



UN Business & Human Rights Framework: Time to open constructive discussions towards developing an international legally binding instrument

CIDSE briefing note, July 2015

The June 2014 session of the UN Human Rights Council saw the adoption of two complementary resolutions: one continuing the existing Guiding Principles approach, the other establishing a new inter-governmental working group to begin the process of elaborating an international legally binding instrument on business and human rights. The first session of the IGWG will take place on 6-9 July in Geneva.

During the June session, there was general recognition by States of continuing gaps in the UN business and human rights framework and the limitations of current practice, particularly in relation to ensuring access to justice. The desire to better protect human rights defenders was highlighted by many. Following on from the session, some States have signaled their intention to intensify work on these issues in their national or regional context. The EU announced a commitment to further develop European legislation¹. In December, we underlined the pressing need for more action at both national and international level to stop human rights abuses by business.

Pope Francis, in his encyclical *Laudato Si'* on our common home published in June, underlines the urgency of addressing the widespread, serious harms taking place:

“The export of raw materials to satisfy markets in the industrialized north has caused harm locally, as for example in mercury pollution in gold mining or sulphur dioxide pollution in copper mining. ... The pollution produced by companies which operate in less developed countries in ways they could never do at home, in the countries in which they raise their capital: “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”. (51)ⁱⁱ

Strong demand for action from the ground

While there have been some limited successes on the ground in protecting human rights, mainly due to civil society activism, violations of human rights involving businesses continue on a wide scale. In March at the World Social Forum in Tunis, good news was shared that in Brazil indigenous peoples have defined a consultation protocol for the government to discuss with them until consensus is reached concerning use of their landsⁱⁱⁱ. At the same time, it was highlighted that even when large-scale projects such as the Conga project in Peru or Tampakan mine in the Philippines are suspended, these victories are fragile and subject to new confrontation.

With conflicts and abuses continuing to be fuelled by sourcing of minerals in countries including the Democratic Republic of Congo and Myanmar, in May nearly 150 Catholic leaders from 38 countries on 5 continents called on the European Union to take strong measures requiring businesses to check their supply chains^{iv}. In June, in parallel to the summit of EU and Latin America leaders, social movements and civil society groups gathered in Brussels to highlight continuing violations such as the killing of people defending their rights and land in Colombia, and called for engagement by both Latin American and European governments in the treaty process^v.

Amixed picture at national level

The last months have seen some developments regarding implementation of the UN Guiding Principles, with acceleration in progress towards National Action Plans in a number of countries particularly in Europe (for example, Belgium, Germany, Ireland and Switzerland) as well as in the United States. At regional level, after much hesitation, the European Union has indicated a readiness to finally take up its own Action Plan. This is a positive dynamic, to which the opening of a process towards an international legally binding instrument has contributed. However, we need strong progress at EU level to make up for lost time.

In light of our call in December for effective legislative measures and enforcement at national level that convincingly address the shortcomings now generally acknowledged, the measures contained in National Action Plans continue to be insufficient. We therefore welcome the first review of the UK Action Plan as an opportunity to evaluate progress since 2013 and identify practical ways to strengthen the implementation of the Guiding Principles at national level. We hope that learning from this iterative process will raise the bar for other countries developing their first National Action Plan.

Here it is important to note that human rights due diligence approaches are gaining ground. In March, the French National Assembly approved in first reading legislation requiring large companies to establish a plan of “vigilance” to prevent damages to human rights and the environment. If damage occurs, companies would face liability in case of non-respect. In June, the French National Assembly also adopted a resolution asking the Commission to take similar measure at EU level^{vi}. In Switzerland, after first an approval and then a narrow rejection of a Parliamentary resolution on human rights due diligence, a number of civil society groups launched a popular initiative in April to gather signatures in order to put this issue back on the legislative agenda.

At European level, in May the European Parliament voted in favor of a strong due diligence obligation for companies placing products on the European market containing minerals coming from conflict-affected areas. In April 2015, the European Parliament also called “*on the Commission, EU Governments and others to consider proposals for mandatory frameworks that will ensure that access to remedy and compensation is based on need and responsibility*”^{vii} ». G7 countries announced in June 2015 that they « *will take action to promote better working conditions by increasing transparency, promoting identification and prevention of risks and strengthening complaint mechanisms* ». And the ILO decided to work on fundamental rights protection throughout the supply chain during the 2016 International Labor Conference.

Opening of the international treaty process

Governments and other concerned actors are preparing for the 1st session of the IGWG in July, which will address the principles, scope and format of the instrument. In view of this, the global Treaty Alliance coalition has put forward a statement^{viii}, already signed by over 300 organizations. CIDSE, together with other groups, has made a submission to the IGWG^{ix}, based on legal research. The submission addresses issues and options concerning the State duty to protect, human rights due diligence, access to justice and the scope of businesses and rights in the application of the treaty. These issues are equally present in discussions on implementation of business and human rights frameworks at national level.

