



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

7th Session, October 2021

The negative impacts of corporate activities on human rights and the environment occur in most economic sectors. The agri-food industry remains one of the main drivers of deforestation globally, also responsible for the loss of land and livelihoods of millions of peasants. While the world is attempting to move on from fossil fuels, the new 'green' transition may lead to a global expansion in mining. Yet, extractive industries have been the cause of deforestation, abuses of workers' rights, displacement of entire communities, and environmental pollution – particularly in Africa and Latin America. Meanwhile, the extraction of fossil fuels continues to pollute the environment and erase people's livelihoods, culture, and rights from Nigeria to Mexico.

In 2020, [more than 200 Catholic Bishops](#) called on States to act on their obligation to protect human rights and regulate corporations worldwide. Since then, European Union Member States have adopted or are proposing laws to regulate the activities of their corporations. In 2017, France adopted a law on the duty of vigilance of large corporations. The law is now starting to ensure [accountability for major French corporations](#) such as [supermarket giant Casino](#), [electricity provider EDF](#) or [oil company Total](#). In 2021, Germany adopted its Act on Corporate Due Diligence Obligations in Supply Chains, obliging companies to conduct human rights and environmental due diligence throughout their operations. The same year, the Netherlands adopted its *Wet Zorgplicht Kinderarbeid* regarding child labor in supply chains, and discussions are ongoing for broader legislation. As for Belgium, the country is currently discussing a proposal on corporate regulation.

Despite these national initiatives and the upcoming European Commission's Sustainable Corporate Governance Directive, the EU has [remained on the sidelines](#) of the negotiations for a UN Legally Binding Instrument (LBI). CIDSE and its members regret the absence of such a significant global player from the negotiations. We call on the EU and its Member States to engage in an active, constructive, and progressive fashion.

While CIDSE and its members welcome the various national and regional initiatives, these can only have limited efficacy in preventing and addressing human rights and environmental abuses, considering the globalisation of value chains, the interconnectedness of the world

economy, and its global impacts. It is essential to address the issue of corporate impunity in international law.

In this context, CIDSE and its member organisations welcome the [Third revised draft](#) of the Legally Binding Instrument to regulate the activities of transnational corporations and other business enterprises in international human rights law. This Third draft contains appreciated clarifications to crucial issues such as prevention and liability. On the other hand, the text still presents contradictions and vague provisions that would keep it from achieving its objectives to protect human rights.

A [legal opinion](#) by Prof. Markus Krajewski, commissioned by CIDSE, concludes that the draft is an "appropriate and sufficiently clear basis for substantial negotiations".¹ However, he also pointed out that differences in structure and content remain scarce compared to the previous versions.

POSITIVE CHANGES IN THE THIRD REVISED DRAFT

We welcome a series of changes in this draft, and in particular:

- The clarifications and additions regarding the obligation for business enterprises to respect internationally recognised human rights "regardless of their size, sector, location, operational context, ownership and structure".
- The clarification regarding prevention, especially the obligation for States Parties to "regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character". This paragraph helps lifting the veil over transnational corporations' impacts outside the jurisdiction where they are registered.
- The addition of an obligation to 'avoid' negative human rights impact, in addition to 'prevent and mitigate' them and the clarification that companies are responsible for risks throughout their business relationships.
- The enlargement of the impact assessment to include labor rights and the explicit reference to Trade Unions regarding consultations in 6.4.
- The explicit mention of the inapplicability of the doctrine of *forum non conveniens* in Art. 7.3., and the specification regarding the non-accessory nature of civil liability to criminal liability in Art. 8.7.
- The addition on "the use of child soldiers and the worst forms of child labour in Art. 16.3. including forced and hazardous child labour", which partially incorporates the recommendations concerning conflict-affected areas.

WEAKNESSES IN THE THIRD REVISED DRAFT

Despite some improvements, the current draft is still lacking in key respects. In general, the articles on prevention are still too vague and leave too many questions open as per how, concretely, States Parties shall adopt domestic measures to introduce human rights due diligence in their jurisdiction.

¹ Markus Krajewski: Analysis of the Third Draft of the UN Treaty on Business and Human Rights, CIDSE, October 2021: <https://www.cidse.org/wp-content/uploads/2021/10/EN-Binding-Treaty-legal-analysis.pdf>;

While mentioned in the Preamble, human rights and environmental defenders are also orphaned by the current text. Yet, [2020 was the year](#) with the highest number of lethal attacks against human rights defenders to date. For the LBI to effectively reach its objectives, it must explicitly include provisions to enhance protection for human rights defenders.

