

# MAKING A KILLING

Holding corporations to account for  
land and human rights violations



**trócaire**

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# LIST OF ACRONYMS

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CESCR	UN Committee on Economic and Social and Cultural Rights
CETIM	Europe-Third World Centre
CFS	Committee on World Food Security
CIDSE	Coopération Internationals Pour le Développement et la Solidarité
CRC	UN Committee on the Rights of the Child
CSW	Commission on the Status of Women
ENNHRI	European Network of National Human Rights Institutions
FAO	Food and Agriculture Organization of the UN
FCCC	Framework Convention on Climate Change
HRC	Human Rights Council
HRDD	Human Rights Due Diligence
IACHR	Inter-American Commission on Human Rights
IBFAN-GIFA	Geneva Infant Feeding Association
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEA	International Energy Agency
ILC	International Land Coalition
ILO	International Labour Organisation
IPCC	The Intergovernmental Panel on Climate Change
IPRA	Indigenous Peoples' Rights Act
ISDS	Investor-State Dispute Settlement
NCP	National Contact Point
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPDHA	Permanent Observatory for Human Rights in the Aguán
RAI	Committee on World Food Security Principles for Responsible Investment in Agriculture and Food Systems
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNDPI	United Nations Department of Public Information
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNESC	United Nations Economic and Social Council
UNGA	United Nations General Assembly
UNSG	United Nations Secretary-General
VGGT	The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

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# THE FOREWORD

In the Polochic Valley region of Guatemala, nine-year-old María and her family live each day in fear of the bulldozers returning to demolish their homes.

They are one of hundreds of families in this region under threat from the growth of large industrial farms, set up to feed the growing global demand for palm oil and sugarcane. Having already lost their homes once, María's family live an uncertain life, constantly at risk of losing everything all over again.

Their story is far from unique. The corporate race for natural resources has put millions of people around the world at risk of exploitation and abuse. Jobs and economic growth allow communities to lift themselves out of poverty. However, the absence of a comprehensive global legal framework on business and human rights has allowed many businesses to exploit communities – stealing land, polluting rivers and inflicting brutal violence on those who question them.

The legal human rights framework governing businesses has not kept pace with the modern economy. Today, we live in a globalised world, where business knows no border. Countries, particularly in the global south, compete for investment from companies often richer and more powerful than they are. The world's top 10 corporations have a combined revenue equivalent to more than the 180 'poorest' countries GDP.

The global rush for natural resources and large scale land acquisition that has marked the past two decades, has impacted the world's poorest people, who are at the front lines of the decisions made by political elites and large businesses. Impunity for human rights violations by a toxic nexus of political leaders and private corporations is not new, indeed, over 20 years ago Trócaire campaigned for the protection of the rights of the Ogoni people in Nigeria in the face of environmental and human rights abuses by Shell. However, violence against land, environment and indigeneous defenders, who resist large corporations is on the rise.

The growing levels of violence stand in stark contrast to the lack of global accountability. It is now time to act.

This report marks the start of a new Trócaire campaign calling for a legally binding global treaty governing business and human rights. We believe this is urgently needed to protect the world's poorest people and ensure their rights are not discarded in the hunt for profits. We believe that Ireland, north and south, can play a positive role by supporting calls for a legally binding UN treaty to ensure economic activity is consistent with upholding people's human rights.

This report argues that devastating human rights violations will continue to occur with impunity unless we move beyond voluntary approaches and bring in a legally binding treaty on business and human rights.



Caoimhe de Barra  
CEO, Trócaire

# EXECUTIVE SUMMARY

## The 21st century economy is dominated by large transnational corporations.

The 21<sup>st</sup> century economy is dominated by large transnational corporations. These companies operate across borders and are often wealthier and more powerful than the states competing to host them. Across the developing world, their use of natural resources can negatively impact communities. Despite this, there is no legally binding instrument to regulate the actions of transnational corporations. The global human rights legal framework has not kept pace with the modern globalised economy.

The current framework is largely voluntary in nature. This means it is ineffective at preventing abuses of human rights by corporations. The vast majority of these violations go unpunished. The size, influence and complexity of corporations pose major challenges for states to hold them to account. Impunity regarding human rights abuses by companies is increasing.<sup>1</sup>

### Attacks on human rights defenders

Communities seeking to protect their human rights from the actions of corporations face growing levels of violence and intimidation. States and corporations often combine to suppress communities who oppose large-scale developments on their lands. Growing numbers of human rights defenders are risking their lives. Companies engaged in land-consuming industries, such as mining, agribusiness, energy and dam construction, are the

most dangerous for defenders.<sup>2</sup> Since 2015, more than 1,400 attacks on activists working on human rights issues related to business have been documented.<sup>3</sup> In 2018, 321 human rights defenders were murdered, 77 per cent of whom were working on land, indigenous peoples and environmental rights.<sup>4</sup> Judicial harassment and criminalisation are commonly used to silence and suppress opposition to business developments. Those who are trying to resist businesses are labelled as terrorists, criminals, and anti-development. Women human rights defenders are targeted through threats of sexual violence and smear campaigns.

### Land acquisition and displacement

These defenders are trying to protect their communities from the impacts of large scale land acquisition, which has dramatically increased since the early 2000s. Over 49 million hectares of communal or smallholder land has been acquired for commercial use by transnational entities since 2000 – approximately seven times the size of Ireland.<sup>5</sup> Investors from high-income European countries account for almost one third of such deals, which are primarily focused in African countries.<sup>6</sup> Indigenous communities often face the human rights impacts of this resource acquisition, often imposed on communities without consent. Trócaire partners have reported violent evictions of people from their lands, pollution of land, destruction of the

environment, loss of livelihoods and deepening poverty. Fifteen million people are forced to leave their homes every year for large development and business projects.<sup>7</sup> Resource extraction is a major contributor to climate change, which not only threatens our ability to achieve sustainable development but it also infringes upon a vast array of internationally recognised human rights. Over 70% of total CO2 emissions are linked to just 100 major fossil fuel companies.<sup>8</sup>

The corporations involved in these actions are rarely held to account and often victims are left without access to remedy. Corporations wield major economic and political power, often aligning with the interests of states or powerful political decision-makers, resulting in a lack of regulation in order to keep and attract investment. Victims can find it difficult to access remedy in the host state (where the violation occurred) and in the corporation's home state. This includes the difficulty of holding a parent company accountable for actions of a subsidiary and legal obstacles used to defeat extraterritorial claims. Corporations avoid liability when their subsidiaries are involved in human rights abuses. These companies can then be bought over or wound up. As long as corporations are able to avoid accountability they can keep operating at the expense of human rights. It becomes a never-ending cycle. It means that victims don't get access to remedy or reparations for human

**“In pursuit of this humanizing enterprise, we should be aware that business-related human rights abuses are much like other human rights abuses: it is the impact of the actions of the relatively powerful on the relatively powerless that we seek to address.”**

**Kate Gilmore, United Nations Deputy High Commissioner for Human Rights<sup>9</sup>**

rights violations. It also guarantees that there will be future victims – because corporations that abuse human rights are not held to account.

### **Ireland’s role**

This gap in accountability requires an urgent global response. Ireland has a strong track record in promoting human rights globally and has a role to play to promote global accountability, particularly in issues that impact so deeply on human rights defenders and civil society space. Ireland should also ensure that Irish companies are not complicit in human rights violations, either directly or indirectly through business relationships. This would require human rights due diligence which is not being undertaken systematically across Irish corporations. Mandatory human rights due diligence would address this and create a level playing field for all businesses.

Ultimately, a binding UN treaty is needed to provide legally binding human rights standards that will apply across states. Ireland has not yet played a proactive role in supporting the development of such a treaty. We call on Ireland to support calls for a binding treaty on business and human rights and to play a constructive role in its development. A legally binding treaty can build a culture of respect for human rights by all corporate entities and allow for the application of the UN guiding principles.

### **IRELAND SHOULD:**

#### **Strengthen corporate accountability:**

Support a UN binding treaty on business and human rights to regulate the activities of transnational corporations and other business enterprises. This treaty should include provisions to ensure the prevention of human rights violations, access to justice, the primacy of human rights over trade and investment agreements, protection of human rights defenders, inclusion of a gender perspective and strong enforcement mechanisms.

Adopt mandatory human rights due diligence to ensure businesses respect human rights across their activities and supply chain.

Implement an effective Irish National Plan on Business and Human Rights that includes a comprehensive gender analysis.

#### **Strengthen resource rights of communities:**

Provide support through the Irish Aid programme for strengthening land and other natural resource rights, particularly for women and indigenous communities.

Ensure Irish investors and corporations respect land and other natural resource

rights through their business operations.

#### **Strengthen civil society space:**

Continue to advocate for an enabling civil society space at the Human Rights Council and other international fora.

Continue to advocate for an enabling civil society space in all countries, at the Human Rights Council and in other international fora.

#### **Protect human rights defenders:**

Explicitly recognise the legitimacy of human rights defenders and publicly support and acknowledge their work, with a particular focus on the participation of women human rights defenders.

Take immediate, appropriate and effective action in relation to specific attacks on human rights defenders – for example through public statements, diplomatic channels, and support for local organisations working to protect human rights defenders.

Once devolution is restored in Northern Ireland, we call on the Executive and Assembly to adopt a National Action Plan on Business and Human Rights, to encourage UK support for a UN binding treaty on business and human rights and take immediate, appropriate and effective action in relation to specific attacks on human rights defenders.



Community members from San Pedro Ayampuc & San Jose del Golfo, La Puya, peacefully protesting against the El Tumbador gold mine. Photo: Daniele Volpe.

# WHY A FOCUS ON CORPORATE ACCOUNTABILITY?

“Enforceable international agreements are urgently needed, since local authorities are not always capable of effective intervention. Relations between states must be respectful of each other’s sovereignty, but must also lay down mutually agreed means of averting regional disasters which would eventually affect everyone. Global regulatory norms are needed to impose obligations and prevent unacceptable actions, for example, when powerful companies or countries dump contaminated waste or offshore polluting industries in other countries.”

**Pope Francis, *Laudato Si’: On Care for Our Common Home***<sup>10</sup>

Nearly 25 years after the murder of Nigerian activist Ken Saro-Wiwa drew widespread international condemnation, serious human rights violations perpetrated by businesses continue in some of the most vulnerable communities in the world. Since 2015, the Business & Human Rights Resource Centre have tracked more than 1,400 attacks on activists working on human rights issues related to business, with over 500 attacks related to land rights.<sup>11</sup> Trócaire works primarily with people living in rural areas, for whom natural resources such as land, water and forests are essential to their livelihood. The growing number of attacks on communities and individuals who are defending their right to resources is therefore at the heart of the types of injustice that Trócaire seeks to challenge.

Transnational corporations, investors, and private individuals are acquiring large areas of land, particularly in developing countries, to extract profitable resources — including commodity crops, timber, minerals, and fossil fuels, at the expense of livelihoods, human rights and the environment. Communal resources, particularly those of indigenous peoples, such as

land, rivers and forests are under threat from polluting industries, deforestation and hydro-electric projects. Women, who have less secure rights to land, are particularly vulnerable to land grabs, eviction and dispossession to make way for large scale development projects, such as extractives or agricultural industry projects.<sup>12</sup>

The impacts upon land arising from the global response to climate change will also continue to exert pressure on land and human rights. The global response to the climate crisis must be urgently accelerated if we are to avoid further exacerbation of poverty, hunger, disease, conflict and displacement. However, the rapid and far reaching changes that are required in mitigating climate change, such as the essential move to 100% renewable energy, pose significant additional risks for communities unless there is effective governance and mandatory human rights due diligence throughout the transition to low carbon societies. For example, there is evidence that some renewable energies infrastructure and mega projects have further contributed to the land and natural resource grab.

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Trócaire partners - many of whom work with communities on the frontlines of resource extraction, have reported violent evictions of populations, lack of respect for indigenous land rights, pollution of land, destruction of the environment, loss of livelihoods, gender based violence, attacks, and even killings of human rights defenders, by businesses and complicit governments. However, the corporations involved in these actions are rarely held to account and often victims are left without access to remedy.

The current legal framework has not kept pace with the proliferation of large and powerful corporations in a globalised economy. Given the vast power of corporations and the complex ways in which they can operate to evade accountability, existing international instruments relating to business and human rights are not adequate to hold corporations to account.

**Power:** many corporations wield huge economic and

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political power, sometimes with revenues larger than the states that are tasked with regulating them. States may be unwilling or unable to regulate their behaviour for fear of losing investment, while some states perpetrate human rights abuses in order to keep or attract investment.<sup>13</sup>

**Remedy in host state:** victims of human rights violations by transnational corporations can find it difficult to access remedy in the host state

(where the violation occurred) for reasons such as lack of due process or political interference, and can also face barriers to accessing remedy in the home state.

**Remedy in home state:** there are particular difficulties in obtaining remedy for human rights violations in home states, including the difficulty of holding a parent company accountable for actions of a subsidiary, difficulties in building a claim when trying

## The Sustainable Development Goals and business and human rights

Human rights are essential to achieving the Sustainable Development Goals (SDGs). The 2030 Agenda for Sustainable Development is explicitly grounded in the UN Charter, the Universal Declaration of Human Rights, international human rights and labour rights treaties, which sets out a framework for poverty eradication and sustainable development. The 2030 Agenda emphasizes that the business sector is a key partner for the United Nations and governments in achieving the SDGs. Paragraph 67 of the 2030 Agenda calls on “all businesses to apply their creativity and innovation to solving sustainable development challenges” and commits states

to “foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with international standards and agreements and other ongoing related initiatives, such as the Guiding Principles on Business and Human Rights...”<sup>14</sup>

The UN Working Group on Business and Human Rights have produced a set of recommendations to governments and businesses on the business and human rights dimension of sustainable development.<sup>15</sup> The working group note that much work remains to be done to translate the SDGs into action in a manner consistent with international human rights standards and this includes ensuring that partnership activities

involving the business sector are based on respect for human rights.

