no impediment to an international treaty with similar content. On the contrary, there is vital interest in promoting a **global human rights-based economy/regime for all companies worldwide**. This process is supported by the different levels, national and supra-national, through the implementation of laws. These levels are complementary and will ultimately guarantee compliance with the Treaty. A **balanced articulation** between the national, regional and international levels of action will be needed for the Treaty to work effectively in practice.

In this context, CIDSE welcomes the second revised draft of the Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, as further qualitative progress in the development of this Treaty and a very good basis for negotiations. We welcome the **consistency of the draft with the UN Guiding Principles on Business and Human Rights (UNGPs)** by requiring human rights due diligence from all business enterprises in their activities and business relationships along the whole value chain.

We welcome the **obligations of States to make companies liable for causing or contributing to human rights violations in every part of the world, and to improve access of the affected people to courts, and the option of collective redress**. And we welcome the obligations to **ensure compatibility of trade and investment agreements** with State Parties with human rights conventions. We welcome the language strengthening the importance of a gender perspective and the provision for free, prior and informed consent of indigenous peoples. At a time in which indigenous peoples are coming under increasing pressure from business activities affecting their lands, health and livelihoods, they and other affected communities must be at the forefront of decision-making processes that determine the type of development that can take place on their land.

On the other hand, the next sections will expand on the areas where we still see room for improvement. Namely, with respect to **civil liability**, we emphasize the need to **reverse the burden of proof on a mandatory basis** in order to guarantee **access to remedy for the affected people** in the context of strong power information imbalances. We recommend to **explicitly include environmental rights and due diligence requirements with administrative sanctions in cases of abuses**. We recommend including **specific measures to ensure trade and investment agreements do not undermine States’ capacity** to respect, protect and fulfil human rights in their territory and abroad. And we recommend **strengthening institutional arrangements** to monitor and implement the Legally Binding Instrument. We recommend provisions to make the Treaty more gender-responsive, along with further emphasising the protection of human rights defenders and we recommend that the term victim is replaced with more empowering and participatory language in the revised draft, such as affected persons or affected rights-holders.

CIVIL LIABILITY AND ACCESS TO REMEDY

A very positive improvement is the consistent adoption of the term *business relationships* instead of contractual relationships, covering all types of relations between professionals in coherence with the terminology of the UNGPs and the French duty of vigilance law. Moreover, this reference acknowledges the broader relationships among the entities involved in value and supply chains beyond direct legal, contractual relations. However, some aspects remain insufficiently addressed to ensure effective reparation and reduce power asymmetries:

- **Article 1** – Definitions: “**Business activities**” should cover not only “**for-profit economic**” activities, **but all business activities** and sectors that transnational companies or other companies can carry out, including activities carried out by the State itself, regardless of their size, sector, location, operational context, ownership and structure, not

just strictly commercial or for profit. All business must be held accountable for human right abuses.

- **Art 7.2.** Additional language should be included to remove domestic legislation that impedes women’s access to remedy. At the end of the article, the following text should be added: “State Parties must review and repeal domestic legislation that is a barrier to eliminating gender discrimination and providing training and education programmes to prevent recurrences of abuses and changes in patriarchal attitudes.”
- **Art 7.3.e.** The right-holder must get sufficient public financial support in civil proceedings **to avoid financial obstacles**. The approach should be to use the term “affected persons”, or that of “rights holders”, many of which are characterised by their collective nature, and defence, especially of collective rights and common goods.
- **Art 7.6.** Clarification of **liability of parent companies in relation to burden of proof** could be improved. The terminology of this sub numeral can also be strengthened by formulating that States *shall* “[...] enact or amend laws” to reverse such burden, instead of *may*.
- **Article 8 – Legal Liability:** This article does not expressly state the need to determine “joint responsibilities” between companies in the supply chain (between parent companies and their local subsidiaries and generally between business partners as appropriate). Yet, this type of responsibility is essential to move towards judicial solidarity in the reparation of damages caused in production processes. “Joint responsibilities” shall be included here explicitly.
- **Article 10 – Statute of limitations:** The formulation of Art 10.2 can lead to malfunctioning or denials of justice when changing from one domestic legislation to another based on civil or criminal law. Statutes of limitation should be determined and harmonised clearly.

