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

February 2018

There is a **growing momentum** for the UN Treaty. 100 States participated in the 3rd session of the intergovernmental working group (IGWG), with an increasing number of countries from all regions making interventions. Over 250 Parliamentarians from 14 European countries and 9 countries in other regions signed a call supporting the establishment of the Treaty, while in France alone 245 Parliamentarians wrote to the President to ask for France's engagement in favor of the Treaty. Over 200 civil society representatives were present in Geneva from across the world, while liaising with many more in their home countries. Growing numbers of victims of corporate abuse, human rights defenders and civil society are calling for a UN Treaty to help close clear global accountability and protection gaps and put a stop to continuing corporate human rights abuses.

The process has now reached a critical stage towards shaping a Treaty that can help fill the acknowledged gaps in the global legal framework, preventing adverse human rights effects of business activities and providing access to justice for victims and affected communities. A draft text should be presented in the next months for negotiation at the 4th IGWG session on 15-19 October 2018.

The Treaty is needed to help **address insufficiencies in the global legal framework**, which has not kept up with evolutions in the global economic and business reality, and to help redress the current imbalances between the rights and obligations of business. The Treaty process is the only existing inter-governmental space for debates to tackle international regulatory challenges in a focused manner.

> *"The Holy See is aware that there are no easy solutions to address the multifaceted challenges of business and human rights, or to provide the effective remedy and accountability that victims legitimately seek as a matter of urgency. We need international cross-border enforcement, including broader and strengthened laws, giving broad legal rights to bring actions that can hold companies that violate human rights accountable in their home countries. Soft law—the establishment of norms of the kind reflected in the Guiding Principles on Business and Human Rights—are critical; but they will not suffice. We need to move towards a binding international agreement enshrining these norms."*
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> Statement by the Permanent Observer of the Holy See to the UN and Other International Organisations in Geneva at the 3rd IGWG session, 25 October 2017

Over the last year, **civil society groups have been taking forward work on the substantive issues** that are most pressing for our partner organisations on the ground, researching and deepening ideas and proposals. As CIDSE, we commissioned a study by Prof. Markus Krajewski, University of Erlangen-Nürnberg, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights* (March 2017); and jointly commissioned[1] a study by Daniel Blackburn, International Centre for Trade Union Rights, *Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims* (August 2017). We have consistently called upon States to inform and advance their own discussions and positioning, and have worked to engage with them in this respect at national level as well as in international fora.

CIDSE strongly welcomes the elements for the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereafter referred to as "the Treaty"). The holistic nature of the elements has been an essential starting point for the negotiations towards a Treaty, allowing to consider the various aspects as well as their inter-relationships. The 3rd IGWG session allowed States and other actors to express initial views, with discussions reflecting both areas of convergence as well as others where positions diverge. We believe these open discussions, taking the elements paper as the starting point, will be helpful in building the future Treaty, structuring the issues and focusing the Treaty on its core purposes and added value.

General considerations

1. The **reaffirmation of the UN Guiding Principles on Business and Human Rights** and other such principles and frameworks carries forward the spirit of complementarity between the UN Guiding Principles and the Treaty. CIDSE agencies have been actively involved in the development of National Action Plans (NAPs) on business and human rights in states such as Belgium, France, Germany, Ireland, Italy, Switzerland and the UK. NAP processes have raised awareness in the public, within governments and parliaments, and some contain positive elements. At the same time, current NAPs have clear gaps, limits and shortcomings, when it comes to concrete measures to advance binding human rights due diligence, improved access to justice, recognize extraterritorial State obligations and the primacy of human rights over trade and investment agreements. Part of the problem is that these issues are not adequately addressed in the UNGPs. A Treaty covering the points highlighted in the elements document would significantly enhance national policies and processes to date to implement the UNGPs. This is reflected in the supportive language contained in the Belgian National Action Plan with regards to the Treaty. As another concrete example, provisions in the Treaty to improve access to remedy would complement and strengthen this pillar in both the current UK and the Irish National Action Plan.