They state that for business, the most powerful contribution to sustainable development is to embed respect for human rights across their value chains. They also note that business strategies to contribute to the SDGs are no substitute for human rights due diligence. They recommend that the increased role of business in development must be coupled with adequate accountability and that individuals and communities who face adverse business-related human rights impacts must have access to effective remedy, including in the context of business operations undertaken in the name of sustainable development.<sup>16</sup>

to access information and evidence in different countries, and legal obstacles that can be used to defeat extraterritorial claims.<sup>17</sup> The example of Shell in Ogoniland shows how a parent company can escape liability and victims can be left without access to remedy.

In addition, under **bilateral investment treaties** and in certain international trade treaties that include investor-state dispute settlement, a company can argue that new laws or regulations could adversely affect the expected profits or potential investment, and seek compensation in a binding settlement. These mechanisms exert a cooling effect on governments enacting policies that may strengthen corporate accountability, ultimately weakening human rights protections.

The above factors act as obstacles to the development and implementation of regulatory frameworks to prevent human rights abuses and for access to remedy for violations that occur. These issues combined, result in a global governance gap that enables corporations who violate human rights to act with impunity. As stated by the

Special Rapporteur on the Rights of Indigenous Peoples “such impunity should be prevented at all costs and the need for a stronger instrument to address this cannot be overemphasized enough.”<sup>18</sup>

While there has been some progress in the emergence of human rights guidance and instruments to regulate the conduct of business, there is a severe legal imbalance between the protection afforded to businesses globally, potentially at the expense of the human rights of citizens, and the lack of legally binding measures to hold them to account for human rights violations. While some treaty bodies are increasingly raising issues of business and human rights, there has been a reticence by states to meet extra-territorial obligations. The UN Guiding Principles on Business and Human Rights (UNGPs) provide guidance to states and businesses on how to meet obligations and responsibilities, but lack the legally binding force needed for implementation of this guidance.<sup>19</sup> The substantive legal reforms needed, such as removal of jurisdictional barriers and allowing for parent company liability for actions of a subsidiary, have not been implemented in the absence of binding regulations,

leaving victims without recourse to justice.

Pressure is building towards more legally binding measures to hold businesses to account. The French Duty of Vigilance law provides an important example of how national legislation can be used to ensure businesses take the necessary steps to ensure respect for human rights.<sup>20</sup> Pressure is also forming at international level. In June 2014, a groundbreaking resolution was adopted by the Human Rights Council that established an Inter-Governmental Working Group to elaborate a legally binding instrument to regulate the activities of transnational corporations and other business enterprises in international human rights law (UN Treaty). The development of a UN Treaty on business and human rights has potential to address the accountability gap at a global level by clearly asserting legally binding obligations in the area of business and human rights. As the Deputy High Commissioner for Human Rights states, this “is our opportunity to take a bold step forward for protection of human rights in the context of business activities, and, most importantly, for strengthened accountability and more effective remedy for those who are the victims of business-related activities.”<sup>21</sup>

## UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) provide guidance for the ways in which states and businesses should operate to enhance standards and practices with regard to business and human rights. The “Protect, Respect and Remedy” framework outlines: the state duty to protect, respect and fulfil human rights; the corporate responsibility to respect human rights; and the need for more effective access to remedies.

## Human Rights Due Diligence

Human rights due diligence is process that a company should to follow in order to identify, prevent, mitigate and account for how it addresses its adverse human rights impacts. It includes assessing actual and potential human rights impacts; integrating and acting on findings; tracking responses; and communicating about how impacts are addressed. Business should conduct human rights due diligence along their supply chain and in their procurement activities.<sup>22</sup>

## UN Treaty on Business and Human Rights

In June 2014, the Human Rights Council established an open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights, to elaborate a legally binding instrument to regulate the activities of transnational corporations and other business enterprises in international human rights law.<sup>23</sup> The fifth session in October 2019 will focus on an official first draft of the legally binding instrument.



Drawing on our experiences of working with communities across the world, and in particular drawing on cases in Central America, East Africa, the Middle East and Myanmar, this paper examines the impact of powerful corporations on communities' access to and control of land and natural resources and human rights. Corporations can and do play an important and productive role in job creation and providing economic opportunities. However, this paper also highlights how the lack of an adequate legislative framework means that the most powerful actors can act with impunity at the expense of some of the most vulnerable.

Based on this paper's review of the scale of human rights violations perpetrated by corporations and the impunity with which they are enabled

to act, we argue that legally binding measures are needed to address the current gaps in accountability and to ensure corporations respect human rights. We recognise that a multi-pronged approach will be needed to address corporate human rights violations. Treaty bodies should continue to strengthen their articulation of the rights enshrined in existing conventions vis-à-vis business enterprises and states should meet their human rights obligations. The UNGPs, recognised as a globally agreed framework which outlines the duties of states and business enterprises, should be implemented.<sup>24</sup> In an Irish context, the implementation of the National Action Plan on Business and Human Rights will be an important step in this regard, along with moves towards mandatory human rights due diligence.

It is widely acknowledged that the UN Guiding Principles and the UN Treaty can be and should be mutually reinforcing and complementary.<sup>25</sup> In the face of continuing violations, whereby victims have little access to remedy and corporations continue to act with impunity all of these measures are important. However, the UN Treaty is the crucial piece that is needed to put an end to the impunity that leaves victims so powerless. Voluntary initiatives cannot be relied upon in order to hold corporations to account. We also cannot rely on individual states to take action, while others lag behind. The issues at stake are global and demand a global response.<sup>26</sup> A culture of respect for human rights by all corporate entities can be established by building on a strong global legal framework.

## Supporting the struggle for Ogoni rights

Trócaire has a long history in calling out the injustices caused by transnational corporations in countries where we work. In the early 1990s the human rights abuses that Shell was imposing on the Ogoni people in Nigeria became a priority campaign for the organisation. Between the 1960s and the 1990s an estimated \$30 billion had been extracted from Ogoniland, yet the people who lived here were among the poorest in Nigeria, with no running water and no electricity. The company had also caused major environmental damage in the area, prompting the formation of the Movement for the Survival of the Ogoni People. After being arrested many times, the Nobel Peace Prize nominee, Ken Saro-Wiwa, was arrested with 8 other colleagues and sentenced to death in a trial that was condemned by international observers. Trócaire called on the Nigerian government to release

the leaders and ran a full page ad in the Irish newspapers entitled "Ken Saro-Wiwa's only crime was to campaign for his people. Now the Nigerian military regime wants to kill him for it," and noting that "37 years after Shell had begun drilling for oil in the area, 400 square miles of Ogoniland were dotted with oil spills, contaminated water and gas flames." In 1995 Ken Saro-Wiwa and his colleagues were hanged, causing international shock and outrage. Trócaire noted that they were killed because they had dared to protest peacefully against the damage that Shell had caused to their land. After these killings Shell continued to rely on the military to stifle opposition and to terrorise communities, while they produced billions in profits, at the expense of the Ogoni people. Trócaire called for accountability and justice for those affected.<sup>27</sup> A 2011 report by the United Nations Environment Programme found

that people in the Niger Delta had been exposed to widespread and severe oil contamination for decades. It found that in one community families are drinking water from a well that is contaminated with benzene (a known carcinogen) at levels over 900 times above World Health Organization guidelines.<sup>28</sup>

In April 2018 a British court ruled that Nigerian communities in the Niger Delta could not sue Shell for serious pollution caused by its Nigerian subsidiary, Shell Petroleum Development Company and that Shell N.V. is not liable for pollution caused by its subsidiary. The victims can expect little from the Nigerian legal system where complex cases such as these can last as long as 20 years. Even after many years of drawn-out court proceedings, acknowledgement and compensation for the victims has not been forthcoming.<sup>29</sup>



**STAND WITH PEOPLE  
UNDER ATTACK  
FROM BIG BUSINESS**

Bertha Zuniga Cáceres (28) stands beside a mural of her mother, murdered human rights activist, Berta Cáceres. Berta is the general coordinator of the Civic Council of Popular and Indigenous Organizations of Honduras (COPINH). Photo: Garry Walsh.



## COMMUNITIES AT THE FRONTLINE

“Indigenous peoples and other local communities continue to suffer disproportionately the negative impact of corporate activities, while community leaders and activists suffer a true escalation of violence on the hands of government forces and private security companies.”

**Victoria Tauli-Corpuz**, *UN Special Rapporteur on the Rights of Indigenous Peoples*<sup>30</sup>

People need access to and control over natural resources, in particular land and water, in order to realise a wide range of rights, such as the right to health, the right to an adequate standard of living and the right to food. Working with communities to ensure they have the right to access and manage water and land resources is therefore one of the four goals of Trócaire’s strategic plan. However, for many of the communities that Trócaire works with, and in particular for women and indigenous people, the rights to access, use and control of natural resources are precarious and vulnerable to exploitation.

Women face multiple barriers in accessing and benefiting from natural resources, including inadequate legal standards and implementation of laws, discriminatory social norms and attitudes in relation to their roles, and exclusion from participation in decision-making. Women are more affected by land tenure insecurity due to direct and indirect discriminatory laws and practices at the national, community and family level,

including land and property deprivation by kin or state.<sup>31</sup> Land reform programmes often target the household, or assign ownership to the “head of household” most frequently defined as a man.<sup>32</sup> Globally, more men than women own land. Data from 10 African countries shows that only 12% of agricultural land is owned by women, compared to 31% by men.<sup>33</sup> Thus, women account for the majority of the world’s hungry; largely as a result of discrimination in access to, and control over, productive resources, such as land, water and credit.<sup>34</sup> Women, and particularly indigenous and ethnic minority women, are more vulnerable to displacement and dispossession in the context of large-scale land acquisition by private companies as they are more likely to lack security of tenure.

Women’s land rights are included in the core human rights documents including the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and the Convention for the Elimination

of All Forms of Discrimination Against Women. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and the Committee on World Food Security Principles for Responsible Investment in Agriculture and Food Systems (RAI) also articulate the importance of gender equality in land and resource rights.<sup>35</sup> Most recently, the Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted in 2018, also recognises that peasant women and other rural women play a significant role in the economic survival of their families, including through informal and unpaid work, but are often denied tenure and

ownership of land and equal access to land.<sup>36</sup>

Indigenous people also have particularly insecure tenure and have suffered historic injustices of colonisation and dispossession.<sup>37</sup> It is estimated that as much as 65% of the world's land is held through customary or community-based tenure systems. However, national governments only recognize formal, legal rights of indigenous peoples and local communities to a fraction of these lands.<sup>38</sup> Weak security of tenure places communities at greater risk of being displaced due to large-scale land acquisitions. For example, for many years the indigenous Tolupanes of Honduras have had to fight to remain on their ancestral territories (of which

they have legal title) and to stop illegal mining exploitation and the logging of their forest. Companies were granted illegal licences by the state to exploit the wood of the Tolupanes people. The Broad Movement for Justice and Dignity (MADJ), a Trócaire partner working with the Tolupanes people has noted that the community has been torn apart by killings of those who have peacefully resisted corporations, with more than 100 leaders murdered in the last 20 years. Martín Fernandez who works with MADJ says, "This motivates you to seek justice, despite the great risk involved, because their communities have been neglected, and these remarkable, brave people have died to defend their land and their rights."<sup>39</sup>

## CASE STUDY: San Rafael Las Flores, Guatemala

**"The Xinka People have historically been made invisible by the Guatemalan State. Today, we are not surprised that a foreign company like Tahoe is using the same discriminatory mechanisms to negate our existence in the area to protect its investment. This is history repeating itself with the same goal as always: to displace our communities. Who are they to decide who I am and violate my right to self-determination? That is my right,"**

**Moisés Divas, Xinka community member and Coordinator of the Diocesan Committee in Defense of Nature (CODIDENA)<sup>1</sup>**

The area of San Rafael Las Flores in Guatemala, approximately 40km from Guatemala City, is populated by the Xinka people. This is also the location of the Escobal mine, the world's third largest gold mine. Originally owned by the Canadian company, Goldcorp, it was bought by another Canadian company

Tahoe Resources Inc. in 2010 and then bought by Pan American Silver Corp. in 2019.