With regards to trade and investment policies, the Third draft, such as the Second draft, establishes that trade and investment agreements shall not undermine or restrict the capacities of States to fulfil their human rights obligations. But it fails to give clear guidance on concrete steps to be taken by States with this objective.

Moreover, the draft lacks a consistent and coherent gendered approach throughout the text. While the specific challenges faced by women are mentioned in the articles on implementation, the influential role women play as human rights and environmental defenders and the particular barriers they face when accessing justice remain unaddressed in the relative articles.

The text also continues referring to right-holders as 'victims', while the definition of victims fails to include the particular challenges faced by indigenous people.

The remaining part of this Contribution focuses on some of the areas where we believe the text would benefit from clarifications, additions and textual changes, namely: definitions, language and scope, prevention, legal liability, access to justice for right-holders, applicable jurisdiction, human rights defenders and environmental protection.

Definitions, language and core concepts

We welcome the enlargement of the definition of businesses to include non-profit economic activities in **Art 1.3.**, together with the explicit mention of State-owned enterprises and financial institutions. We further welcome the enlargement of the definition of human rights to include the right to a healthy, safe, clean and sustainable environment in **Art 1.2.**, a crucial issue in a time of impending climate crisis. However, core concepts and definitions could benefit from further clarifications.

We strongly suggest the use of the term 'right-holders' in the place of 'victims'. This would allow for a more inclusive definition that would not reduce people to the role of victims. Moreover, right-holders should include not only 'groups of people', but also 'peoples' themselves. This is particularly important for indigenous communities and other ethnic groups, who constitute peoples with a specific cultural and spiritual identity. Moreover, we regret the removal of reference to "*persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation*". This would provide more explicit protection for human rights and environmental defenders, who often suffer reprisal and further victimisation by those committing harm. Finally, the particular impacts of human rights abuses on children should be taken into account.

Therefore, the following Article should be rephrased as suggested, with the language of "rights-holder" thereafter replacing "victim" throughout the text:

Art 1.1. – "**Rights-holder**" shall mean any person, group of persons, community, tribal or indigenous people, irrespective of nationality or place of domicile, who individually or collectively have suffered harm that constitutes human rights abuse through acts or omissions in the context of business activities. **When the victim is a child, harm should contemplate the impacts on their development.** The term "**rights-holder**" shall also include the immediate

family members or dependents of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

Statement of purpose

This LBI aims to fill gaps in international law regarding the respect of business enterprises for human rights and the environment and the legal barriers people face in seeking justice. We suggest making this overall objective explicit and adding, before Art 2.1., a new 2.1., which would reiterate paragraph 11 of the Preamble:

Art 2.1. – *Business enterprises, regardless of their size, sector, location, operational context, ownership and structure, have an obligation to respect internationally recognised human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships.*

Art 2.2 – *Hence, the purpose of this (Legally Binding Instrument) is: ...*

Prevention

The current draft adds more clarity and precision regarding the scope of companies to which provisions in **Art 6.** apply and clarifies that companies are responsible for avoiding negative human rights impacts, not only preventing and mitigating them. However, companies should also be responsible for ceasing and redressing adverse impacts when they have caused or contributed to them.

To ensure that companies have an obligation to cease and redress adverse human rights impacts, the following Article should be rephrased as suggested:

Art 6.3.b – *Take appropriate measures to avoid, prevent, mitigate, **cease** and redress effectively the identified actual or potential human rights abuses (...)*

While the explicit mention of trade unions in Art 6.4c is a welcome addition, **Art 6.4** remains overall vague on the issue of communities' consent to the presence of business activities that might affect them. When affected right-holders deny consent to business activities that might negatively affect them and their territories, such denial should be operationalised and result in the ceasing of the activities. While free, prior and informed consent (FPIC) is mentioned for indigenous communities, it is not clear whether a denial of consent from the same communities would be enough to actually prevent business activities from taking place or cease ongoing activities. Moreover, while FPIC is an internationally recognised right for indigenous communities, there is a lack of a similar requirement for communities impacted by business activities that do not fall under the 'indigenous' umbrella.

