

# **HOLDING COMPANIES TO ACCOUNT**

**How a new EU law can  
help create a more  
sustainable future**

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April 2021

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## GROWING MOMENTUM

In April 2020, the European Commissioner for Justice, Didier Reynders, publicly committed to tabling a legislative proposal on sustainable corporate governance.<sup>1</sup> The European Parliament has since shown clear support for this initiative. In March 2021, a large majority in the Parliament voted in favour of a legislative own-initiative report calling for new due diligence and corporate accountability legislation.<sup>2</sup>

With a growing consensus amongst civil society,<sup>3</sup> the private sector<sup>4</sup> and the wider public<sup>5</sup> on the need for corporate accountability legislation, the European Union (EU) has a clear mandate to introduce a strong, enforceable law.

## ALIGNING EU AMBITIONS

The EU Treaties codify the Union's commitment to ensuring sustainable development,<sup>6</sup> respect for fundamental rights and freedoms,<sup>7</sup> and a high level of environmental protection.<sup>8</sup> The new law provides an opportunity for the EU to align the core objectives laid out in the Treaties and the ambitions of the EU Green Deal with the global impacts of Member States.

The last five years has seen the introduction of new laws in France and the Netherlands, further proposals tabled in the Netherlands, Germany, Switzerland and Norway and others still promised in the Netherlands and Austria.<sup>9</sup>

With ad hoc legislative responses emerging across Europe, the introduction of robust EU-wide legislation for EU-based companies and those doing business in the EU is an appropriate and timely development. Harmonisation of laws across the EU will provide greater legal certainty for companies and reduce distortions which lead to unfair competition within the internal market. And the impacts will extend beyond the EU.

By catalysing a change in the way companies do business and creating mechanisms for accountability, this law can help clean up global

supply chains and promote sustainable development.

## THIS BRIEFING

This briefing sets out Global Witness' key proposals for a robust human rights and environmental due diligence obligation and corporate liability regime as part of a new EU Directive on sustainable corporate governance.

It aims to inform ongoing EU legislative discussions and to support the development of a robust and enforceable law to ensure greater accountability for all companies doing business in the EU.

Our key proposals are:

- > The new Directive must require all companies, across all sectors - including finance - that are doing **business in the EU's internal market** to conduct human rights and environmental due diligence (HREDD).
- > Mandatory HREDD will require companies to identify, assess, prevent and mitigate their negative human rights, environmental and governance risks and impacts in their operations and value chains, monitor the effectiveness of the steps taken and publicly account for this process.
- > The HREDD process must incorporate meaningful stakeholder engagement and a requirement for companies to remedy harms.
- > The law must create a robust liability regime and strong enforcement mechanisms to hold companies accountable both when they cause harms and when they breach the due diligence requirements.
- > The liability regime should include administrative, civil and criminal liability. This must allow victims of harm outside of the EU to access EU courts to ensure that there is meaningful access to remedy for those most impacted by harmful business activities.

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The proposed legislative intervention from the EU is long overdue and urgently needed. Global Witness has recorded how, in pursuit of profit, corporate actions have led to significant and often irreversible harms to both people and the planet. One example such corporate abuses is seen in Colombia.

## **“WE ARE GOING TO KILL YOU” – A CASE STUDY ON CORPORATE POWER LEFT UNCHECKED**

Cerrejón is one of the world’s largest open-pit coal mines, and the communities who live alongside it are some of Colombia’s poorest.<sup>10</sup> For decades, they have been inhaling poisonous dust from the mine. Their water has been contaminated by the toxic waste dumped in their rivers.<sup>11</sup> Meanwhile, the mine’s owners – BHP, Anglo-American and Glencore – count among the most profitable companies in the world.<sup>12</sup>

A desert-like expanse of barren land, Cerrejón covers 690 km<sup>2</sup> - more than half the size of Istanbul.<sup>13</sup> Reportedly 35 communities have been displaced to make way for the mine, many of

them members of indigenous and Afro-Colombian communities.<sup>14</sup>

Footage acquired by Global Witness shows how some of these people were violently forced out of their homes - the scenes of a 2016 eviction in the Roche community show riot police dragging women along the ground and loading them onto trucks.<sup>15</sup> This eviction was allegedly carried out using tear gas and metal projectiles, with bulldozers sent in to flatten people’s homes.<sup>16</sup> Cerrejón later stated that it regretted the events of that day.<sup>17</sup>