Leaders of the Xinka community oppose the mine due to worries it will harm their ancestral land and water resources. The exploration licence was illegally

granted, without consulting local communities, and Minera San Rafael (subsidiary of Tahoe Resources) entered into operations in 2014. This resulted in major resistance from communities in the area, including the establishment of an encampment to prevent mine traffic from reaching the site. 1000s of people living in the region have voted against the mine and further expansion plans, with numerous plebiscites and peaceful marches held.<sup>2</sup>

### **Criminalisation and attacks**

Members of the Xinka parliament, a representative structure of the Xinka people, feel that they are being persecuted by the Government and the Government is "always on the side of the business". They have identified criminalisation, intimidation, attacks, a lack of consultation and the lack of transparent information from the company as major concerns.<sup>3</sup> Opponents of the mine have been criminalised,

**“This motivates you to seek justice, despite the great risk involved, because their communities have been neglected, and these remarkable, brave people have died to defend their land and their rights.”**

Both the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention No. 169 enshrine a series of fundamental principles to determine the scope of indigenous peoples’ rights to lands, territories, and natural resources. The UN Declaration on the Rights of Indigenous Peoples asserts that states should respect the principle of free, prior and informed consent of indigenous peoples, whose territorial rights extend beyond the land that they directly inhabit and/or cultivate to the broader environment, including natural resources, rivers, lakes and coasts. Indigenous peoples have rights to the lands, territories, and resources that they have traditionally occupied, owned, or used, meaning that it is “the traditional occupation

and use which is the basis for establishing indigenous peoples’ land rights, and not the eventual official recognition or registration of that ownership.”<sup>40</sup> In cases where states retain ownership over mineral and sub-surface resources, Convention No. 169 (article 15.2) stipulates that indigenous peoples have rights regarding consultation and participation in the benefits of resource exploitation, as well as compensation for damages resulting from such exploitation.<sup>41</sup>

with over 100 legal cases being brought against them. They are being stigmatised and in some cases called “terrorists” in order to discredit their work.<sup>4</sup> 239 Xinka women have been criminalised between 2012 and 2017 for engaging in the peaceful resistance.<sup>5</sup> A number of people who were in opposition to the mine have been killed. Laura Leonor Vásquez Pineda was one of the leaders of the Committee for the Defence of Life and Peace, and was murdered in 2017.<sup>6</sup> Telésforo Odilio Pivaral González, another member of the Committee for the Defence of Life and Peace was murdered in 2015.<sup>7</sup> Exaltación Marcos Ucelo was an indigenous Xinka leader and was killed in 2013.<sup>8</sup>

In April 2013, six farmers and a student claimed that they were “shot at close range by Tahoe security personnel during a peaceful protest on the public road outside of the gates of the Escobal mine.” This is now the focus of a civil lawsuit in Canada and the ruling represents the first time that a Canadian appellate court has permitted a lawsuit

to advance against a Canadian company for alleged human rights violations committed abroad. In the judgment, the Court of Appeal overturned a lower court decision that had found Guatemala was the more appropriate venue for the case. The Court of Appeal ruled that several factors, including evidence of systemic corruption in the Guatemalan judiciary, pointed away from Guatemala as a preferable forum, thereby keeping the case in British Columbia. The court concluded that “there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state.”<sup>9</sup>

#### **Lack of consultation**

Initially the State denied the very existence of the Xinka population in San Rafael Las Flores. However, following a legal petition, in 2017, the Constitutional Court of Guatemala ordered the temporary suspension of the license for exploration and exploitation of the San Rafael mine. The court

ordered the Ministry of Energy and Mines (MEM) to carry out an immediate consultation of the local indigenous population in line with ILO 169.<sup>10</sup>

Tahoe Resources was subsequently bought by Canada’s Pan American Silver for a reported \$1.07 billion in cash and stock.<sup>11</sup> It was also reported that “Tahoe shareholders will receive contingent consideration in the form of contingent value rights (“CVRs”), that will be exchanged for 0.0497 Pan American shares for each Tahoe share, currently valued at US\$221 million, and payable upon first commercial shipment of concentrate following restart of operations at the Escobal mine (the “Contingent Purchase Price”).”<sup>12</sup> The extent to which local communities are impacted by the actions of large multinational corporations seeking profit is exemplified in the case of the Escobal mine. As human rights defenders face intimidation, attacks and lose their lives for defending their communities, corporations continue to operate to seek maximum profit for their shareholders.

## Trócaire's approach to supporting people living in poverty to exercise their right to access and control natural resources

Building on experience over 40 years of working with communities, Trócaire's approach is to support interventions at multiple levels:

**At individual level:** we support rural women and men, and excluded groups, to have knowledge, skills and capacity to claim their resource rights, to have timely knowledge of key threats to these, and the support to mobilise to secure, formalise, and take action to defend their natural resource rights

**At community level:** we support communities to mobilise to secure and defend their natural resource rights, and to seek access to justice when violations occur

**At civil society level:** we support a strong, diverse and representative civil society to work collectively to monitor and speak out on key barriers

and threats to resource rights. We support civil society to test and document best practice models in relation to community, particularly women's, natural resource ownership and control, in order to challenge social norms and structures that enable and perpetuate resource rights violations

**At institutional level:** we seek to increase the capability, opportunity and motivation of duty-bearers at local, national and international levels to: take action to recognise and protect the natural resource rights of rural and indigenous communities, particularly women; to protect communities and human rights defenders working to defend these rights; and to ensure respect for international law and policy coherence, in order to support an enabling environment for natural resource rights

Trócaire's takes two key approaches:

**Securing rights:** Awareness raising of customary and other rights to natural resources and how to secure or protect these rights (for example, through mapping and documenting natural resources, seeking formal recognitions/titles as appropriate and advocacy for laws, policies and institutional practices that protect customary and communal rights – with a focus on women's access and inheritance practices).

**Defending rights:** Awareness raising of risks such as extractive industries or mega projects that impact on communal resources including eviction, displacement or pollution, and support to using laws and other alternative mechanisms to mitigate these threats (for example, free, prior and informed consent (FPIC), environmental impact assessments, legal action, compensation, negotiation processes and mediation).

## Reducing conflict risks associated with the extractives industry in Turkana South and East, Kenya

In 2012 Tullow Oil PLC discovered oil in Turkana, in Northern Kenya, and is currently transporting crude oil by road to Mombasa, with the aim of transporting 80,000 barrels of oil per day upon completion of an export pipeline from Turkana to Lamu.<sup>42</sup>

Since the discovery of oil in Turkana country in Kenya, by Tullow Oil PLC, there have been significant concerns, partially based on similar experiences in other developing countries, that while representing a promise of increased financial resources in the county, the development of the oil and gas industry could have

negative economic, social, cultural and environmental impacts upon residents, especially given that the livelihoods of the majority of indigenous Turkana communities depend upon community lands to carry out traditional forms of migratory pastoralism or agro-pastoralism. In particular, there were concerns that it could precipitate an increase in existing violent conflict between and within communities in the county. Turkana is an arid region and is the poorest in Kenya, with 59.9% of the population living in extreme poverty according to the most recent World Poverty Clock.<sup>43</sup>

The ongoing and growing conflict in the county is driven by a scarcity of natural resources, particularly livestock, pasture and water, compounded by successive and increasingly regular droughts largely as a result of the effects of climate change.<sup>44</sup>

Many of the concerns raised have already been realised to some degree. The planned construction of a large oil field in Turkana South and East has now given rise to serious concerns within the local population in relation to their rights to own, control and benefit from the use of land, water and other natural resources, upon

which their livelihoods and culture depend.

In 2017, Trócaire worked in partnership with six local partners based in Turkana to deliver a multi-dimensional programme designed to address the risks of conflict in the county. It focused on working with women and youth in three areas: (i) conflict mitigation: supporting community members to manage conflicts emerging in their locality peacefully and positively; (ii) public participation: supporting community members to participate meaningfully in decision-making processes affecting their lives; and (iii) natural resource rights: supporting community members to claim their rights to land and natural resources, including their right to free, prior and informed consent.

Programme findings indicated that while the legislative and policy framework has developed in Kenya, including the Community Land Act (2016), Environmental Management and Coordination Act (2015) and Petroleum (Exploration, Production & Development) Bill, the operationalisation of such legislation is inadequate.

Key elements to ensuring resource rights in Turkana were identified as: addressing concerns in relation to the implementation of legal and policy frameworks; ensuring free, prior and informed consent for new developments; access to information; public participation; sharing of oil resources; means of land compensation; implementation of environmental regulations, in particular relating to disposal of hazardous waste; and transparency in leasing of land to investors. These issues will continue to be the focus of a Trócaire project in Turkana which will promote human rights by working with affected communities and other key stakeholders to ensure the realisation of their land, resource and environmental rights.



Esther Chegem and her son in Central Turkana, Kenya. Photo: Aidan O'Neill.

The case of fossil fuel extraction in particular raises the fundamental issue evident in the majority of countries, developed and developing alike, around consistency of government energy and economic development policy with their obligations under the Paris Agreement on Climate Change, and the impacts on the type of investment and activity that is enabled, encouraged and regulated. The opening up of new fossil fuel reserves anywhere in the world now pose serious risks to planetary stability given the evidence that the vast majority of known fossil fuel reserves cannot be exploited if the temperatures limits that are central to the Paris Agreement are to be respected.

**In 2017, Trócaire worked in partnership with six local partners based in Turkana to deliver a multi-dimensional programme designed to address the risks of conflict in the county.**

## The global rush for resources

“Conflicts around labour rights, land grabbing or the exploitation of natural resources are doomed to worsen if there is no reassessment of economic and development models that deprive entire communities of their fundamental rights.”

**Michel Forst, UN Special Rapporteur on the Situation of Human Rights Defenders**<sup>45</sup>

Land reforms of the 1990s, reinforced by the World Bank led structural adjustment conditions, provided market-friendly conditions for foreign large-scale acquisition of land, as indebted governments were required to free up land as a commodity.<sup>46</sup> From the mid-2000s a global commodity boom for food, minerals, and energy, underpinned a wave of land use investments in particular in the agriculture, mining and petroleum sectors in low and middle income countries. Investment in metals exploration is estimated to have increased ten-fold between 2002 and 2012, and investment in fossil fuels is estimated to have doubled over the same period.<sup>47</sup> While the commodity boom appears

to have slowed, on-the-ground impacts arising from the boom may still be growing as more of the deals arising from that period are reaching the implementation stage.<sup>48</sup>

This wave of investments has been associated with significant impacts on land. The Land Matrix has documented over 1,500 concluded transnational deals since 2000, which cover over 49 million hectares of land.<sup>49</sup> The latest stocktake of Land Matrix data shows that the large majority of deals related to agriculture, with 1,004 concluded large-scale agricultural land acquisitions covering 26.7 million hectares under contract. Africa is the most significant target area, accounting

for 42% of all deals and 10 million hectares. The top five investor countries are Malaysia, the USA, the UK, Singapore and Saudi Arabia. Investors from high-income European countries are involved in 31.4% of all such deals which makes this region the biggest investor region.<sup>50</sup> Private companies and stock-exchange listed companies constitute 70% of all deals. Investment funds and governments play a relatively small role as secondary investors in large-scale land acquisitions, but are involved through indirect engagement such as the financing of stock exchange-listed companies and pension funds.<sup>51</sup>

The state plays a key role in land deals by creating a narrative about

## CASE STUDY: Polochic Valley, Guatemala

**‘There were many many police, army and security contractors at the eviction. I begged them not to burn my house and crops but they went ahead. They could have killed us but we ran away.’**

**José Cuc Cuz (45) is from the community of Parana and this is how he described the night the community was forced to flee their home.**<sup>1</sup>

Access to ancestral land has been denied to Q’echi communities in the Polochic Valley for centuries, most recently due to the accelerated expansion of oil palm monocultures in 1998 and sugarcane in 2005 which was financed by the Central America

Development Bank for Economic Integration. After the economic collapse of the sugarcane mill the communities settled in the fertile part of the valley.<sup>2</sup> In March 2011, 769 families from fourteen Q’eqchi communities were evicted from the valley by private security

forces accompanied by officials from the Attorney General’s office.

In most cases families were given less than one hour’s notice to leave, before being violently evicted by military and riot police. Their houses were burned, along with their remaining possessions. After 22 weeks living on the roadside with no support, community members from Parana moved back to their land. They were attacked in the middle of the night by state police and private contractors. Two people were injured, an old man and a young girl who were shot.

The Inter-American Human Rights Commission documented acts of

why these deals are necessary; and by identifying “marginal” and “available” land, including through reclassifying land; expropriating land; and through (re)allocation or dispossession processes, which can be legal or illegal.<sup>52</sup> Communal, customary and indigenous land is particularly vulnerable to being identified as available and often developments are initiated without free, prior and informed consent. “Every year 15 million people are forced to leave their homes and land to make way for large development and business projects, such as the construction of hydroelectric dams, mines and oil and gas installations, or luxury resorts for tourism.”<sup>53</sup>

Communities evicted or coerced from their land often have little recourse to justice, pushing them into poverty. For example, in the Aguán Valley in Honduras, hundreds of families were coerced into selling, or were evicted and dispossessed of their land to allow for the expansion of industrial-scale plantations of African

Palm. Allegations were made to the World Bank that the Dinant Corporation (who received \$15 million in loans from the World Bank), conducted, facilitated or supported forced evictions in the area. Communities were terrorised and it is alleged that the Dinant Corporation hired paramilitary death squads and private assassins to murder those that resisted.<sup>54</sup> It is estimated that up to 130 people were killed between 2008 and 2013, and a government unit set up to investigate the deaths during the conflict has only processed one case to date.<sup>55</sup>

Human rights issues also arise when the actions of corporations result in pollution and environmental degradation, resulting in loss of livelihoods for entire communities. Since 2008, communities living near the Heinda mine, operated by the Thai company Myanmar Pongpipat Company Limited (MPCL), have reported that it has contaminated the Myaung Pyo river in Myanmar. The surrounding communities rely on agriculture and use this water

**Communities evicted or coerced from their land often have little recourse to justice, pushing them into poverty.**

as a source for drinking, domestic use and for irrigation. The polluted water has allegedly caused health problems and damaged the quality of soil for farming. Villagers have reported that in rainy seasons, the water turns dark-red or blackish and greasy, and in dry seasons, the water turns bright-orange with strong smells. The mining has also led to large amounts of sediment in the river and flooding increases during the rainy season. A four-year battle with MPCL went all the way to the Myanmar Supreme Court. However, in February 2018 their legal case was dismissed due to procedural issues. The community have not received any compensation for damages to their land and water.

violence against the communities, which reportedly led to the deaths of two individuals. In June 2011, the Inter-American Commission for Human Rights ordered the Guatemalan state to protect the rights of the 769 families, to provide humanitarian assistance including food and housing, and to find a long-term solution for land access for the evicted families.<sup>3</sup> So far the government has largely failed to implement these measures and families live in constant fear of forced eviction.