To ensure that a denial of consent from indigenous people constitutes a sufficient reason for preventing or ceasing business activities, the Article should be amended as follows:

Art 6.4.d – *Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent **and that denial of such consent constitutes sufficient grounds for preventing or ceasing business activities. Consultations with children shall be undertaken in accordance with the principle of the child's right to be heard.***

To ensure that the consent of all affected communities is always a requirement, a new letter should be added following Art 6.4.e:

Art 6.4.e – *Ensuring that right-holders who may be affected by the negative human rights impacts of business activities have a right to express their consent or lack of thereof, and that denial of consent constitutes a sufficient basis for preventing or ceasing the business activities.*

Moreover, a new letter in Art 6.4 should explicitly mandate States to require companies to include the behavior of their own security forces or, that of other security firms, when providing security for their operations. Thus, a new letter in Art 6.4 should read:

Art 6.4.x – *Reporting on the provision of security for their operations, regardless or whether they are enforced security forces directly employed by the company, hired, or through other arrangement.*

Legal Liability

We welcome the clarification regarding the obligations of States to provide for comprehensive and adequate systems of legal liability of business activities "within their territory, jurisdiction or otherwise under their control", reflecting the complicated reality of companies' corporate structure and registration practices.

In the context of establishing the joint liability of companies and their business relationships when causing or contributing to harm, the third draft changes the tense used in the **Art 8.6.** to the past, referring to persons with whom companies 'have had' a business relationship (instead of 'had'). It is welcome that the draft reflects companies' liability for historical damages; however, the current language could confuse and lead to interpreting the provision as *uniquely* referring to past business relationships.

The first part of Art 8.6 should be amended as follows:

Art 8.6 – *States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they **have or have had** a business relationship (...).*²

Another problematic aspect of Art. 8.6 is the crucial notion of control. As the draft lacks provisions establishing a rebuttable presumption of control, it can be assumed that "to establish legal liability, it must be proven in each individual case that a company effectively exercised control over their business relationships. This can be difficult because corporate relations between different companies (percentage of shares, appointment of directors, voting rights such as "golden shares") are often not apparent to third parties.

Similarly, if control is exercised through contractual relations (right to unilaterally determine price, quality and quantity of products), it may be challenging to prove control without access to these contracts. In light of the variety of control situations and the differences between legal systems, the LBI should require States to ensure that their domestic systems provide for a presumption of control in the meaning of Art 8.6. to reduce the difficulties of proving control on a case-by-case basis.³

² Krajewski, ib., p.14.

³ *Ibidem.*

A sentence should be added to Art 8.6, worded as follows:

Art 8.6 – *States Parties shall determine in their domestic law that control over one legal person by another legal person is presumed with reference to corporate, contractual and other business relations between the former and the latter into account.*

The LBI also lacks an explicit recognition of joint or several liability of different corporations, with one (or several) directly causing human rights abuses and the other (or several) controlling it but failing to prevent it from causing or contributing to harm. The text of the LBI should explicitly recognise the possibility for joint and several liability, as this is crucial in court cases to determine responsibility for the damage caused. Such provision could be added at the end of Art 8.6 or as a new comma to Art 8, and should read as follows:

Art 8.6 – *States parties shall ensure that their domestic law includes the possibility of joint and several liability in addition to liability for own business activities and liability activities for other persons.*⁴

Corporations should not be exempted from liability when they cause or contribute to harm in reason of their compliance with due diligence obligations. While Art 8.7 establishes this clearly in the first part; the second part muddies the water by stating that the competent courts or authority should decide on liability "*after an examination with applicable human rights due diligence standards*". Art 8.7 should be strengthened and simplified by reformulating it as follows:

Art 8.7 – *When determining the liability of a natural or legal person for causing or contributing to human rights abuses or failing to prevent such abuses as laid down in Article 8.6, the competent court or authority can take into account if the person undertook adequate human rights due diligence measures, but compliance with applicable human rights due diligence standards shall not absolve from liability ipso iure.*⁵

Protection of right-holders and access to justice

We welcome the inclusion of a gender-sensitive language in **Art 4.c** and the introduction of reparation both as a collective and individual right. However, we believe **Art 4.d** should be strengthened by specifying that right-holders' right to access non-judicial grievance mechanisms should not infringe upon their right to seek remedy through the judicial System. An additional sentence at the end of Art 4.d should read:

Art 4.d – (...) *and that their right to submit claims to non-judicial grievance mechanisms shall not infringe upon their right to access judicial mechanisms.*

We further welcome in **Art 9.3**. the mandate on competent courts to reject the doctrine of *forum non conveniens*. We also welcome that **Art 9.4** and **9.5**, respectively, removed the term 'closely' regarding the connection between a claim and the jurisdiction in which the business activity is domiciled and the specification of cases where courts may have jurisdiction over a particular claim.