COLOMBIA CASE STUDY

The **Cerrejón** open-pit coal mine, operating in Colombia for over three decades, is jointly owned by subsidiaries of mining companies BHP, Anglo American and Glencore. More than ten court rulings and resolutions from Colombian courts, the Environmental Ministry and other authorities have highlighted the negative impacts of the operation to the right to health, water, to a healthy environment, to participation, to food security, and to live in decent conditions.² In mid-September 2020, Colombia’s Constitutional court denied a request to annul its ruling on the protection of indigenous people who have been affected by the mining operation with regards to their health and environmental impacts.³ However, to date, there has been the inadequate implementation of these court resolutions by Colombian authorities⁴ and human rights groups have complained of a lack of full compliance by the company.⁵ There is a **lack of effective redress and justice** and a clear need for greater access to international legal redress. A UN expert has called for a halt to mining close to affected communities.⁶ The pandemic has also highlighted how in this semi-arid area, lack of water, exacerbated by mining operations and the climate emergency, is an important challenge. Further, if BHP were to sell its assets or shares of the mine, as recently confirmed⁷, there is a risk that communities would find it harder to access effective remedy and integral reparation. The key point is that businesses should be held liable for harm committed (“**historical damages**”), even if ownership is then transferred.

² The Colombian high courts have issued rulings such as T-614/19, SU 698/17, T 704/16, T -256/15, SU - 658/15, among others, which indicate that there is a violation of the rights of the communities, and damage to the environment, water and health by the extraction activity of the company, the Ministries of Environment, Mines and Energy, the National Environmental Licensing Authority ANLA, Coporguajira, among other state entities that are responsible for omission or action.

³ <https://www.eluniversal.com.co/colombia/corte-nego-solicitud-de-nulidad-de-fallo-que-protege-a-la-comunidad-wayuu-MC3501592>.

⁴ <https://www.contraloria.gov.co/documents/20181/1736422/015+Informe+Auditoria+Cumplimiento+MADS+Arroyo+Bruno+ls.pdf>.

⁵ <https://www.business-humanrights.org/en/latest-news/colombia-civil-society-organisations-rejoinder-to-cerrej%C3%B3n-coal-on-evidences-of-social-environmental-impacts/>.

⁶ <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=26306&LangID=E>.

⁷ <https://www.theguardian.com/business/2020/aug/18/bhp-commits-to-selling-its-thermal-coal-mines-within-two-years>.

ENVIRONMENTAL RIGHTS

The right to a healthy environment is integral to fully enjoy a wide range of human rights, as the mandate of the UN Special Rapporteur on human rights and the environment recalls. And in the wake of the *Laudato Si'* encyclical, it has become clear that protection of human rights and protection of our common home are deeply intertwined, requiring the UN Treaty to call States and corporations to be held accountable for their impacts on the environment.

- **Article 1 – Definitions: Exclude** the expression “**substantial**” under the impairment of human rights. This suggests that rights, the environment and the livelihoods of a people can be damaged and abused, provided that it is not deemed “substantial”. Who defines what should be understood as a substantial impairment? A sacred hill for an indigenous people could be interpreted as “small” harm for a company.
- **Art 4.2.b** should explicitly include “*the right to a safe, clean, healthy and sustainable environment*”. A specific provision shall be established within the framework of the protection of the right to the environment, based on principles applicable to the prevention and reparation of environmental damage. Inclusion of the rights of nature and territory with an intercultural focus should be strengthened.
- **Art 4.2.c.** Although “**Environmental remediation**” is included, there should also be mention to “**integral remediation**” not only for damages to affected populations but also to affected territories and environments.
- **Art 6.1.** The **precautionary principle in environmental matters** enshrined in Principle 15 of the Rio Declaration⁷ must be included. This requires taking measures that reduce the possibility of suffering environmental damage even if the precise probability of it occurring is not known. The inclusion of this principle gives greater weight, in terms of the right to the environment, to the material content of the binding instrument. The principle of “precaution”, also called “caution”, requires the adoption of **protective measures before the deterioration of the environment occurs**, operating in the face of the threat to health or the environment and the lack of scientific certainty about its causes and effects. It requires action as the environmental damage that may occur is known in advance. Here “precaution or guardianship” requires scientific certainty that damages will not occur or that, if they do occur, they can be remedied.
- **Art 6.3.** Needs to establish the obligation of States to develop **more specific national norms on mandatory due diligence**. While the inclusion of impact assessments in this article is a positive improvement, the lack of provisions for sanctions when environmental due diligence is not respected remains problematic. For example, during the COVID-19 pandemic, some governments have introduced new regulations which reduce environmental standards to push through extractives projects in support of economic reactivation. These risks are negatively affecting human rights, transparency, citizen participation and environmental rights, as well as increasing social conflict.⁸