Trócaire is supporting this community and others through our partner organisation in a number of ways including negotiating with local and central government to obtain land or land title for the families. “It is really important that Trócaire is



supporting our community. I really believe that without the support we have received many of us would be in prison today. We have been motivated to continue the struggle,” said José.

José and his wife Adele, with their children, Edgar, Walter, Jessica and Maria, their daughter in law Flavia, and grandson Joel. Photo: Manuel Morillo.

While the boom in investments appear to have slowed across these sectors as a result of the more recent commodity slump, global population growth, rising incomes and changing consumption patterns are expected to increase demand for commodities in the longer term.<sup>56</sup> The impacts upon land and land-use arising from the global response to climate change will also continue to exert pressure on land and human rights. Experiences with the

Clean Development Mechanism (CDM)<sup>57</sup> under the Kyoto Protocol demonstrates how instruments and policies to incentivise and facilitate private sector investment in delivering climate action can result in negative human rights outcomes when human rights and human rights accountability are not embedded in corporate practice.<sup>58</sup> For example a CDM project was approved in the Aguán Valley for a project that optimises the wastewater treatment system of the palm oil mill from

the plantations that are at the centre of evictions and killings – as referenced above.<sup>59</sup> The scale of decarbonisation that will be required to meet the temperature limit goals set out in the Paris Climate Accord will require a range of approaches and initiatives that, without effective governance, will have profound consequences for communities. Pressures upon communities depending on their natural resources is therefore likely to continue to grow.

## Climate Change – a double edged threat

According to the Intergovernmental Panel on Climate Change (IPCC), the slow and inadequate response of the international community to the climate crisis means that what is now required to prevent breaching the temperature limits set out in the Paris Agreement is a transition of unprecedented scale over the next decade.<sup>60</sup>

The poorest and most marginalised people in the world are disproportionately impacted by climate change and they are also the most vulnerable to unintended consequences arising from decarbonisation. In their most recent report, '*Global Warming of 1.5°C*',<sup>61</sup> the IPCC assessed the compatibility of various decarbonisation pathways with delivery of the Sustainable Development Goals. They found that the scale of the transition required poses profound challenges for sustainable management of multiple demands on land, including for human settlements, food, livestock feed, fibre, bioenergy, carbon storage, biodiversity and other ecosystem services. The IPCC point out that, without effective governance, many approaches needed to stay within the 1.5°C limit can result in negative trade-offs.<sup>62</sup>

The Paris Agreement is the first climate change treaty to explicitly acknowledge the need for human rights to be embedded in climate action, "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."<sup>63</sup>

Governments hold ultimate responsibility for ensuring the decarbonisation process is managed in a way that is conducive rather than regressive to the realisation of human rights. The increased emphasis placed by governments in recent years on mobilising private finance to

help deliver development and climate change goals does not free them of this responsibility, rather it requires them to ensure an institutionalised human rights safeguards system at national and international levels.

One of the main authors of the IPCC's recent Special Report on warming of 1.5 °C highlights that "the next few years are probably the most important in our history."<sup>64</sup> Without systematic application of human rights safeguards, including corporate accountability, the urgently needed increase in climate action coupled with the significant emphasis being placed on the role of the private sector in delivering the transition, presents a significant threat to communities living in poverty, exacerbating the direct impacts of climate change, of which they already disproportionately bear the burden.

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**Without systematic application of human rights safeguards, including corporate accountability, the urgently needed increase in climate action coupled with the significant emphasis being placed on the role of the private sector in delivering the transition, presents a significant threat to communities living in poverty**

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## Deteriorating political context: restrictions on civil society space

“People and civil society groups often risk their lives to improve the lives of others. They speak out even when knowing they could be silenced forever... They protect our rights. They deserve their rights.”

*Former UN Secretary-General* **Ban Ki-moon**<sup>65</sup>

“...business enterprises already have significant influence over States and ensure that regulations, policies and investment agreements are framed in a way that promotes the profitability of their business, often to the detriment of human rights. Concomitant to this is the growing trend among States to adopt legislation curtailing the activities of civil society organizations.”

**Michel Forst**, *UN Special Rapporteur on the Situation of Human Rights Defenders*<sup>66</sup>

The rush for resources has been happening at the same time as a deterioration in the political context for negotiating resource disputes. Restrictive NGO laws, administrative burdens and funding restrictions are increasingly common and in particular targeted at NGOs that engage in human rights work and critical advocacy.

In July 2017, the number of states in which action had been taken to restrict the activities of civil society reached a record 106, which is more than half the number of states who are members of the United Nations.<sup>67</sup> These can include arbitrary measures under the guise of legality (e.g. anti-money laundering, anti-terrorism,

national security, public morals, defamation, protection of national sovereignty) and can include arbitrary scrutiny of management and internal governance, threats of, or actual, de-registration, forced office closures, search and seizures of property, exorbitant fines, spurious prosecutions, arbitrary arrests and detentions and bans on travel.<sup>68</sup>



Women from San Pedro Ayampuc & San Jose del Golfo, La Puya, resisting the El Tambor gold mine. The community members are peacefully protesting and surrounded by police. Photo: Daniele Volpe.

The UN Special Rapporteur on the Situation of Human Rights Defenders notes concerns about the negative impacts of business interests on civil society including the over-regulation of non-governmental organisations, limitations on advocacy, and restrictions on the receipt of international funding.<sup>69</sup> Many of Trócaire's partners report pressure on their organisations, which is directly related to the pressure they are placing on corporations. For example, in Honduras, the Broad Movement for Justice and Dignity (MADJ), had their bank accounts closed down in order to curtail their work. In Guatemala, a proposed NGO law is being considered, which would greatly restrict human rights work of national and international NGOs. Independent and well-resourced civil society is crucial for sustainable development and human rights accountability. The realisation of human rights can only happen in practice when

members of civil society are monitoring rights implementation, when they are claiming rights and informing how human rights should be realised in local contexts.

Corporations can profit from grave breaches of international law and in fact facilitate human rights violations in contexts where respect for human rights is weakly enforced or contested. For example, corporations that operate in illegal Israeli settlements are operating in a context where Palestinians' rights are violated consistently and on a daily basis. This includes their rights to freedom of self-determination, non-discrimination, freedom of movement, equality, due process, fair trial, not to be arbitrarily detained, liberty and security of person, freedom of expression, freedom of access to places of worship, education, water, housing, adequate standard of living, property, access to

natural resources and effective remedy.<sup>70</sup>

The violations of human rights associated with illegal settlements are pervasive and devastating, thus the generation of profits by corporations from economic activity that facilitates this abuse needs to be addressed. A number of developments to address economic activity in the Israeli settlements are progressing, such as the UN Database on Business Enterprises with Activities Related to Israeli Settlements in the Occupied Palestinian Territory (see below). In addition, *The Control of Economic Activity (Occupied Territories) Bill 2018*, which seeks to prohibit certain economic activity with settlements beyond internationally-recognised borders, could also be applied to trade with the Israeli settlements given that they have been deemed to violate international law.

## UN Database on Business Enterprises with Activities Related to Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan

Despite UN resolutions declaring the illegality of settlements in the West Bank, the settlements continue to expand along with the development of new structures, thus undermining the right of Palestinian people to self-determination.<sup>71</sup> In 2013, an independent fact finding mission, mandated by Human Rights Council resolution 19/17, found that business enterprises have "directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements."<sup>72</sup> In 2016, the Human Rights Council (HRC) adopted resolution 31/36 which requests that the UN High Commissioner for Human Rights would produce a database of all business enterprises engaged

in certain Israeli settlement activity in the occupied Palestinian territory.<sup>73</sup> The listed activities range from the supply of equipment and materials facilitating the construction and the expansion of settlements and the wall; the supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops; to the provision of services and utilities supporting the maintenance and existence of settlements, including transport.<sup>74</sup> It is envisaged that that database will be a living database that will be updated, and be communicated annually at the Human Rights Council. The 2018 report of the OHCHR

identified one Irish company that had been screened but not yet contacted.<sup>75</sup> The database will assist both states and business enterprises in complying with their respective legal obligations and responsibilities under international law.<sup>76</sup> The OHCHR is due to publish before the March 2019 Human Rights Council session.

## A growing threat: killing, harassment and criminalisation of human rights defenders (HRDs)

“...defending and promoting human rights in the context of business is dangerous, and even deadly, work. For defending human rights over profit, privilege and prejudice, ordinary people, communities, workers and trade unionists face stigmatization, criminalization, physical attacks and sometimes death.”

**Michel Forst**, *UN Special Rapporteur on the Situation of Human Rights Defenders*<sup>77</sup>

“The data on disappearances, unlawful killings and assassinations tells a horror story about the burden of fear, intimidation and violence associated with some business activities and borne at great personal cost by human rights defenders and other activists, including land rights and environmental defenders, and by affected communities.”

**Kate Gilmore**, *United Nations Deputy High Commissioner for Human Rights*<sup>78</sup>

As the threat to natural resources has grown, communities seeking to protect their human rights have faced growing levels of violence and intimidation. Growing numbers of human rights defenders are risking their lives in order to protect their communities from the activity of corporations in the areas of extractive industries, energy and infrastructure projects. Companies belonging to land-consuming industries, such as mining, agribusiness, oil, gas and coal and dam construction, are the most dangerous for defenders.<sup>79</sup> In 2018, Front Line Defenders documented 247 killings of defenders working on land, indigenous peoples’ and environmental rights. These defenders are reported to be 3 times more likely to be killed than those working in other sectors. They are also more likely to be targeted by physical attack and smear campaigns.<sup>80</sup> With many killings unreported, and even less investigated, it is likely that the true number is actually far higher.

Judicial harassment and criminalisation are among the most common forms of attacks to silence opposition to business-related projects.<sup>81</sup> The Inter American Human Rights Commission notes that since 2010 there have been

3,064 prosecutions as a result of the misuse of criminal law to intimidate human rights defenders in Honduras.<sup>82</sup> There is also a worrying trend whereby laws are being developed to prosecute those who resist projects locally in higher courts. For example, in Honduras, an amendment to a jurisdictional law in 2017 included trespassing as a criminal offence, which means cases against human rights defenders face longer sentences and are treated in the same manner as the most dangerous criminals.<sup>83</sup> In Guatemala, a proposed Law 5239 on anti-terrorist acts includes a definition of cyber-terrorism that criminalises criticism of the government and would make it possible to prosecute obstruction of traffic, through protest, as a criminal act.<sup>84</sup> The Special Rapporteur on human rights defenders has also expressed particular concern about the complicity of states

who tend to pursue cases against human rights defenders, whilst ignoring those initiated against corporations.<sup>85</sup>

Our partners have also reported experiencing smear campaigns, travel bans, imprisonment, gender-based violence and an undermining of the right to freedom of assembly. Other extra-legal actions include threatening phone messages, surveillance, physical attacks and destruction of property.<sup>86</sup> Those who are trying to resist businesses are being labelled as terrorists, criminals, and anti-development in order to undermine and discredit them, and to deter others from joining with them and acting in solidarity. For example, in November 2018, Front Line Defenders put out an alert in relation to Juana Esquivel, director of Fundación San Alonso Rodríguez (FSAR), in Honduras, who was targeted in a smear campaign due to her support

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**Those who are trying to resist businesses are being labelled as terrorists, criminals, and anti-development in order to undermine and discredit them, and to deter others from joining with them and acting in solidarity.**

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for activists at Guapinol who are resisting the development of a mine in their area, which has already caused damage to their river. Her and her colleagues are being identified as criminals and anti-progress.<sup>87</sup> In February 2019, 13 community leaders from Guapinol were arrested under the national jurisdiction court for organised crime. This is an extremely worrying development in the criminalisation of land and environmental defenders, using a law that was designed to prosecute members of highly dangerous crimes, such as organised crime.

Women human rights defenders are targeted in particular ways due to their gender, including through

threats of sexual violence and dissemination of sexual images in order to stigmatise them. Often the attacks against them are not acknowledged as such and not reported. The work of women human rights defenders can be seen as challenging social norms and gender roles in society, which can lead to hostility by the general population and the authorities.<sup>88</sup> These defenders face the added layers of institutionalised sexism when trying to access justice.

A lack of state action in response to attacks creates a culture of impunity, increasing the likelihood of future attacks. The Special Rapporteur on the situation of HRDs notes that attacks, including killings, of human rights defenders

take place in a context where business enterprises already have significant influence over states and ensure that regulations, policies and investment agreements are framed in a way that promotes the profitability of their business, often to the detriment of human rights.<sup>89</sup> In some cases companies have used state forces, private security or organised crime to attack human rights defenders, and so, often the state is complicit or directly involved in the attacks.<sup>90</sup>

## Case Study: Daw Tin Hla

Daw Tin Hla, 61, lives in Myaung Phyong village in southern Myanmar, which has been affected by pollution from the nearby Heinda tin mine. She is active on her village's mining monitoring group, which gets access to observe the company's mine, and engage directly with government.

She says that as a result of the pollution the water is not safe to drink, and of the 140 households in the village, only 30 have access to safe drinking water. Daw Tin Hla has lost 250 betel nut trees and 12 coconut trees on her land due to flooding caused by the mine, and has not received any compensation.