2. The **scope of application** based on the "transnational character" of the *activities* of the enterprise, rather than on transnational versus domestic corporations, is an important step forward in defining the approach. This does not have to be "either/or" situation, but can rather be a "both/and" or hybrid approach. The Treaty should recall that States are obliged by the existing Human Rights Covenants to protect from abuses by third parties, including all business enterprises. At the same time, a critical challenge faced by States and by victims of corporate abuse is that corporations have been able to avoid legal liability for abuses in the context of transnational activity. We thus consider the emphasis on transnational activity legitimate, as it is in these constellations where we face the biggest challenges: complex business structures, jurisdictional restraints, divergent legal systems and levels of enforcement. The Treaty can add value by addressing these gaps, which require coordinated action at international level. Specific provisions on access to justice, for example, should then lead to strengthening national systems consistent with equal protection, also

[1] Commissioned by Action Aid Netherlands, Brot für die Welt, SOMO, Friends of the Earth Europe, International Trade Union Confederation (ITUC), International Transport Workers' Federation (ITF), the Norwegian Forum for Development and Environment, and CIDSE.

helping to reduce abuses from activity with national character. We recognize that the concept of "transnational character" needs further clarification and legal certainty in a future text. We believe the Treaty process offers space for debate, discussion and evolution on this issue.

3. The future instrument should include strong language on the State's obligation to **protect human rights defenders** working in the context of business activities, closing gaps in this respect in the global and national policy responses to the Guiding Principles. This could include adopting legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any person who seek to exercise their human right to peacefully protest against and denounce abuses linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect human rights defenders against any form of criminalization and obstruction to their work, including gender-specific violence against women human rights defenders; and fully, promptly and independently investigating and punishing attacks and intimidation of human rights defenders. Provisions to ensure access to justice will be essential, as effective access to justice and remedy will reduce the current climate of impunity that many powerful companies enjoy. Such impunity contributes to creating an environment where communities and individuals face harassment and the risk of abuse in defending their rights.

4. The general obligations address the primary responsibility of States. We underline that State measures should include coverage of business operations and relationships in countries other than the countries where the business may be domiciled or headquartered, in line with their **extraterritorial obligations** as defined in General Comment 24 of the UN Committee on Economic, Social and Cultural Rights (CESCR)**.** This should be elaborated more explicitly and systematically in the future text of the Treaty. With regards to business operations where States have a particular influence (State-business nexus), similarly to public procurement, this obligation should explicitly cover external trade promotion and subsidies. This section rightly includes obligations of transnational corporations and other business enterprises, subject of the instrument. The implementation of these obligations is then to be discussed.

Prevention of human rights abuses should be at the heart of the Treaty

5. The elements include ways to strengthen preventive mechanisms, reinforcing the due diligence approach of the UN Guiding Principles on Business & Human Rights by giving it a legally binding nature. The elements **build upon important recent developments in national law**, in particular the 2017 French duty of care legislation requiring large corporations to adopt preventive **vigilance plans,** covering the corporate group, subsidiaries, controlled companies, providers and business relationships globally**.** At the same time, Switzerland has been taking steps forward in the consideration of a Responsible Business Initiative on mandatory due diligence. And important initiatives have been taken to target specific abuses, such as the UK Modern Slavery Act and the Netherlands child labour legislation. With respect to the latter, the Treaty can add value in creating a level playing field by addressing the entire range of human rights. As with the French legislation, the text of the Treaty should clearly state that human rights due diligence must cover all **business relationships** throughout the whole value chain such as supply, export, services, insurance and finance and investment. This can reinforce the whole value chain approach of the complementary work by the International Labour Conference on decent work in supply chains and other actions in support of Sustainable Development Goal 8 on the promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. These important provisions help to redress the inequality of means and resources between corporations and victims of abuse, providing a legal basis for victims to oppose the corporate veil and ensure parent company responsibility. This section should be read together with the section on **liability**. The boundaries of civil, criminal and administrative, personal and collective liability will need further discussion to provide greater legal certainty. The French legislation is **enforced by court sanctions, addressing home State jurisdiction**. This demonstrates the feasibility of such a measure, together with the potential of enhancing global common standards. Existing

national legislation would also be further strengthened by inclusion in the Treaty of provisions on international cooperation.