The mine is also profoundly hazardous. It emits pollutants that are invisible to the human eye but can cause a multitude of health issues, ranging from heart disease to cancer and premature births.<sup>18</sup>

According to a 2018 study in the *Journal of Environmental and Public Health*, over 336,000 people are believed to have developed respiratory complications that are directly attributable to the mine, with over 400 emergency hospital visits every year.<sup>19</sup>



2019. Cerrejón Coal Mine in Barrancas, La Guajira, Colombia. *Nicolo Filippo Rosso/Bloomberg via Getty Images*

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Cerrejón is a leech on water too – it consumes a staggering 24 million litres *every day*, which has reportedly caused 17 waterways to dry up.<sup>20</sup> What little water is left for local people is potentially contaminated. In 2019, a water sample taken downstream from one of Cerrejón’s dump sites contained dangerous levels of mercury.<sup>21</sup> That same year, the company admitted to having dumped 578 million litres of liquid waste into natural bodies of water.<sup>22</sup>

These health impacts are so severe they’re being written into local people’s DNA. A 2018 study found that pollution from Cerrejón is damaging local people at the cellular level, raising the risk of cancer and chromosomal instability.<sup>23</sup>

In 2019, Colombia’s Constitutional Court ordered the mine’s operating company to comply with health and environmental protection requirements.<sup>24</sup> This was the latest in a series of decisions against Cerrejón by Colombia’s Constitutional Court and Supreme Court.<sup>25</sup> Legal cases about the harmful impacts of the mine on communities date back to the 1990s.<sup>26</sup>

The company announced it had addressed this latest ruling by striking a deal with a local community for a series of improvements<sup>27</sup> – a statement local indigenous leaders called “fraudulent” and “lies”.<sup>28</sup>

#### A COMMUNITY PROPELLED INTO ACTIVISM

Angelica Ortiz said she became an activist because she didn’t want other communities to go through what she has.<sup>29</sup> She is secretary general of the Association of Wayuu Women, a local indigenous campaigns group that has opposed Cerrejón for years.<sup>30</sup> But in the context of a mine that some say is backed and protected by paramilitary groups, criticising Cerrejón poses its own risks.<sup>31</sup>

The campaign against Angelica began in 2011, with a series of threatening phone calls. She has been watched and followed, and drones are flown over her home. These intimidation tactics

were initially directed at Angelica, but when she refused to stay silent about the mine’s impacts, they moved onto her family too. At times she has chosen to live apart from her children to protect them.<sup>32</sup>

A colleague of Angelica’s, Jakeline Romero, told Global Witness how her teenage daughter had received an anonymous phone call on her way home from school. “Tell your family to take care of themselves and of you. Because we are going to kill you,” she was told.<sup>33</sup>

Threats against Cerrejón’s opponents are reportedly common.<sup>34</sup>

Cerrejón told Global Witness that it rejects any accusation of being involved with paramilitary groups or being linked to any case of threats to social or community leaders.<sup>35</sup>

#### EUROPE FANS THE FLAMES

Europe may be thousands of miles away, but it is central to the Cerrejón fiasco. In 2019, most of the 26.3 million tonnes of coal exported from Cerrejón<sup>36</sup> – worth around €1.2 billion<sup>37</sup> – was shipped to the Mediterranean.<sup>38</sup>

Cerrejón’s three parent companies, are also listed on the London Stock Exchange, with one headquartered in the UK and one in Switzerland.<sup>39</sup> In addition, two Irish companies are central to Cerrejón’s profitability – Dublin based CMC-Coal Marketing sells and markets all of the company’s coal, and Ireland’s state company, the Electricity Supply Board has purchased millions of tonnes of it.<sup>40</sup>

Despite both owning 33.3% stakes in the mine, Glencore and Anglo American have tried to distance themselves from the allegations surrounding Cerrejón. Both told Global Witness that Cerrejón is an independently managed joint venture.<sup>41</sup>

#### A LITANY OF ABUSES SPANNING DECADES

The mine is no stranger to public condemnation. In September 2020, Cerrejón’s operations were

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denounced by several prominent UN human rights experts.<sup>42</sup> One of them, the UN Special Rapporteur on Human Rights and the Environment, said that the case was, “one of the most disturbing situations” he had encountered during his time in post.<sup>43</sup>

Some months later, in January 2021, the Global Legal Action Network (GLAN) submitted a series of complaints with the OECD calling for the mine’s closure – the latest in a series of attempts to seek justice.<sup>44</sup> But to this day affected communities still lack effective remedy for a litany of abuses spanning decades.<sup>45</sup>