Daw Tin Hla has been active in organising the community, and campaigning for compensation and for the company to prevent further pollution of their river. One success has been the

establishment of a formal mining monitoring group. The government gives this group the right to inspect the mine and report directly to the government with the community's concerns. When the community lost their compensation case, Daw Tin Hla was very upset. She spoke publicly about the case, and cried during the press conference. She says "my plantations are my life, my only livelihood".

Daw Tin Hla doesn't trust in the company's Environmental Impact Assessment, saying that it has been done "in secrecy" without proper consultation with the community. However she says that the regional Minister for Natural Resources and Environmental Conservation does listen to the community's concerns and negotiate with the company on their behalf. Following meetings with the



Minister and the monitoring group together with the company, Daw Tin Hla feels that the company is starting to behave better, and is paying better wages to its staff. She says "the government are responsible to protect the community" and need to be accountable.

## Case study: Río Blanco, Honduras

**“Today there’s no satisfaction, or happiness, but we are glad to see jailed the killers who murdered my mother simply for defending natural resources at a moment when she was defenceless. We don’t want revenge because we are not killers like them, but we demand that the masterminds behind the murder be brought to justice.”**

*Olivia Zuniga, Berta Cáceres’s eldest daughter<sup>1</sup>*

In 2011 the Honduran company, Desarrollos Energéticos SA (DESA), started construction of a hydro-electric project in Río Blanco in western Honduras, home to the indigenous Lenca community. This relatively small project threatens the Gualcarque river and the communal farm lands that surround it.<sup>2</sup> Led by the confederation of indigenous organisations of Honduras (COPINH), the community have asserted the right to free, prior and informed consent, in relation to a project that will have an impact on their lives and environment. The vast majority of the local population has been protesting against the dam and there has been massive resistance in the area since 2013. Their resistance was met with repression, criminalisation and targeting of COPINH members. Global Witness have documented a litany of attacks and killings of human rights defenders who have opposed the Agua Zarca project.<sup>3</sup>

### **Accountability for the murder of Berta Cáceres**

Berta Cáceres’s was one of the most prominent environmental defenders in Honduras, co-founder of COPINH and an inspiring advocate for human rights. She was murdered in March 2016 following repeated intimidation and death threats

due to her opposition to the Agua Zarca hydro-electrical project. Significant concerns have been expressed internationally about the trial of her murder, particularly regarding the exclusion of victims and the delay in trial proceedings. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his mission to Honduras in 2017 expressed concern that case files had been stolen from a Supreme Court Magistrate and from the offices of the Broad Movement for Justice and Dignity (MADJ).<sup>4</sup> The lawyers for the family, including Victor Fernandez of MADJ, were expelled from proceedings shortly

before the trial, after calling for the judges to be recused for bias and abuse of authority. In November 2018, seven men were found guilty of her murder, two of whom are directly linked with DESA (the DESA communities and environment manager and the former DESA security chief). Three of the seven men have ties to the Honduran army.

Despite this ruling COPINH and the lawyers for Berta Cáceres have noted that the owners and board of the company need to be held to account. DESA documentation shows that its board includes members of the business and political elites of Honduras. Accountability needs to go to the highest levels. This is echoed by human rights experts who have said that “while we acknowledge that the decision of the court is a positive development, we remain concerned that the intellectual authors and the financiers of the crime have still not been investigated, prosecuted and sanctioned.”<sup>5</sup> Furthermore, the Honduran Government should revoke the license granted for the Agua Zarca dam.



Austra Berta Flores Lopez (86) mother of Berta Cáceres, and Agustina Flores Lopez (59) sister of Berta Cáceres. Photo: Garry Walsh.

# MAKING A KILLING

## HOLDING CORPORATIONS TO ACCOUNT FOR LAND AND HUMAN RIGHTS VIOLATIONS



Since 2015 more than

**1400  
ACTIVISTS**

working on human rights related to business have been attacked.<sup>1</sup>



In 2018,

**247 PEOPLE**

were murdered for defending land, indigenous peoples and environmental rights.<sup>2</sup>



**SIXTY-NINE**

of the world's top global economic entities are corporations, with only 31 being countries.<sup>3</sup>



Investors from high-income

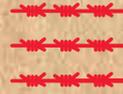
**EUROPEAN  
COUNTRIES**

are involved in 31.4% land deals which makes this region the biggest investor region.<sup>4</sup>



**OVER 70% OF TOTAL CO<sub>2</sub> EMISSIONS**

are linked to just 100 major fossil fuel companies.<sup>5</sup>



In July 2017, the number of states in which action had been taken to

**RESTRICT THE  
ACTIVITIES OF  
CIVIL SOCIETY**

reached a record 106, which is more than half the number of states who are members of the United Nations.<sup>6</sup>



In 2015, the world's

**TOP 10  
CORPORATIONS**

had a combined revenue equivalent to more than the 180 'poorest' countries.<sup>7</sup>



The 2018 UN Global Compact Progress Report found that only

**27% OF  
COMPANIES**

reported performing risk assessments directly linked to human rights, and only 17% reported conducting impact assessments linked to human rights.<sup>8</sup>



In 2018,

## 26 HUMAN RIGHTS DEFENDERS

were killed in Guatemala.<sup>9</sup>



Since 2010 there have been

## 3,064 PROSECUTIONS

as a result of the misuse of criminal law to intimidate human rights defenders in Honduras.<sup>10</sup>



In December 2013, Guatemala was ordered to pay

## \$21.1 MILLION DAMAGES

to a US based electricity company for introducing a regulation to lower electricity rates.<sup>8</sup> This was the equivalent of the per capita health spend for 44,608 Guatemalans in 2014.<sup>11</sup>



Africa is the most significant target area for

## LAND ACQUISITIONS

accounting for 42% of land deals since 2000.<sup>12</sup>



## CRIMINALISATION, ATTACKS AND HARASSMENT

have increased in Honduras since the coup of 2009. Between 2010 and 2017 more than 120 land defenders were murdered.<sup>13</sup>



As of 2016 there were

## 837 POTENTIAL MINING PROJECTS

in Honduras, extending across nearly 35% of the nation's territory.<sup>14</sup>



A community in the Niger Delta was found to be drinking water from a well that is

## CONTAMINATED WITH BENZENE

(a known carcinogen) at levels over 900 times above World Health Organization guidelines.<sup>15</sup>



Data from 10 African countries shows that only

## 12% OF AGRICULTURAL LAND

is owned by women, compared to 31% by men.<sup>16</sup>



Daw Tin Hla from Myanmar lost her livelihood due to pollution from a mine and now is working to hold the government and mining company accountable. She shows how the contaminated water has changed the colour of this bowl from silver to bronze.

Photo: Garry Walsh.

# CORPORATIONS: THE ACCOUNTABILITY CHALLENGE

“I have spoken of the economic and largely non-transparent power and authority of multinational corporations, an influence that is being felt unequally across the world, but that is being felt nonetheless. So often when we speak of the market, we are really speaking of large individual firms, some exercising extreme power, far greater and more extensive than that of the state.”

President **Michael D. Higgins**<sup>91</sup>

“Too often those whose human rights are affected by the operations of businesses... are left without any real access to effective remedies, and often states themselves are without the requisite tools to hold corporations accountable where needed.”

**Victoria Tauli-Corpuz**, *UN Special Rapporteur on the Rights of Indigenous Peoples*<sup>92</sup>

The current legal framework has not kept pace with the rise of large and powerful transnational corporations in a globalised economy and has therefore been ineffective at preventing widespread abuses of human rights by corporations. Furthermore, the vast majority of human rights violations perpetrated by corporations go unpunished and impunity regarding human rights abuses by companies is increasing.<sup>93</sup> In international human rights law, states are considered the primary duty-bearers, with a duty to ensure that non-state actors, including corporations, respect human rights. They should regulate the conduct of businesses to ensure they are not violating human rights and provide an effective remedy to victims of human rights violations, including human rights defenders.<sup>94</sup> However, the size, influence and complexity of corporations, along with the transnational nature of much business, pose major challenges for states or victims to hold them to account.

## Power of corporations

Since the 1970s, the dominance of the neoliberal model of free trade, liberated markets and the privatisation of public services, has facilitated the proliferation of transnational corporations. Supported by international financial institutions including the IMF and the World Bank, transnational corporations have gained unprecedented economic and political power in a few decades.<sup>95</sup> Sixty-nine of the world's top global economic entities are corporations, with only 31 being countries.<sup>96</sup> In 2015, the world's top 10 corporations had a combined revenue equivalent to more than the 180 'poorest' countries.<sup>97</sup>

While most transnational corporations are headquartered in industrialised countries, many of them have operations in the global south, including in countries whose revenues are dwarfed by those of the corporations

they are tasked with regulating. According to UNCTAD in 2013, 93 of the 100 biggest TNC's had their main headquarters in countries of the global north.<sup>98</sup> However, the overwhelming majority of human rights violations are taking place in countries of the global south. In his 2006 report, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises surveyed allegations of the worst cases of corporate-related human rights harm. He found that they occurred disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high.<sup>99</sup>

There are significant power imbalances between the capacities of states to meet their obligations to protect citizens from human rights abuses by third parties, and the resources of transnational corporations. Governments may be unable

or unwilling to enforce human rights with respect to these corporations, or in some cases, may commit human rights violations themselves in order to attract inward investment and to facilitate commercial activity of transnational corporations.<sup>100</sup> For example, the Guatemalan State facilitated the development of a hydro-electric project by Hidro Santa Cruz (a subsidiary of Hidralia Energia, a Spanish-owned hydroelectric company) in Santa Cruz Barrillas Guatemala, through granting concessions without consulting with the community and by criminalising the Q'anjob'al people who were resisting the project. In May 2012, the Government declared a state of siege and carried out arbitrary arrests. The report of the UN High Commissioner for Human Rights states that the decree establishing the state of siege lacked a clear justification and analysis of necessity, exceptionality and proportionality and that the 9 arrests constituted illegal detentions.<sup>101</sup>

Corporations operating domestically can also wield major economic and political power. Indeed, the board of the company at the centre of the murder of Berta Cáceres in Honduras, includes a former government official, a former military intelligence official and some are part of one of the most powerful families in the country. In a global context where there is an increase in nationalism, conservative policies and protectionism, there is also a danger of states turning inward with less focus on their international reputations and compliance with human rights standards, thus further weakening accountability for non-state actors.<sup>102</sup>

Corporate lobbying power extends to within the United Nations. Corporate actors have pushed for voluntary, partnership and consensus approaches at the UN rather than

a regulatory approach that will hold perpetrators of human rights violations accountable. Business organisations have lobbied against binding regulations and currently oppose the proposed UN Treaty on Business and Human Rights.<sup>103</sup>

## Complexity and structure of transnational corporations

The complexity of corporate structures in a globalised economy enables transnational corporations who commit human rights violations to evade accountability. The UN Guiding Principles set out some of the legal barriers that can prevent legitimate cases involving business related human rights abuses from being addressed, including: the ways in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws; where claimants face a denial of justice in a host state and cannot access home state courts; and where certain groups including indigenous groups and migrants are excluded from the same level of protection that applies to the general population.<sup>104</sup> The UNGPs acknowledge the additional barriers or marginalisation that particular groups may face in accessing remedy.<sup>105</sup> Indeed the embedding of discriminatory systems within institutions, including the courts and judiciary, can operate to exclude women, indigenous people and people from poorer communities from justice mechanisms. For example, in her report on Guatemala the Special Rapporteur noted that

“indigenous people continue to experience serious difficulty, against a backdrop of extreme impunity, in obtaining access to the ordinary justice system in a way that meets the relevant international standards. The Special Rapporteur received numerous testimonies about the discrimination and racism suffered by indigenous people, particularly indigenous women, when they apply to the courts at the local level.<sup>106</sup>

### Legal liability

It can be difficult to hold parent companies legally accountable for the abuses caused by their subsidiaries. These legal concepts of separate corporate entity and limited liability have their roots in colonisation and were first applied to the British and Dutch East India Companies.<sup>107</sup> Referred to as the “corporate veil” a parent company can avoid liability for the actions of a subsidiary by stating that they are a separate legal entity, even when it would have been in a position to influence the conduct of a subsidiary. Parent companies can counter cases by arguing that the subsidiary is the responsible party. Lifting the corporate veil only occurs in exceptional circumstances.<sup>108</sup> In the case of *Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* (2017) (see box – section 1) the UK court found it did not have jurisdiction to hear the claims against the subsidiary. As recognised by the UN Committee on Economic, Social and Cultural Rights, establishing the causal link between the conduct of the business in one jurisdiction and

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**The complexity of corporate structures in a globalised economy enables transnational corporations who commit human rights violations to evade accountability.**

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the abuse which occurred in another jurisdiction represents an enduring challenge for victims.<sup>109</sup> However, in the case of *Vedanta Resources PLC and Another v Lungowe and Others*, the Court dismissed the appeal of the UK company Vedanta Resources, who were appealing a previous court decision to allow claimants from Zambia to bring their case to the UK – thereby allowing the case to be held in the UK courts.<sup>110</sup> This decision is important in opening up the possibility that parent companies could be liable to communities affected by the operations of their subsidiaries.

**Jurisdiction**

Victims can face obstacles to justice both in the country where the human rights issues arise, the host state, and also in the home country, where the transnational corporation has its headquarters. While the existing human rights framework does set out extraterritorial obligations for

states, there are particular barriers that affected individuals face while trying to access remedy in a different jurisdiction from where the violation took place.