Access to Justice – Addressing the existing barriers

6. There is wide state recognition that access to justice and remedy for victims of business related human rights abuse is largely lacking at present. As organisations working directly with communities and workers negatively affected by business operations, we can confirm that obstacles to remedy are real and need to be addressed urgently, also in view of reaching Sustainable Development Goal 16 on the promotion of peaceful and inclusive societies for sustainable development and the provision of access to justice for all. The OHCHR project on Access to Remedy is a welcome effort to push for progress, and provides opportunities for important synergies and cross-fertilization with inter-governmental negotiations towards a legally-binding instrument. The sections of the elements on access to justice, jurisdiction, and international cooperation aim to respond to some of the pressing barriers, also analyzed in our September 2017 report 'Removing Barriers to Justice We wish to highlight the importance of a number of elements and urge states to develop those further into concrete actions. First, the reduction of **regulatory, procedural and financial obstacles**. Second, the inclusion of a provision on **access to information**, such as on corporate structures and activities which is often in the possession of corporations, that can substantiate claims of victims and be crucial to determine the role of corporations in human rights abuses. Third, the establishment of a framework for **judicial cooperation** which will improve the effectiveness of State enforcement. Finally, we especially welcome the inclusion in the elements of the **reversal of the burden of proof** in the context of huge power and resource asymmetries between corporations and affected communities. In order for the treaty to result in real improvements for victims in daily life, it would need to go beyond the reaffirmation and expansion of existing obligations. It would need to **specify required state actions and provisions** that need to be in place at the national level to actually improve access to remedy for victims and remove existing barriers. We think the UN Convention against Corruption provides an inspirational model in this regard.

Ensuring the primacy of human rights in trade & investment policies

7. CIDSE has promoted the potential of the Treaty to strengthen measures so that trade and investment can serve to protect and support the enjoyment of human rights rather than infringe upon them.[2] There is ample evidence of conflicts between State obligations under current trade and investment agreements on the one hand, and obligations under international human rights law on the other. This has led to a high number of negative impacts on human rights, and women's livelihoods in particular. Current efforts towards reforms have been insufficient; States cannot push forward with securing rights for investors while putting brakes on discussions on their obligations. This issue cannot be ignored or left only in the hands of those working on trade and investment policy: it is now an urgent matter for this Human Rights Council working group. Trade and investment agreements are reinforcing a power and legal imbalance, giving corporate actors privileged access to private arbitration tribunals, while communities whose rights have been abused struggle to have access to justice, and allowing corporations to drive decisions on national regulation on labor rights, health and environmental standards. This undermines democracy and the constitutional obligations of States to fulfill human rights and defend the common good. We have proposed concrete wording for a **clause establishing the primacy of human rights obligations in the Treaty** over other obligations in trade and investment agreements, elaborated

[2] CIDSE, Human Rights in Trade and Investment Policies: The potential of a UN Treaty on transnational corporations and other businesses, April 2017.

by Prof. Markus Krajewski. We welcome that the draft elements recognize the primacy of human rights obligations over trade and investment agreements and the State's obligation to refrain from entering into agreements that are inconsistent with human rights obligations. We encourage States to spell out in the Treaty that **human right impact assessments** on trade and investment agreements and other trade related initiatives must be undertaken prior to the start of negotiations and be repeated before the conclusion and regularly during the implementation of trade and investment agreements. We also encourage States to include a clause that makes sure the obligations of the Treaty must fully be taken into account in any **trade and investment dispute settlement mechanism**. These provisions are not mutually exclusive and could be combined. The related elements included for the draft instrument should be further developed. Clarifying the relationship between trade and investment and human rights could add to regulatory certainty and a stable legal environment. At a time at which proposals are being advanced to start negotiations on an international framework to protect investor rights (the Multilateral Investment Court), we strongly believe that addressing global governance gaps and strengthening and upholding human rights for communities and victims of corporate abuse should be prioritized.

Effective implementation of the Treaty

8. Enforcement mechanisms will be crucial to the success of the Treaty. The elements rightly recognize the important of both national and international levels, which can help to **reinforce national judicial systems**. The inclusion of potential international judicial mechanisms such as an international court among the options is positive, while requiring more work to set out how this could function effectively in practice. **Resourcing a range of international, regional and national entities**, including National Human Rights Institutions and labour tribunals, will be an important part of making progress. Different levels of action will be needed for the Treaty to work effectively in practice, including monitoring at national, regional and international level.

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We call on all States to consider the elements and to **formulate constructive proposals for further elaboration** of these elements and of the actual text of the Treaty.

We believe that the upcoming in-depth **consultations on substantive issues** on the basis of the elements will be very helpful for moving forward towards elaborated draft text for the Treaty. As civil society groups we will be happy to support, participate in and inform the discussions, both at national and international level, reflecting our expertise and the proposals and experiences of affected communities.

This will contribute to productive discussions and preparations for the 4th session beginning on 15 October 2018, where **all States should come prepared to negotiate the content and draft text of the Treaty**, considering carefully the potential of the elements and their effective implementation to put a stop to corporate-related human rights abuses.

We call on States **to continue to constructively engage until the "mandate to elaborate an international legally binding instrument" established by UN Human Rights Council Resolution 26/9 is fulfilled.**