HUMAN RIGHTS IN TRADE AND INVESTMENT POLICIES

We welcome the clarifications in Article 14.5. according to which *a)* existing trade and investment agreements shall be interpreted and implemented in a manner that will not undermine or limit States’ capacity to fulfil their human rights obligations, and *b)* new trade agreements shall be compatible with State Parties’ human rights obligations.

However, the Article lacks **concrete measures on how to ensure such human rights compatibility of trade and investment agreements**. Experience shows that human rights obligations are not well reflected during negotiations and the implementation of trade and investment agreements.

⁸ This has been the case for example in Peru: <https://muqui.org/noticias/decreto-n1500-sobre-reactivacion-economica-debilita-institucionalidad-ambiental-y-participacion-ciudadana/>.

- **Art. 14.5.b.** Therefore, we recommend, inter alia, including an obligation “**to conduct comprehensive and participatory human rights and environmental impact assessments before, during and after trade negotiations and after some period of implementation**”. A **revision clause** shall oblige the State parties “**to revise articles that have been shown to limit capacity to protect human rights and the environment**”. Art.14.5.b. should also oblige States “**to include specific exception clauses concerning the obligation of the Legally Binding Instrument that trade and investment shall not undermine or limit States’ capacity to respect, protect and fulfil human rights obligations in their territories and abroad**”.¹²

THE EU-MERCOSUR ASSOCIATION AGREEMENT

On 28 June 2019, the European Commission reached an “Agreement in Principle” with MERCOSUR, including Brazil, Argentina, Paraguay and Uruguay. If ratified, the agreement will boost MERCOSUR exports of beef, chicken, ethanol based on sugar cane, and soy, by increasing import quotas in the EU for MERCOSUR meat and ethanol and reducing export tariffs for soy in Argentina.

This would put market prices for meat in the EU under pressure, but more importantly would accelerate the expansion of cattle farming, soy and sugar production, partly to the detriment of Amazon forests and other ecosystems important for safeguarding the climate and the rights of indigenous people. Land grabbing and more human rights violations to be expected. Increased Amazon fires are to be expected as agribusiness, and big landowners will feel encouraged to increase their production and clear forest for it. At the same time, EU exports of dangerous pesticides and their use in MERCOSUR countries will increase, with a negative impact on the environment and the right to health.

Sustainable development and human rights were not sufficiently taken into account in the negotiations. The draft trade Sustainability Impact Assessment (SIA) of the European Commission on the agreement was published in July 2020, more than one year after the “Agreement in Principle”. For this, per se, it could not influence the negotiations. The chapter on Sustainable Development is formulated in a very weak language and is excluded from the part of the bilateral intergovernmental Dispute Settlement Mechanism that disposes of a sanctioning mechanism. Human rights due diligence is conceived as a purely voluntary approach.

HUMAN RIGHTS DEFENDERS

Land and environmental defenders are currently the first lines of defence in the protection of ecosystems and global common goods that are the basis for life on Earth. As the UN Special Rapporteurs on the situation of human rights defenders and the UN Special Rapporteurs on human rights and the environment recall us time and again, corporations operating in the mining, agribusiness, logging, oil and gas sectors are often complicit or directly involved in grave violations against the environment and abuses against those who seek to defend it.