The legal doctrine of *forum non conveniens*, whereby courts are given discretion to dismiss a case in favour of a foreign jurisdiction is an obstacle for victims of corporate human rights violation seeking redress in the home countries of a corporation. As the UN Committee on Economic, Social and Cultural Rights (CESCR) notes, this means that states can decline exercising jurisdiction on a legal case when they believe another jurisdiction is available to the victims. As there may be many reasons as to why a claim may not be possible in a host state, including lack of due process, political interference, mistrust of the courts or lack of affordable legal assistance, legal options in the home state of the corporation also need to be leveraged to ensure justice.<sup>111</sup>

Past experience has also shown that where cases proceed against local subsidiaries in host state courts, there can be a risk that the subsidiary has insufficient funds, will be uninsured or will be wound up, resulting in inadequate reparations for victims.<sup>112</sup> In 2017, for the first time, a Canadian court accepted jurisdiction for alleged human rights violations in Guatemala (see box in section 2). In this case, the British Columbia Court of Appeal rejected efforts by the Canadian company Tahoe Resources Inc. to dismiss the lawsuit and concluded that there was a risk that the claimants would not receive a fair trial in Guatemala, thus accepting jurisdiction.<sup>113</sup>

**Access to information**

Many of the barriers that victims of human rights violations face in holding corporations to account are the result of, or compounded by, imbalances between victims and corporations with regards to



José Cuc Cuz with his sons Edgar and Walter. They are struggling to retain their right to live on their ancestral lands. Photo: Manuel Morillo

financial resources and access to information and expertise. It can be difficult to access evidence on a company's structure or governance that might be crucial for a legal case. In this context victims of human rights violations can find it very difficult to access evidence of the company's activities and this undermines their ability to build a successful case. These issues are all the more difficult when challenging major corporations with well-

funded legal teams compared to the resources likely to be available to communities living in poverty. In this context, the reversal of the burden of proof for victims of violations and a requirement of corporations to disclose information is needed. The Committee on the Rights of the Child note that the lack of mutual legal assistance for the collection of evidence and the enforcement of judicial decisions can seriously impede justice.<sup>114</sup>

UN Guiding Principle 26 notes that "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."<sup>115</sup>

## Trade and investment: tipping the scales further in favour of corporations

"It has become apparent that the regulatory function of many States and their ability to legislate in the public interest have been compromised. The problem has been aggravated by the chilling effect of certain awards that have penalized States for adopting regulations to protect the environment... The legality of such awards is questionable as contrary to domestic and international ordre public..."

**Alfred-Maurice de Zayas**, *UN Independent Expert on the Promotion of a Democratic and Equitable International Order, commenting on Investor-state Dispute Settlement*<sup>116</sup>

"The new colonialism takes on different faces. At times it appears as the anonymous influence of mammon: corporations, loan agencies, certain "free trade" treaties, and the imposition of measures of "austerity" which always tighten the belt of workers and the poor."

**Pope Francis**, *World Meeting of Popular Movements*<sup>117</sup>

Since the 1990's, multilateral and bilateral trade agreements and investment agreements have contributed to the development of international norms that create further barriers to holding transnational corporations to account.<sup>118</sup> Over the past decades, the number of bilateral investment treaties and free trade agreements has proliferated. The 2015 report of the UN Independent Expert on the promotion of a democratic and equitable international order identified over 3,200 bilateral investment treaties alone, and highlighted that international investment agreements, bilateral investment treaties and multilateral free

trade agreements, have had adverse human rights impacts and negatively impact the State's regulatory functions to advance the enjoyment of human rights.<sup>119</sup> A feature of many agreements is investor-state dispute settlement (ISDS) whereby a company can argue that new laws or regulations could adversely affect the expected profits or potential investment, and seek compensation in a binding settlement. Institutions like the World Bank affiliated International Centre for Settlement of Investment Disputes (ICSID) provide legally binding arbitration in disputes between investors and states. Companies can sue states for not meeting projected profits.

These agreements act to increase the culture of impunity.

Firstly, ISDS mechanisms can be used to challenge states who seek to develop legislation that could enhance human rights. For example, in December 2013, Guatemala was ordered to pay \$21.1 million damages to a US based electricity company for introducing a regulation to lower electricity rates.<sup>120</sup> This was the equivalent of the per capita health spend for 44,608 Guatemalans in 2014.<sup>121</sup> In a country where almost 10% of the population live on less than \$2 per day and almost 60% live in poverty, lower electricity rates could be a positive policy to increase energy access for the

poor.<sup>122</sup> Instead, this arbitration process allows for decisions to be made on purely monetary terms for the investor, with no consideration of human rights. It is worth noting that companies do not face the same accountability. Under the Investor-State-Settlement Dispute mechanisms, only a corporation can bring a state to court. There is no similar court where states can bring companies when they violate human rights or environmental rights, or indeed where rights-holders can adequately access remedy.

Secondly, companies have also used the threat of arbitration to influence states' decisions and to lobby for less regulation of their activities. In Guatemala, documents obtained through the Freedom of Information Act showed that the State ignored a recommendation from the Inter-American Commission on Human Rights in 2010 to close down the Marlin goldmine owned by Goldcorp due to a threat of arbitration.<sup>123</sup> The documents warned that such an action could provoke the company to activate the ICSID or invoke clauses of CAFTA to claim damages from the state.<sup>124</sup> Trócaire's partner COPAE works with the indigenous communities who have been impacted by the mine in San Miguel Ixtahuacan and Sipakapa, which was developed without their free and informed consent. The Maya-Mam communities were greatly affected by the Marlin project through violence, attacks and intimidation against those who spoke out against the project, including community representatives, researchers and church representatives. Community members reported that the local water supply was contaminated and the excessive water use for the mine created water shortages. The company eventually closed in 2017.

Trócaire has also worked with communities impacted by the El Tambor gold mine, located near Guatemala City in La Puya. In February 2016, the Guatemalan Supreme Court ruled to provisionally suspend the mining license due to lack of prior consultation. In December 2018, the US based firm Kappes, Cassidy & Associates (KCA) filed an international claim with the International Centre for Settlement of Investment Disputes against the Guatemalan state. In its notice of intent to file arbitration made public in May 2018, KCA cited unjust treatment by the state, and community protests that prohibit the company from carrying out exploration and cited losses in excess of \$300 million dollars.<sup>125</sup> Civil society organisations have expressed concern with renewed military presence in the area since the ruling.<sup>126</sup>

Through trade and investment agreements, foreign investors are assured much greater protections regarding their interests and rights than in the case of human rights. This imbalance in enforceable rights and protections becomes even more problematic as current trade and investment agreements do not establish the primacy of human rights.<sup>127</sup> The UN Guiding Principles on business and human rights state that "States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."<sup>128</sup> However, in situations where human rights obligations conflict with obligations of trade and investment agreements, the cases above demonstrate that human rights can be secondary to financial considerations.

Reform of the international investment protection regime, including the substance of the treaties and the investor-state dispute settlement mechanism, is emerging as an issue of concern for both developing and developed countries.<sup>129</sup> The European Union is proposing the establishment of a Multilateral Investment Court (MIC) to reform the ISDS, a permanent body to settle investment disputes, which would have an appeal mechanism with permanent judges. There are many ongoing discussions on reform of trade and investment agreements, predominantly dealing with how to make the system of investment protection and arbitration more predictable, and to better safeguard the policy space of states, but ultimately, a fundamental shift away from the protection of foreign investors at the expense of human rights is needed.

The UN Guiding Principles note that States retain their international human rights law obligations when they participate in multilateral institutions that deal with business related issues, such as international trade and financial institutions.<sup>130</sup> Human rights are non-negotiable and should take primacy over trade or investment agreements. Also, as articulated by the UN Independent Expert on the promotion of a democratic and equitable international order "to the extent that bilateral investment treaties and free trade agreements lead to violations of human rights, they should be modified or terminated."<sup>131</sup> The political and economic power of corporations in our globalised economy is unprecedented and results in accountability challenges. There is an urgent need for legislative and policy context that can navigate the vast differences in power and resource between victims and corporations and to ensure justice and access to remedy in line with human rights standards.

Consuelo Soto from Honduras is refusing to back down against logging and mining companies that are exploiting her land.  
Photo: Frank McGrath



# THE WAY FORWARD: LEGISLATIVE AND POLICY OPPORTUNITIES

“Multinational corporations are already a dominant part of the global economy - yet many of their actions go unrecorded and unaccounted. They must, however, go far beyond reporting just to their shareholders. They need to be brought within the frame of global governance, not just the patchwork of national laws, rules and regulations.”

UNDP<sup>132</sup>

The international community has responded over the past few decades by introducing a large number of guidelines, principles and codes of conduct in an attempt to prevent human rights violations and to hold corporations accountable for when violations occur.

These range from the OECD Guidelines for Multinational Enterprises, which were adopted over forty years ago (and were updated in 2011) to the UN Global Compact launched in 2000 as a special initiative of the UN Secretary-General, which has been signed up to by more than 9,500 companies, to a whole host of other initiatives and mechanisms to strengthen governance in different areas, including the Extractive Industries Transparency Initiative (EITI), the Kimberley Process Certification Scheme and the Voluntary Principles on Security and Human Rights, the Conflict-Free Sourcing Initiative, the financial sector’s benchmark for managing social and environmental risk, known as the Equator Principles and the Santiago Principles developed by Sovereign Wealth Funds.

Other initiatives include solutions advanced by the non-profit sector including Publish What You Pay (PWYP) and Revenue Watch.

These initiatives are all voluntary in nature. Attempts to develop binding approaches to hold corporations accountable, such as the Code of Conduct for Transnational Corporations in the 1970s and the attempt to adopt UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises in 1990s, were opposed forcefully by transnational corporations and failed to be adopted by states.<sup>133</sup>

While different initiatives can be taken on their own merit, some are viewed as public relations exercises that require little additional action on behalf of participants. For example, the 2018 UN Global Compact Progress Report found that only 27 per cent of companies reported performing risk assessments directly linked to human rights, and only 17 per cent reported conducting impact assessments linked to human rights.<sup>134</sup>

This patchwork of laws, rules and regulations has proved insufficient to address the problem of widespread corporate impunity. This section explores three areas of policy opportunity in particular deepening the implementation of the UN Guiding Principles, further articulation of the rights enshrined in existing conventions by Treaty Bodies and the development of a UN Binding Treaty. We argue that while the multi-pronged approach will be necessary, it is essential to move beyond voluntary initiatives if we are to ensure an end to impunity for corporate violations of human rights.

## UN Guiding Principles on Business and Human Rights

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs), a global standard on business and human rights.<sup>135</sup> The UNGPs were developed in order to operationalise and provide further guidance on the “Protect, Respect and Remedy” framework which had been adopted by the Human Rights Council in 2008. The UNGPs provide authoritative guidance for the ways in which states and businesses should operate to enhance standards

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**...it is essential to move beyond voluntary initiatives if we are to ensure an end to impunity for corporate violations of human rights.**

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and practices with regard to business and human rights. Both the United Nations and the European Union have called on all states to develop National Plans to implement the Principles. However, by 2019 only 21 states have published NAPs, largely in European countries.<sup>136</sup> A gender analysis of existing NAPs by the Danish Institute for Human Rights also noted that not enough attention has been paid to gender in existing NAPs.<sup>137</sup>

The UNGPs provide an important conceptual framework to bring together the obligations of states and responsibilities of businesses. However, it is largely left to states and corporations to decide which guidance to adhere to. For example, although the UNGPs require that human rights due diligence is carried out by corporations, there is little indication of how states should monitor compliance and while the UNGPs refer to strong policy reasons for states to meet obligations outside their territory, they are cautious in articulating the reach of extraterritorial duties.<sup>138</sup>



The UNGPs are a part of the response to corporate human rights abuses, and in combination with legally binding measures could address the widespread corporate impunity that has been highlighted in earlier sections.

Brothers Óscar Armando Cabrera Matute and Celso Alberto Cabrera Matute, from the Tolupane community, San Francisco Campo. Their mother Doña María Enriqueta Matute, was murdered on August 25, 2013. Photo: Martin Calix.

## 4.2 Human rights treaty bodies and business and human rights

“If States take seriously their duties to ensure businesses comply with economic, social and cultural rights, markets can gradually contribute to the aims of the Covenant. They will be more sustainable and move societies in the right direction. Communities will also be better protected from the negative impacts of corporate activities where they have had the most damaging consequences, such as in the extractive industry.”

**Virginia Brás Gomes**, *Chairperson of the UN Committee on Economic, Social and Cultural rights*<sup>139</sup>

By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to protect requires states to protect individuals and groups from human rights abuses, including by entities such as corporations. It is well established in human rights

law that state obligations include a duty to regulate the conduct of private groups or individuals to ensure that they do not violate the rights of others, and to ensure access to remedy. The UN Human Rights Committee’s General Comment 31 notes that positive obligations on States Parties to exercise due diligence to prevent, punish, investigate or redress

the harm caused by such acts by private persons or entities.<sup>140</sup>

Recent years have seen a gradual strengthening of the extraterritorial duties of states in the area of human rights, including their duties to regulate the activities of corporations whose conduct they can influence.<sup>141</sup> Both the UN Committee on the

Rights of the Child (CRC) and the Committee on Economic Social and Cultural Rights have developed General Comments with a specific focus on business and human rights. Taking into account that subsidiaries may be engaged in land dispossession, the CRC notes that transnational corporations must be regulated by the states of origin or where they are headquartered and that the state should ensure that transnational corporations within their border are adequately regulated.<sup>142</sup>

The UN Committee on ESC Rights notes that states should control corporations across national borders to protect communities from adverse human rights impacts and that it expects home states of transnational corporations to establish appropriate remedies, guaranteeing effective access to justice for victims of business-related human rights abuses when more than one country is involved.<sup>143</sup> The ESC committee outlines that states have a positive duty to adopt a legal framework requiring business

entities to exercise human rights due diligence. Paragraph 9 recommends states to particularly incorporate a gender perspective into all their measures to regulate businesses, also paying attention to the intersectionality and multiplicity of discriminations which certain segments of the population face (e.g. indigenous women and girls).