We reiterate the need to explicitly mandate States to remove gender-specific barriers to justice. The Article should be amended with the following sentence:

⁴ *Ibidem.*

⁵ Krajewski, ib., p.15.

Art 7.2 – *State Parties must review and repeal domestic legislation that is a barrier to eliminating gender discrimination and providing training and education programmes to prevent recurrences of abuses and changes in patriarchal attitudes.*

The LBI addresses the issue of financial barriers to access courts for right-holders by requiring States to "ensure that court fees and rules concerning the allocation of costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings" and "that there is a provision for possible waiving of certain costs in suitable cases". The reference to "rules concerning allocation of costs" may be too narrow. In some cases, it may not be the rules themselves that become a barrier but their application or practice. We, therefore, suggest deleting the words "rules concerning". The article which would then read:

Art 7.4 – *States Parties shall ensure that court fees and ~~rules concerning~~ allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings (...).*

We welcome the explicit obligation for State Parties in **Art 7.5** to enact legislation to enable a reversal of the burden of proof regarding the establishment of the liability of companies. However, given the significant imbalance in power, resources, and access to information that right-holders experience when suing corporations, the LBI should explicitly mandate for reversing the burden of proof, moving away from judges' discretion. Art 7.5 should be rephrased as follows:

Art 7.5 – *States Parties shall enact or amend laws ~~allowing judge~~ to reverse the burden of proof in appropriate cases or enabling courts to reverse the burden of proof to fulfil the victims' right to access to remedy where consistent with international law and its domestic constitutional law.⁶*

Applicable jurisdiction

What remains unclear in **Art 9** is whether the right-holder has a choice regarding the jurisdiction that will hear their case. We suggest that, in the view of providing the higher standards of protection for right-holders, the LBI offers them the choice as per the jurisdiction that shall hear their claim. **In Art 9.1 litt a) and c)**, 'or' should be replaced with 'and'.

Art 10 maintains the overall function and structure as in the previous draft while adding essential clarifications regarding the statute of limitations on human rights violations that do not constitute grave human rights abuses. However, the article still lacks clear indications of how long such a period should be. Furthermore, the reference to "legal proceedings" could be clarified in the sense that it refers to civil, criminal and administrative proceedings. Moreover, the article should clarify that statutes of limitations do not apply to crimes against humanity. Based on this, Art. 10.2. LBI could be amended as follows:

Art 10.2 *The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable period of **time of at least [5] years** for the commencement of **civil, criminal, administrative or other** legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when*

⁶ Krajewski, ib., p.17.

*the harm may be identifiable only after a long period of time. State Parties shall ensure that the responsibilities resulting from the commission of crimes against humanity, war crimes and the crime of genocide, will never be subject to statutes of limitation.*⁷

10.2bis – In the case of child victims, States Parties shall take all legislative or other measures necessary to ensure that statutory or other limitations will not deprive them from their right to access justice, remedy and reparation.

Trade and Investment Agreements

In line with our previous submission, we welcome the general principles underlying in **Art 14.5** regarding trade and investment agreements. However, we still consider the article too vague insofar as it does not specify how States should practically ensure that existing agreements do not violate human rights. In particular, the question of how a human rights approach might apply in the context of Investor-State Dispute Settlement Tribunals remains unaddressed. Such Tribunals are criticised for being unfairly biased towards corporate actors and a means for corporations to exercise undue influence on governments' policies and undermine workers' rights and environmental protection. While independent international agreements establish ISDS, the LBI should ensure that such tribunals safeguard the primacy of human rights and the environment over trade and investment concerns when settling disputes.⁸ Moreover, States Parties themselves should be able to reframe their defense in ISDS proceedings, so that it is clear to judges that human rights' obligations contained in the LBI are relevant to the cases.

To specify better how States Parties shall ensure the primacy of human rights over trade and investment agreements, Art 14.5 a) should be rephrased as follows:

*14.5.a – All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, inter alia by ensuring that members of a dispute settlement entity charged with interpreting and implementing these agreements have specialised knowledge in human rights law and by referring to the obligations under this LBI as well as other relevant human rights conventions and instruments in their submissions to such a dispute settlement entity.*⁹

The same vagueness is reflected in Art 14.5 lit b), referring to new trade and investment agreements. While the article mandates States Parties to ensure new agreements are "*compatible with the States Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments*", it does not specify how such compatibility should be ensured.