The Cerrejón case typifies how corporations consider themselves immune from laws designed to protect people and the environment. Cerrejón has repeatedly dodged accountability, despite a series of judgements from Colombian courts and a 2020 report by the governmental auditing body the Controller General that confirmed Cerrejón was not compliant with the Colombian environmental regime.<sup>46</sup> Despite this, the company maintains that “it operates in compliance with the law and applicable standards”.<sup>47</sup>

**“We are calling on the company to sit down with all of the communities that have been evicted, have been uprooted, and have lost their water sources. We have to figure out how to remedy all of this. And who better than the communities themselves to say how they want to be compensated or how they want harms to be mitigated?”**

Angelica Ortiz, Association of Wayuu Women, March 2021<sup>48</sup>

In March 2021, Global Witness introduced Angelica Ortiz to the European Commissioner for Justice, Didier Reynders.<sup>49</sup> She explained to him that many communities had been displaced from

the mine site without any prior consultation. Some consultations have happened, she said, but only after legal action was taken against Cerrejón.<sup>50</sup>

By that time of course, the damage had been done.

## LEGISLATIVE RESPONSES

Multinational companies shouldn’t be allowed to hide behind subsidiaries and supply chains - human rights and environmental catastrophes like those triggered by the Cerrejón mine will never abate if the corporations that profit from them aren’t held accountable.

The proposals outlined in this briefing call for new legislation that would legally mandate more responsible business conduct, and hold companies liable for human rights violations or environmental damage. This could help to change lived realities for people affected by harmful business activities around the world.

## HUMAN RIGHTS & ENVIRONMENTAL DUE DILIGENCE

Voluntary measures and self-regulation have failed to change harmful corporate behaviour and improve the outcomes for affected communities or the environment. The new law must require companies to address their adverse risks and impacts on human rights, the environment and good governance through the process of human rights and environmental due diligence (HREDD).

HREDD is a continuous process that requires companies to identify and assess their actual and potential adverse impacts, take action to prevent or mitigate them, monitor the implementation and effectiveness of the steps taken and then publicly account for it all. Related to this, companies have a responsibility to ensure that victims have access to effective remedies when there is an adverse impact.

The process of human rights due diligence was first introduced in the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>51</sup> and the OECD Guidelines for Multinational Enterprises (OECD Guidelines).<sup>52</sup> The OECD's Due Diligence Guidance for Responsible Business Conduct has since confirmed that “due diligence addresses

actual impacts or potential adverse impacts (risks) related to... human rights, including workers and industrial relations, environment, bribery and corruption, disclosure and consumer interests.”<sup>53</sup> This has clarified that due diligence in this context, extends beyond adverse human rights impacts. Consistent with this, HREDD in the new law should cover this broader application.

### KEY TERMS:

*Business relationships* should be defined as direct and indirect relationships that a company has with its business partners, entities in its value chain and other State or non-state actors that it is linked to through any of its operations, products or services.<sup>54</sup>

*Value chain* refers to all activities that add value, converting any form of input into an output.<sup>55</sup> Value chain **should be defined to include** “all activities, operations, business relationships and investment chains of [a company]”<sup>56</sup> and “entities with which [the company] has a direct or indirect business relationship ... and which either (a) supply products or services that contribute to [its] own products or services, or (b) receive products or services from the [company].”<sup>57</sup>

FIGURE 1. DUE DILIGENCE PROCESS & SUPPORTING MEASURES



Source: OECD, Due Diligence Guidance for Responsible Business Practice

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To be effective, mandatory HREDD under the new EU Directive must:

- > Cover actual and potential adverse impacts that a company causes, contributes to or is directly linked to through its business relationships, in line with the UNGPs and the OECD Guidelines.<sup>58</sup>
- > Cover the **company's operations and entire value chains. Companies' impacts extend far** beyond their own operations, closest relationships or first tier suppliers. In many cases, the worst harms occur well beyond the first tier of suppliers and often take place in host, producer and manufacturing countries. HREDD requirements must therefore ensure that companies are effectively carrying out due diligence across this full range of relationships.
- > Be an ongoing and continuous process, the main aim of which is to prevent harms from occurring as a result of business activity. In order to be effective, HREDD **must be integrated into the company's** operating practices, business practices and decision-making processes. This will range **from the company's buying practices and** supplier relationships to its decisions to expand an existing project or enter a new operating context.
- > Require stakeholder engagement on an ongoing basis. Such engagement must be integrated into all parts of the due diligence process and is key for ensuring that affected people and communities are consulted and are involved across operations and different stages of projects. This includes before business activity begins as well as when harms occur, and remediation is required. Globally, indigenous communities face increasing threats and marginalisation. Their rights – including the right to free prior and informed consent (FPIC) – must be respected.
- > Require the company to provide effective remedy for victims of corporate harms. Remedy is an essential part of justice and accountability. In practical terms, it will also help to reduce the power imbalance between

well-resourced, profitable corporate actors and the affected people and communities that are impacted by their actions.