There has been a gradual strengthening of efforts by Treaty bodies to enforce and articulate existing human rights obligations of states. Increasingly Treaty bodies are raising issues of business and human rights in their concluding observations.<sup>144</sup> International human rights law has recognised the duty of states to regulate the activity of corporations, to extend such duties to extraterritorial situations and to impose on all states that they cooperate with one another in transnational situations.<sup>145</sup> However, while some of the Treaty bodies are articulating positions on human rights and businesses, the human rights framework has not fully adapted and kept pace with the

changing world and acceleration of transnational corporations. While Treaty bodies are exploring further ways to ensure that states meet their obligations, this does not address the difficulties that states may have in regulating powerful corporations that may be larger than they are. While General Comments provide an authoritative and influential interpretation of existing international human rights law, it is often the case that new legal instruments are required as new challenges to human rights arise, none more so than in the case of the activities of transnational corporations and other business enterprises.

## International Labour Organisation

International labour standards are legal instruments drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work. They are either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations, which serve as non-binding guidelines. The ILO's Governing Body has identified eight conventions as "fundamental," covering subjects that are considered as fundamental principles and rights at work: freedom of association and the effective recognition of

the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.<sup>146</sup> ILO Convention No. 169<sup>147</sup>, concerning Indigenous and Tribal Peoples in Independent Countries is a comprehensive instrument that covers a wide range of issues concerning indigenous peoples, including land rights, access to natural resources, health, education, vocational training, conditions of employment, and contacts across borders. It is the only international legal instrument that is open for ratification which exclusively deals with the

protection of indigenous and tribal peoples' rights.<sup>148</sup> It has been ratified by 23 countries to date.

The principles laid down in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) offer guidelines to multinational enterprises, governments, and employers' and workers' organisations in such areas as employment, training, conditions of work and life, and industrial relations. This guidance is founded substantially on principles contained in international labour Conventions and Recommendations.

## Towards a UN Treaty to regulate transnational corporations and OBE

“There is a compelling need to adopt a legally binding convention on corporate social responsibility, and to impose civil and penal liability on transnational corporations, as a way of protecting rights holders from violations enabled by corrupt Governments, investors and speculators.”

**Livingstone Sewanyana**, *UN Independent Expert on the Promotion of a Democratic and Equitable International Order*<sup>149</sup>

“We are here to change the rules of the game, globalisation as we know it is not set in stone.”

**Professor Oliver De Schutter**, *University of Louvain*<sup>150</sup>

In June 2014, the Human Rights Council established an open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights, to elaborate a legally binding instrument to regulate the activities of transnational corporations and other business enterprises in international human

rights law.<sup>151</sup> The Resolution, put forward by Ecuador and South Africa, was adopted by a recorded vote of 20 to 14, with 13 abstentions.<sup>152</sup>

The first and second sessions of the OEIGWG, were dedicated to conducting constructive deliberations on the content, scope, nature and form of a

future international instrument. The third session discussed key elements for a draft legally binding instrument and after a series of information consultations in 2018 a zero draft treaty and zero draft optional protocol were prepared for discussion at the fourth session.

The fourth session in October 2018 was seen as a milestone in the elaboration of a binding treaty on business and human rights. This session in Geneva was the first time that member states inputted on the substantive content of the treaty, providing comments and positions from states on the issues of scope, jurisdiction, and the refinement of legislative language. The fifth session, scheduled in October 2019 will focus on an official first draft of the legally binding instrument.

While some member states have been very supportive of the treaty there has been significant opposition from others. Corporations represented by the International Organisation of Employers oppose the development of a legally binding treaty to regulate their actions and the process is often contested. Countries that are home states of large transnational corporations have also opposed the process including the US, Canada, and the UK. The EU, representing



Maria Mercedes Gomez, 65, is from the Rio Blanco community who are resisting the construction of a hydro-electric dam. Maria is a member of the Rio Blanco Elderly Indigenous Council. Photo: Garry Walsh.

Ireland, has stood in opposition to the Treaty; it has called for a new resolution, has not actively engaged in the OEIGWG sessions and in 2018 dissociated from the recommendations and conclusions of the process.

In contrast, a range of host countries support the process mainly in Latin America and Africa, including South Africa and Ecuador who have been key advocates for the Treaty. There are also some states that are home to large transnational companies that are supportive of a Treaty, such as India, which is encouraging. A number of EU member states, including France, are now more

positively disposed towards a Treaty and constructively engaging in the Treaty process. Civil society, rooted in the experiences of communities and human rights defenders, across the world has been mobilising and advocating for a treaty. The global treaty alliance<sup>153</sup> consists of more than 1,100 organisations who recognise the potential of this new instrument to enhance protection for victims against human rights violations and to provide effective access to remedies. Over 300 civil society organisations, including human rights defenders and trade unions participated in the latest session of the OEIGWG.<sup>154</sup> The European

Parliament has expressed support for a binding UN instrument as a necessary step forward in the promotion and protection of human rights and has adopted a range of Resolutions in support of the process.<sup>155</sup> The European Network of National Human Rights Institutions has noted the insufficient progress on the part of European businesses in implementing human rights due diligence and the adverse impacts of businesses on human rights, and stated that a binding treaty could make a significant contribution to addressing current governance gaps.<sup>156</sup>

## What a UN Treaty should include:

A new treaty is an opportunity to further develop international human rights law in line with the lived reality of communities and human rights defenders who are on the frontlines of corporate human rights abuses. A new instrument should address the following areas:

### Overarching

- Ensure a gender lens throughout treaty provisions
- Affirm the protection of human rights defenders - including mechanisms to refrain from restrictive laws, protection against criminalisation and attacks, and immediate responses to attacks - taking into account the specific harms experienced by women human rights defenders
- Strong enforcement mechanisms

### Access to justice

- Overcome jurisdictional barriers with specific reference to extraterritorial obligations
- Remove legal barriers to corporate liability so that parent companies can be held liable for the actions of their subsidiaries
- Ensure access to information for victims
- Ensure effective judicial cooperation and legal assistance across jurisdictions
- Reversal of the burden of proof
- Legal aid for victims

### Prevention

- Provide for mandatory human rights due diligence (including gender impact assessments), specifically mentioning business relationships related to supply, export, services, insurance, finance and investment, reinforcing the whole value chain approach
- Provisions for free, prior and informed consent of indigenous peoples
- Strengthen mechanisms to consult with communities

### Primacy of human rights

- Articulate the primacy of human rights over trade and investment agreements
- Ensure human right impact assessments on trade and investment agreements and other trade related initiatives - prior to the start of negotiations, before the conclusion and regularly during the implementation
- A clause to ensure that the obligations of the Treaty must fully be taken into account in any trade and investment dispute settlement mechanism

## Ireland's position on Business and Human Rights

"I believe that the protection of human rights and the promotion of economic growth, trade and investment should be complementary and mutually reinforcing. We can put respect for human rights at the heart of all our business practices as we work towards meeting the sustainable development goals set out in agenda 2030 at national, regional and global levels."

**Simon Coveney T.D., Tánaiste and Minister for Foreign Affairs and Trade**<sup>157</sup>

Ireland published a National Plan on Business and Human Rights 2017-2020 in November 2017. The plan is rooted in a stated commitment to "promote responsible business practice at home and overseas and to put respect for human rights at the heart of all our business practices."<sup>158</sup> This is an important step in bringing the UN Guiding Principles on Business and Human Rights into the sphere of official Government policies and demonstrates a continued commitment towards ensuring that Irish businesses respect human rights domestically and abroad. In early 2019 a Business and Human Rights Implementation Group was established to oversee the implementation of the National Plan with representation across relevant government Departments, civil society and academia. A baseline assessment of the legislative and regulatory framework in Ireland has been completed for publication in 2019.<sup>159</sup>

Under the OECD Guidelines for Multinational Enterprises National Contact Points (NCPs) are established by governments to promote and implement the Guidelines.<sup>160</sup> In the Irish context, the role of the NCP is to undertake promotional activities, handling enquiries, and contribute to the resolution of issues that arise from the alleged non observance of the OECD Guidelines in specific instances.<sup>161</sup> However, Ireland's National Contact Point has been criticised for not being adequately

resourced, publicised or effective. Between 2001 and 2015 just three cases were filed with the NCP and in one of these cases the complainant was waiting over four years for an initial assessment.<sup>162</sup>

It is notable that the draft baseline assessment for the National Plan on Business and Human Rights acknowledges that the commitments in the National Plan propose a largely voluntary regime, whereby the role of the State is to encourage and support rather than to ensure compliance by way of a mandatory regime. It raises concerns about low levels of compliance and recommends mandatory human rights due diligence. It makes a series of strong recommendations that should be incorporated into the implementation of the National Plan, including in relation to Human Rights Due Diligence (HRDD) as a minimum requirement; reporting on HRDD practice outside the jurisdiction and the particular need to ensure HRDD in high risk industries or conflict jurisdictions.

In relation to mandatory human rights due diligence, a number of developments in other jurisdictions could inform Ireland's approach. Germany is in the process of drafting a law on mandatory human rights due diligence for German companies and their supply chains. The 2017 French Law on the Duty of Vigilance of Parent and Instructing Companies establishes a legally binding obligation for parent companies (focusing on the largest companies) to identify

and prevent adverse human rights and environmental impacts throughout the supply chain. It establishes liability when companies default on their plan or its implementation. The preamble makes the point that increasingly companies are adopting ethical charters and adhering to voluntary principles and that many companies are adopting best practices, and that therefore the law will penalise the companies that have not implemented these practices or who use it as a display, while the efforts of others will be enhanced.<sup>163</sup>

The development of European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017, which transposed the EU Directive (2014/95/EU) in law, provides a useful foundation upon which Ireland could develop mandatory human rights due diligence. It requires large public-interest companies with more than 500 employees to include a declaration in their annual management report containing information stating material data related to

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**In relation to mandatory human rights due diligence, a number of developments in other jurisdictions could inform Ireland's approach.**

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## Ireland has recently developed and supported resolutions on civil society space in the Human Rights Council, a foreign policy priority, and is seen as a leader in this regard.

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the environment, social affairs, human rights, and prevention of corruption.

Trócaire has recommended that Ireland should support the development of a UN Treaty on business and human rights, a recommendation that was also included in the Shadow Report by Coalition 2030, a coalition of over 60 Irish civil society organisations working on the Sustainable Development Goals. To date Ireland has not been supportive of a legally binding treaty on business and human rights, focusing instead on the implementation of the UNGPs, the OECD guidelines and the ILO International Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The UN Guiding

Principles and the UN Treaty can and should be mutually reinforcing and complementary. There is opportunity for Ireland to engage with the treaty process in a supportive way and to strengthen the content of the draft legally binding treaty where needed. Indeed, there are a range of areas that still need inclusion and refinement, including protections for human rights defenders and a gender analysis throughout the treaty. Ireland has recently developed and supported resolutions on civil society space in the Human Rights Council, a foreign policy priority, and is seen as a leader in this regard. The treaty negotiations would be an opportunity for Ireland to bring this expertise to bear on a process that human rights defenders are calling for in order to protect

their rights and by extension civil society space. The issues that Ireland has pioneered at the human rights council, including challenging stigmatisation and criminalisation of human rights defenders, align with the issues that human rights defenders are asking to be addressed in the legally binding treaty.

### Northern Ireland – Action on business and human rights

“Just as consumers and service users are giving more careful consideration to the products and services they choose to purchase based on the reputation and values of the service provider, there is a duty on businesses and the State to ensure they are respecting and protecting human rights.”

Draft Northern Ireland Action Plan on Business and Human Rights<sup>164</sup>

In the absence of a sitting Northern Ireland Executive and Northern Ireland Assembly, the Northern Ireland Business and Human Rights Forum is developing a Northern Ireland Action Plan on Business and Human Rights. Members of the Forum will commit to this plan and it will be used as a platform to promote business and human rights in Northern Ireland.<sup>165</sup> The plan seeks to incorporate the UNGPs as a model of good practice on business and human rights in Northern Ireland. For meaningful progress to be made, state action must follow this positive action by the Forum. In addition, it will be important for Northern Irish political leaders to play a part in ensuring UK support for an international binding treaty on Business and Human Rights.