Considering some of choices to be made, the submission advances the following:

- **All human rights** should be incorporated into a binding Treaty, including the rights contained in the core human rights instruments as well as the core ILO conventions related to labor rights and the rights of indigenous people. It should be clear that when the Treaty refers to human rights, this includes the negative impacts of environmental damages on people.
- While the Treaty would not exclude any business category, its main objective and focus should be on **provisions for transnational operations of business**, e.g. an obligation on states to regulate the extraterritorial activities of business and to provide mutual assistance between states in investigating violations and in enforcing judgments.
- A Treaty should clarify the State duty to ensure **corporate human rights due diligence** and be explicit about the extraterritorial scope of the State duty to protect, seeking inspiration from Maastricht Principles 24, 25. The Treaty should elaborate on the modalities in which businesses participate in the commission of human rights abuses, including through corporate complicity and human rights abuses in supply chains. Breach of due diligence should give rise to legal liability.
- The Treaty should specify the State duty to provide **access to remedies**. The Treaty could include a ‘consultation clause’ providing that a home State intending to exercise its extraterritorial jurisdiction has the obligation to consult the host State; if the host State does not pursue the case, the home State could proceed. Inspiration for provisions on mutual legal assistance may be found in chapter IV of the United Nations Convention against Corruption.
- By ratifying this instrument, a State would express its consent to a new **monitoring and enforcement mechanism** applying directly to the transnational corporations under its jurisdiction. A Treaty thus conceived could provide a significant incentive for the State to improve the remedies available in the domestic legal order to victims of corporate human rights harms, as well as for the corporations concerned to prevent, and where necessary remedy, any such harm.

Given the essential role of the State duty to protect, the future international instrument should reinforce action by States at national and regional level. And yet two years after Rana Plaza in Bangladesh and 30 years after Bhopal in India, we know that international-level action is required. Imbalances in power of different actors must be addressed: why are so many victims of human rights abuses by companies still waiting for justice, when following the Deepwater Horizon oil spill in the Gulf of Mexico the U.S. government could order BP to provision \$20 billion in a trust fund to be used for damages and compensation? This demands a credible treaty process with serious discussion on the gaps in protection and the different legal options; so that the instrument can make a difference on the ground for affected individuals and communities whose rights are at risk or have been violated. CIDSE believes that to complement and inform the discussions of the Working Group, this new UN process should identify ways to allow active participation and input by a broader range of communities and local NGOs.

Positions are evolving: a number of governments who did not support the June 2014 resolution have indicated they will participate in the IGWG. Among European countries are France and Switzerland. The European Parliament has called on the EU and its Member States to engage in the emerging debate^x. If European governments are serious about their often-stated commitment to human rights, they should constructively engage in the treaty process. The reluctance by EU Member States and the US to explore ideas for how an international treaty could help to end ongoing, documented abuses of human rights by businesses contrasts markedly with the political momentum behind the Transatlantic Trade and Investment Partnership (TTIP). Yet given the significance and scope of the TTIP negotiations, it is remarkable that human rights considerations are not well embedded into the TTIP proposals and it is difficult to find many instances where the UN Guiding Principles have had any obvious influence on the development of policy positions or text. More reflection is needed here on the meaning of the State duty to protect.

The urgency of international action to protect our common home

In the encyclical *Laudato Si'*, Pope Francis emphasizes that action at the international level is required to prevent wide-scale social and environmental damages by business taking place in the context of global markets:

“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 dump contaminated waste or offshore polluting industries in other countries.” (173)

It is now time to open constructive discussions in the IGWG towards developing an international legally binding instrument that can make an important contribution to effectively stopping the occurrence of human rights abuses by businesses on the ground.

ⁱ https://www.globalpolicy.org/images/pdfs/GPFEurope/HRC_resolution_Explanation_of_vote_EU.pdf

ⁱⁱ Encyclical Letter *Laudato Si'*, of the Holy Father Francis On Care For Our Common Home, 24th May 2015:

<http://w2.vatican.va/content/francesco/en/encyclicals/index.html#encyclicals>

ⁱⁱⁱ See also the WSF World Parliamentary Forum motion on TNCs and Human Rights:

<http://www.guengl.eu/policy/action/world-parliamentary-forum>

^{iv} <http://www.cidse.org/publications/business-and-human-rights/catholic-leaders-statement-on-conflict-minerals.html>

^v <http://www.cidse.org/newsroom/press-release-eu-celac-summit-reclaiming-peoples-sovereignty-against-corporate-led-trade.html>

^{vi} <http://www.assemblee-nationale.fr/14/ta-commission/r2854-a0.asp>

^{vii} <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P8-RC-2015-0363+0+DOC+PDF+V0//EN>

^{viii} <http://www.treatymovement.com/statement>

^{ix} <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/cidse-s-contribution-to-the-un-intergovernmental-working-group-on-transnational-corporations-and-other-business-enterprises-with-respect-to-human-rights.html>

^x <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2015-0228+0+DOC+XML+V0//EN>