Consistent with our submission for the 5th session, we reiterate the need to improve provision with regards to Environmental and Human Rights Defenders. Human rights defenders working on business-related abuses and environmental issues face extreme risks. In the face of powerful interests, those who oppose projects relating to extractive industries, agribusiness, infrastructure, hydroelectric dams and logging are facing brutal consequences, such as killings, attacks, sexual violence, smear campaigns, criminalisation, judicial harassment and repression. 2019 saw the highest number of killings of land and environmental defenders in a single year in 2019, with 212 land and environmental defenders being murdered, an average of more than four people a week. Women human rights defenders often face gender-specific violence, stigma, reprisals and job insecurity for reporting business-related abuses. Women human rights defenders working in this context also face gendered risks, which exploit existing inequalities and perceptions about their role in society. Attacks on women human rights defenders have increased every year, with 137 attacks recorded in 2019. Almost half of all of these attacks were against indigenous women and affected rural communities’ leaders and members.

Cases of violence against social leaders, including threats and attacks, usually occur when human rights and environmental defenders denounce human rights violations, especially related to the environment, or take public or legal actions such as following up on the implementation of court rulings. Public statements which undermine human rights defenders' role can also be very dangerous as it can expose community leaders to greater risks and threats, especially in a context of high numbers of killings and violence.⁹ It is, therefore, necessary that mandatory due diligence includes human rights.

It is welcome that the new draft includes a reference to the UN Declaration on Human Rights Defenders in the third paragraph of the Preamble. That said, the Preamble could better recognise the importance of human rights defenders and refer to the State duty to protect them and provide remedies for human rights abuse. The Preamble, para 14 could include the additional text “and that States and businesses have a corresponding responsibility to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role,” and the following paragraph could be added: “Concerned, that despite these responsibilities, individuals and communities continue to face business-related human rights violations and abuses in all parts of the world, including in connection with economic, social and cultural rights and in connection with the rights related to a healthy environment and remedies associated with environmental damage, including climate change, and deeply concerned that human rights defenders working on human rights issues related to the business are among those most exposed and at risk.”

- **Art 4.2.d.** To ensure that human rights defenders have the standing to bring claims, they should be added to Art. 4(2)(d). **Art. 5 – Protection of Victims:** In adherence to the UN Declaration on Human Rights Defenders, Article 5(2) should specifically refer to the term “human rights defenders,” acknowledging the need for a focus on women and indigenous defenders, whilst articulating the types of measures needed. Adequate and effective measures to protect defenders should be further specified, *for example adopting legislative provisions that prohibit interference, including through the 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* as well as more concrete responses and mentions to environmental aspects. In addition, new sub-articles should be added after Art. 5(2) to clearly protect against retaliation in the form of Strategic Lawsuits Against Public Participation (SLAPP) suits and reprisals, and to avoid a situation in which transnational corporations make decisions on national laws governing labour rights, health and environmental standards, while communities whose rights have been abused struggle to access a remedy. For example, “State Parties shall protect rights holders who are parties to legal proceedings in the public interest and their legal representatives against harassment and intimidation through judicial complaints or counter-complaints.”
- **Art 6 – Prevention:** special attention should be given to those defending human rights and the environment (EHRDs) “another provision requiring States to **ensure that enterprises do not intimidate or harass human rights defenders** is required”.

INSTITUTIONAL ARRANGEMENTS

- Enforcement mechanisms will be crucial to the success of the Treaty. For this, the Committee, established in Article 15, should be equipped with more functions than mentioned in Art. 15.4. The parenthesis in Art. 15.4.e. should be deleted to enable the Committee to request the Secretary-General to undertake studies on specific issues related

⁹ <https://censat.org/es4/noticias/comunicado-a-la-opinion-publica-sobre-accion-de-nulidad-a-la-licencia-ambiental-de-cerrejon>; <https://www.business-humanrights.org/en/latest-news/colombia-civil-society-organisations-rejoinder-to-cerrej%C3%B3n-coal-on-evidences-of-social-environmental-impacts/>.

to the Legally Binding Instrument on his own behalf. The Committee should also be equipped with an individual complaint mechanism to investigate cases of human rights abuses indicated by affected people or civil society groups. Moreover, the establishment of an international court of justice, before which those affected can sue the companies and/or States involved in the case of infringements and the exhaustion of national legal protection possibilities, should be pursued further.