## Recent reports of Irish companies accused of human rights violations

In 2018 the Global Legal Action Network submitted a formal complaint against San Leon Energy PLC, an Irish based multinational oil and gas exploration company. GLAN assert that “San Leon’s activities in Western Sahara contribute to the maintenance of an illegal annexation and denial of the internationally-recognised right of the Sahrawi people to self-determination in their territory,” and that “companies like San Leon benefit from Morocco’s illicit economy in Western Sahara and contribute to the severity of ongoing human rights violations.”<sup>166</sup> The complaint alleges that the company failed to ensure that it has the consent of the Western Saharan people before drilling for oil on their land. The complaint was filed before Ireland’s National Contact Point for the OECD.<sup>167</sup>

Reports have also highlighted the use by the Electricity Supply Board (ESB) of coal from the Cerrejón mine in Columbia, a mine long since associated with human rights issues, including displacement, a lack of consultation with indigenous communities, and environmental

damage.<sup>168</sup> Figures from the ESB show that almost 90% of the coal burned at Moneypoint has come from Colombia, and the vast majority of that has come from the Cerrejón mine in the north east of Colombia.<sup>169</sup> This is sourced through CMC Coal Marketing, a Dublin-registered company set up to market and distribute coal from Cerrejon in Ireland and internationally. The company, which is owned by Anglo American, BHP and Glencore, according to their website have co-ordinated the sale and delivery of over 450 million tonnes of Cerrejón coal. Trócaire, along with other non-Government organisations have expressed concern to the Oireachtas Joint Committee on Communications, Climate Action and Environment that Irish companies are facilitating the environmental degradation and human rights abuses that have been identified at the Cerrejon mine. In 2018, in response to a Dail question, the Tánaiste noted that “I am aware of the specific mine to which the Deputy refers, and of the difficult situation which currently obtains for environmental and indigenous

rights defenders in Colombia. Environmental degradation, and the rights of indigenous communities to be consulted in regard to projects which affect them, such as the Cerrejón mine, are recurring challenges... I remain concerned at reports of mining activities having a negative impact on local populations or on the environment, as well as of reported abuse of workers.”<sup>170</sup>

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## Case study: Consuelo Soto

A voicemail told Consuelo Soto she would be raped and cut into pieces if she didn't keep her mouth shut. Days later her husband was shot dead.

Consuelo and her community in Honduras are refusing to back down against logging and mining companies that are exploiting her land. And she knows, not just from what happened to her husband, there are men who think little of taking a life to silence those who stand in the way of powerful interests. The Tolupan have seen around 100 people murdered in the past two decades.

Recently, there has been a further surge in assassinations of Tolupan people, as well as many others who have stood firm against the exploitation of vast tracts of land where indigenous communities live. Living in her remote forest community of San Francisco de Locomapa high up in the mountains above the city of El Progreso, Consuelo shows little signs of wavering in the face of such obvious danger. She said she began campaigning against the logging and mining firms in 2002, but that in 2007 the seriousness of what she was doing became clear.



"People came looking for me and others and they asked for us by name. They came to my house and they offered me money to stop speaking out. First they offered me 30,000 lempira and when I said no they offered me 50,000," she said. These are huge sums for people who live in simple homes with corrugated metal roofs but Consuelo would not be swayed, although she admitted she felt very intimidated by the advances. "Of course I

was afraid and then the threats started. I got voicemails saying if I kept going two of my fellow campaigners would be killed and I would be raped and cut up. Thank God I never had a moment of weakness and took the money."

Consuelo lives life constantly looking over her shoulder. She says, "I am very afraid but I won't give up. Because blood has been spilled I have the strength to go on fighting."

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**Consuelo lives life constantly looking over her shoulder. She says, "I am very afraid but I won't give up. Because blood has been spilled I have the strength to go on fighting."**

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Felipe Gomez (63) stands next to the sacred Rio Gualcarque river. He is a member of the Rio Blanco Elderly Indigenous Council who are resisting the construction of a hydro-electric dam.  
Photo: Garry Walsh.

**STAND WITH PEOPLE  
UNDER ATTACK  
FROM BIG BUSINESS**

# RECOMMENDATIONS: ACTION ON ACCOUNTABILITY

“We note that often the businesses which operate this way are multinationals. They do here what they would never do in developed countries or the so-called first world. Generally, after ceasing their activity and withdrawing, they leave behind great human and environmental liabilities such as unemployment, abandoned towns, the depletion of natural reserves, deforestation, the impoverishment of agriculture and local stock breeding, open pits, riven hills, polluted rivers and a handful of social works which are no longer sustainable”.

**Pope Francis**, *Laudato Si’: On Care for Our Common Home*<sup>171</sup>

This paper has outlined major gaps in the way in which corporations are regulated in relation to human rights. Victims of business-related human rights violations are facing multiple barriers that prevent them from gaining access to remedy, particularly in relation to transnational corporations. This level of impunity creates a situation where those on the frontlines of defending resource rights and their wider communities are rendered powerless in the face of corporations who can extract resources at the expense of human rights.

This is a major human rights issue of our time that must be tackled. A range of legislative and policy responses are needed, including actions on two main tracks:

**Firstly** strengthening the natural resource rights of communities, protecting human rights defenders and ensuring civil society space is protected, are essential for enabling communities to advocate for their rights.

**Secondly**, closing the gaps in the regulatory framework governing corporate accountability and re-balancing the current primacy of trade and investment over human rights: by addressing parent company liability, overcoming jurisdictional barriers, access to information and mutual legal assistance, access to legal systems, a reversal of the burden of proof and the primacy of human rights over trade and investment is essential to end impunity and prevent future corporate violations of human rights.

The UN Treaty is a critical instrument that can address corporate impunity from a global perspective and through removing the barriers to accessing remedy put an end to the impunity that leaves victims so powerless. Building on this a culture of respect for human rights by all corporate entities can be established. The legally binding treaty can allow for the application of the UN Guiding Principles, and to build a culture of respect for human rights across corporations.

We call on all countries, and in particular Ireland to show leadership and pioneer this new development in human rights law. The de-carbonisation transition that is an essential response to the climate crisis represents a transformation at a scale much like the agricultural or industrial revolutions. It is both appropriate and essential that this is the moment to fundamentally transform accountability of corporations in order to ensure poverty, vulnerability and human rights abuses decrease rather than spiral during this transition.

## **IRELAND SHOULD:**

### **Strengthen corporate accountability:**

Support a UN binding treaty on business and human rights to regulate in international law the activities of transnational corporations and other business enterprises — with provisions to ensure the prevention of human rights violations, access to justice, the primacy of human rights over trade and investment agreements, protection of human rights defenders, inclusion of a gender perspective and strong enforcement mechanisms.

Engage constructively in UN treaty discussions to ensure the protection of human rights defenders and a strong gender analysis is embedded in the treaty.

Attend and participate in the Open Ended Intergovernmental Working Group to elaborate a legally binding treaty to regulate transnational corporations.

Act as member of the European Union to encourage the EU to engage constructively in the UN treaty negotiations.

Adopt mandatory human rights due diligence to ensure businesses respect human rights – across business activities and business relationships related to supply, export, services, insurance, finance and investment, reinforcing the whole value chain approach.

Implement an effective Irish National Plan on Business and Human Rights, based on a comprehensive gender analysis.

Ensure the Irish National Plan on Business and Human Rights aligns with the national plan to implement the sustainable development goals (SDGs).

Ensure that business partners for sustainable development have made a clear and demonstrable commitment to the UN Guiding Principles on Business and Human Rights, and uphold these principles in efforts to reach the SDGs.

As member of the European Union work to ensure the removal of the investor-state dispute settlement provisions from existing trade and investment agreements, and do not conclude any such agreements in the future.

Ensure the primacy of human rights is provided for and fully implemented in all trade and investment agreements to which Ireland is a party.

Conduct human rights impact assessments prior to concluding trade and investment agreements, and provide for the suspension or amendment of contractual provisions where these have proved a risk to human rights.

Facilitate the passage of *The Control of Economic Activity (Occupied Territories) Bill*

2018 through Dáil Éireann and enshrine it into legislation.

Ensure that the publication of the UN Database of companies operating in Israeli settlements in the occupied West Bank and East Jerusalem occurs as planned, and support the ongoing resourcing and updating of the database following its initial publication.

Ensure that the contribution of Irish businesses to advance the climate transition are accompanied by mandatory human rights due diligence and environmental impact assessments in order to avoid further violations of fundamental rights.

### **Strengthen resource rights of communities:**

Provide support through the Irish Aid programme for strengthening land and other natural resource rights, particularly for women and indigenous communities.

Ensure Irish investors and corporations respect land and other natural resource rights through their business operations.

### **Strengthen civil society space:**

Continue to advocate for an enabling civil society space in all countries, at the Human Rights Council and in other international fora.

Support and respond to alerts by international civil society networks and speak out against government actions which seek to constrain legitimate civil society activities.

Support and protect Irish and global civil society actors and networks through direct programme support.

Make available specific funding to develop partnerships, and programmes, that strengthen an enabling environment for civil society, and protect human rights defenders.

Ensure the fulfilment of human rights principles, including the protection of civil society activism, as the overarching framework for defining performance criteria in aid relations — necessitating resources and training on human rights, and the identification of human rights impact, to be contained in partnership agreements.

**Protect human rights defenders:**

Explicitly recognise the legitimacy of human rights defenders and publicly support and acknowledge their work, with a particular focus on the participation of women human rights defenders.

Ensure Irish investors and corporations respect the rights of human rights defenders.

Take immediate, appropriate and effective action in relation to specific attacks on human rights defenders – for example through public statements, diplomatic channels, and support for local organisations working to protect human rights defenders.

**NORTHERN IRELAND SHOULD:**

Develop a Northern Ireland National Action Plan on Business and Human Rights, based on a comprehensive gender analysis, and the adoption of same by the Northern Irish Assembly when it is sitting.

Encourage the UK Government to support a UN binding treaty on business and human rights.

Take immediate, appropriate and effective action in relation to specific attacks on human rights defenders – for example through public statements, support for local organisations working to protect human rights defenders, and urging the UK Government to do the same.

**ALL COUNTRIES SHOULD:**

Support a UN binding treaty on business and human rights to regulate in international law the activities of transnational corporations and other business enterprises – with provisions to ensure the prevention of human rights violations, access to justice, the primacy of human rights over trade and investment agreements, protection of human rights defenders, inclusion of a gender perspective and strong enforcement mechanisms.

Implement existing human rights treaty obligations in relation to business and human rights.

Adopt mandatory human rights due diligence to ensure businesses respect human rights.

Implement the UN Guiding Principles on Business and Human Rights, based on a comprehensive gender analysis.

Remove investor-state dispute settlement provisions from existing trade and investment agreements, and do not conclude any such agreements in the future.

Ensure the primacy of human rights is provided for and fully implemented in all trade agreements and treaties to which they are a party.

Conduct human rights impact assessments prior

to concluding trade and investment agreements, and provide for the suspension or amendment of contractual provisions where these have proved a risk to human rights.

Ensure that efforts to harness the contribution of business to advance the climate transition are accompanied by mandatory human rights due diligence and environmental impact assessments in order to avoid further violations of fundamental rights.

**Strengthen resource rights of communities:**

Promote domestication of the Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGT) through National Engagement Strategies.

Promote the responsible governance of land and resources through the implementation of Free Prior and Informed Consent (FPIC).

Implement and respect the UN Declaration on the Rights of Indigenous Peoples.

Implement and respect the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.

Ensure contractual engagements between state authorities and private contractors do not violate the rights of communities and human rights defenders.

**Strengthen civil society space:**

Ensure an enabling legal framework and a conducive political and public environment for civil society organisations to freely carry out activities, on a legal basis, consistent with international law and standards, to strive for the protection and promotion

of all human rights and fundamental freedoms.

Ensure that legislation, in particular on freedom of association, peaceful assembly and expression, is drafted and applied in conformity with international human rights law and standards.

Refrain from implementing laws, administrative procedures which restrict the operation of civil society.

Establish effective, independent, pluralistic and adequately funded NHRIs in compliance with the Paris Principles, or where they already exist, strengthen them for the protection and promotion of all human rights and fundamental freedoms, including in their role to protect and promote an effective environment for civil society.

Ensure timely and transparent public consultations in policy development and draft legislation, especially where it may affect civil society, making sure to promote and support the participation of a diverse civil society.

Provide support and funding for civil society organisations; particularly those focused on the rights of indigenous peoples and women.

#### **Protection of HRDs:**

Implement and respect the UN Declaration on Human Rights Defenders.

Build a safe and enabling environment for women and all other human rights defenders to promote and protect human rights, ensuring that all non-state actors respect human rights and that all State actors respect, protect and fulfil human rights.

Explicitly recognise the legitimacy of HRDs and publicly support and acknowledge their work.

Publicly recognise the importance of the equal and meaningful participation of women human rights defenders at every level and in every institution in society.

Refrain from developing anti-terrorism laws that target civil society actors and human rights defenders.

Refrain from the criminalisation of human rights defenders.

Ensure the protection of human rights defenders, particularly land, environmental and indigenous defenders who are at high risk.

Take steps to prevent and address the specific harms experienced by women human rights defenders, including smear campaigns and gender based violence.

Ensure independent and effective investigations of violations of HRDs' rights and ensure accountability for those responsible.

Ensuring access to resources to support funding of HRDs and increase efforts to promote their activities in accordance with the principle of substantive equality to ensure equal participation of women.

#### **THE INTERNATIONAL COMMUNITY INCLUDING THE EU SHOULD:**

Ensure the elaboration of a legally binding instrument to regulate the activities of transnational corporations and other business enterprises.

Provide adequate funding to the Open-Ended

Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights.

Treaty bodies and the Human Rights Council should continue to use their country hearings and the universal periodic review procedure to inquire into and make concluding observations in relation to the impact of corporations on the realisation of human rights in communities and for human rights defenders.

Treaty bodies and the Human Rights Council should systematically use their country hearings and the universal periodic review procedure to inquire into the impact of bilateral investment treaties and free trade agreements on the enjoyment of human rights.

Monitor and document trends in relation to civil society and provide international sources of funding for civil society who are unable to avail of national funds.

Monitor and document violations against human rights defenders, disaggregated by gender and ethnicity, to identify trends and areas that need specific support.

Ensure consistent implementation of the EU roadmaps for civil society, as it relates to the enabling environment for civil society (EU).

Ensure consistent implementation of the EU Guidelines on HRDs (EU).

Create a public online regularly updated platform of business enterprises engaged in business activities related to Israeli settlements pursuant to Human Rights Council Resolution 31/36 (OHCHR).

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Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America  
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