To address the lack of clarity in Art 14.5, we reiterate the need for comprehensive environmental and human rights impact assessment before the negotiation and signature of any

⁷ Partly based on suggestion by prof. Krajewski, ib, p.19.

⁸ For example, in the recently rendered award in *Eco Oro v Colombia* two arbitrators considered the prohibition of mining activities in a high-altitude wetland as a violation of the applicable investment treaty, while a third arbitrator – a human rights lawyer – considered that the state's measures were justified.⁸ The *Eco Oro* award therefore highlights the importance of appointing arbitrators with expertise in human rights and environmental law.

⁹ Krajewski, ib, p.19.

new trade or investment agreements by State Parties. Thus, we suggest adding at the end of Art 14.5 lit b):

Art 14.5.b – *To ensure the compatibility of these agreements with States Parties' human rights obligations, States Parties shall*

- 1. conduct impact assessments based on the UN Guiding Principles on human rights impact assessments of trade and investment agreements before and during the negotiations, before the ratification and periodically after the entry into force of such agreements.*
- 2. include specific exception clauses in all new trade and investment agreement to allow States Parties to fulfil their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments with measures which would otherwise violate their obligations under the respective trade and investment agreement.*

Moreover, the LBI should require States to revise trade and investment agreements that can negatively impact human rights. To do so, we suggest adding a new lit, c), to Art 14.5, reading as follows:

c. All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be reviewed in light of their impact on States Parties' obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, and shall be revised if necessary.¹⁰

Human Rights Defenders

Human rights defenders play a pivotal role in defending human rights and the environment, as recognised by the UN Declaration on Human Rights Defenders, the UNGPs, and the Working Group on Business and Human Rights. Among human rights and environmental defenders, women and indigenous people are particularly at risk of suffering violence, threats and retaliation when confronting corporate abuse.

We reiterate the need for the LBI to recognise the role and threats experienced by human rights and environmental defenders, and we regret that the 3rd revised draft is still lacking in this regard. While references to the importance of human rights defenders are still present in the Preamble, no operative article ensures the protection of this particular category.

Art 5.2. requires that State Parties "take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity." To ensure consistency with the Preamble and guarantee enhanced protection to human rights and environmental defenders, the article should explicitly refer to the protection of rights-holders and human rights defenders in its title and to human rights defenders in its body.

¹⁰ *Ibidem.*

Companies must not only respect the rights of human rights and environmental defenders, they must also refrain from directly or indirectly obstructing their ways in defending communities, territories and the environment.

Based on article 9 of the Escazu' convention, the LBI should add a new comma after Art 5.3, reading:

Art 5.3. – *States Parties shall take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders may suffer while exercising their human rights.*¹¹

Reference to human rights defenders should also be introduced under Article 6, where a new comma should read:

Art 6. – *States Parties shall enact legislation, regulations and enable effective adjudication to ensure that business enterprises respect the rights of human rights defenders.*¹²

Protection of the Environment

While commonly treated as two separate areas, human rights and the protection of the environment are intimately connected. Access to a clean and safe environment is often the *conditio sine qua non* for accessing several fundamental rights. In this light, we welcome the explicit reference of the right to a clean, safe, healthy and sustainable environment in **Art 1.2** – especially given its recent recognition by the Human Rights Council and the appointment of its Special Rapporteur. The reference to "environmental and climate change impact assessments" in **Art 6.4** also reinforces the reading that "human rights abuses" in the text of the LBI include environmental abuses.

The draft could further strengthen its approach to environmental protection through the following changes. **Art 6.1.** should include the precautionary principle in environmental matters enshrined in Principle 15 of the Rio Declaration 7. The latter requires taking measures that reduce the possibility of suffering environmental damage even if the precise probability of it occurring is not known. The inclusion of this principle would give greater weight, in terms of the right to the environment, to the material content of the binding instrument. The principle of precaution requires the adoption of protective measures before the deterioration of the environment occurs in view of the threat to health or the environment and the lack of scientific certainty about its causes and effects.



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¹¹ Krajewski, ib, p.21.

¹² *Ibidem.*