- In addition, resourcing a range of international, regional and national entities, including National Human Rights Institutions and labour tribunals, as well as stepping up monitoring systems will be an important part of making progress. **International action** is necessary to address important acknowledged gaps and help to strengthen national judicial systems.

UNDERLYING PRINCIPLES

We recommend that the Treaty includes the following principles in a cross-sectional way:

Participation

- **Article 1 – Definitions: “Rights-holders” instead of victims.** The definition should include an express recognition not only of persons or group of persons but also of *communities and indigenous and tribal peoples*, using the term included in Agreement 169/89 of the ILO. Groups of persons does not reflect accurately the cultural richness and life plans that characterise indigenous peoples, who are not simply a collective, but a people. *This will strengthen the section dedicated to prior consultation / free, prior and informed consent.* If the above is accepted, the adjustment would have to be made throughout the text.
- **Article 6.3, c) and d)** There should be a **binding value to the consultations and the granting of prior, free and informed consent**, to guarantee that the free prior and informed consent process happens in practice and is adequately implemented. Communities have the right to say NO and have their decision respected.
- **Article 6.2, I 6** – Should establish the special obligation of the States to guarantee access to **timely and adequate information** for the defence of human rights. This is key for social organisations to defend rights and should be regulated in due diligence processes.
- **Article 15 – Committee:** The Committee should have the capacity to receive communications and complaints, and to make recommendations on specific cases. Receiving input from affected people and communities would allow for important feedback on the implementation of the instrument, in view of future improvements.

Gender approach

Business-related human rights abuses impact women in distinctive, intersectional and often disproportionate ways. For example, Indigenous women, who frequently have less formal rights to land, are vulnerable to eviction and dispossession to make way for large-scale development projects. Women are over-represented in precarious work with poor working conditions and are vulnerable to exploitation and abuse, including sexual abuse. Women are less likely to be included in decisions about corporate developments and experience additional barriers in seeking access to effective remedies for business-related human rights abuses. The revised draft includes a new paragraph specifically recognising the need for a gender perspective. Some additional language could clarify the need and scope of a gender perspective (including a new paragraph) which is detailed below. There are further opportunities to ensure a gender-responsive Treaty outlined under other sections.

- **Article 1 – Definitions: “Harm”** Mentions physical, mental, emotional and economic harm, but the gender and ethnic approach is missing from this definition (for example **spiritual and cultural damages**).
- **Article 6(3)(b)** The revised draft references a gender perspective, and additional language should clarify how a gender perspective can be applied. Gender-sensitive assessments must

be conducted with the meaningful participation of women from all affected communities, as well as relevant women’s organisations and gender experts. In such an assessment, multiple and/or intersecting forms of discrimination should be addressed. This information must be compiled in cooperation with those who may be impacted, and it must disaggregate information on impacts to show how women are affected. The following text could be added to Art 6.3b, “whereby women are involved in the collection of data and data is disaggregated by gender and other categories.”

- **Preamble – Paragraph 14:** Recognising the distinctive and disproportionate impact of business-related human rights abuses **on certain groups of people, including** women and girls, children, indigenous peoples, ethnic groups, persons with disabilities, migrants, refugees, and other persons in vulnerable situations, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders, **and additional barriers to an effective remedy, as well as a framework for meaningful engagement in decision-making processes about the effective regulation of business activities.**
- **Article 15 – Committee:** In accordance with CEDAW Article 7 and mirroring the UN’s own gender-parity strategy, gender balance in the monitoring of the Treaty implementation can and should be achieved, rather than considered. In addition to ensuring gender balance of Committee members, the Committee created under the Treaty should foresee gender expertise as a criterion to consider in the selection of experts, given the highly gendered dimension of business-related human rights abuses.
- **[NEW Paragraph 16]** Recognising that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to prevent and remedy business-related human rights violations and abuses against women and girls.

CONCLUSION

We call on all States to consider the revised draft and to **formulate constructive proposals for further elaboration** at the 6th OEIGWG session. 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 own governments and other members of the Human Rights Council to help them to meet this important objective.



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