As an inherently proportionate and context-specific process, HREDD will require companies to take measures that are proportionate to and commensurate with their size, context and the severity of their risks and impacts, among other factors.

### Beyond Standard Due Diligence

HREDD goes beyond the standard due diligence that companies usually undertake in relation to specific projects, actions or investment decisions. There are three key differences:

- > HREDD is a continuous and ongoing process rather than a one-off action.
- > International standards for responsible business conduct such as the UNGPs and OECD Guidelines require *all companies* to conduct HREDD to effectively manage their adverse human rights, environmental and governance risks and impacts, rather than allowing companies to decide whether or not to do due diligence on a case by case basis.
- > HREDD focuses on the impact on and the risk to the rights holders, the communities and the environment rather than the impact on and/or risk to the company itself.

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'Risk' within the OECD Guidelines refers to

“... the likelihood of adverse impacts on people, the environment and society that enterprises cause, contribute to, or to which they are directly linked. In other words, it is an outward-facing approach to risk.”

OECD Due Diligence Guidance, 2016<sup>59</sup>

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## STAKEHOLDER ENGAGEMENT

Meaningful stakeholder engagement is crucial throughout the due diligence process.<sup>60</sup> It should form an integral part of HREDD, taking place at every phase of the HREDD process<sup>61</sup> and throughout the duration of the project, business activities, operations and/or business relationship. This includes efforts to assess or implement remediation measures. Stakeholder engagement as part of HREDD is different to engagement done by the board at designated times such as when setting sustainability targets.

“Meaningful stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. “

OECD, 2011<sup>62</sup>

The OECD Due Diligence Guidance also confirms that stakeholder engagement must be an ongoing process.<sup>63</sup> ‘**Dialogue processes**’ for example, which involve regular meetings with stakeholders are a way to share information, perspectives and build trust.<sup>64</sup> Engagement with stakeholders before and during the course of the project or business activity allows the company to understand the perspectives of those who may be affected by their decisions and activities. The company may also benefit from this input, for example, by pre-empting and helping to avoid potential conflicts.

It must involve all persons or groups that are directly, indirectly or potentially affected by the activities and experts should also be consulted when relevant.<sup>65</sup> Additional safeguards may be needed since those who participate in engagement processes, including human rights, land and environmental defenders may be targeted or face criminalisation for speaking out against harmful commercial projects.<sup>66</sup>

Companies should be forthcoming with information and there should be opportunities

for engagement on an ongoing basis, especially with key stakeholder groups. Companies should share information on the plans, implementation and monitoring of measures to manage their actual and potential negative impacts. Such information should be shared in an accessible format that is appropriate to the context including considerations of language, literacy and culture of the stakeholder group(s).

Stakeholders may already be marginalised or disadvantaged individuals or groups; they may also be physically, financially, spiritually or otherwise dependent on the land or natural resources involved in a project. Mechanisms for stakeholder engagement must always seek to address the inherent power imbalance between the company and the affected persons or groups.<sup>67</sup>

Engagement processes should also aim to understand how existing contexts and or vulnerabilities may create disproportionate impacts on certain groups. For example, women often hold different positions and responsibilities in the community to men. There is evidence that women human rights, land and environmental defenders face different forms and higher levels of threats and violence, including gender-based violence.<sup>68</sup> In 2020, Global Witness reported that over 1 in 10 land and environmental defenders who were killed, were women<sup>69</sup> while the Business and Human Rights Resource Centre reported that between March to September 2020 during the Covid-19 pandemic, almost a quarter of attacks against human rights defenders were women.<sup>70</sup> Special attention must be paid to implementing a gender-based approach to ensure the safe and equal participation of women in consultative and decision-making processes.

Finally, the right of indigenous peoples and communities to free prior and informed consent (FPIC) is paramount and must be respected. FPIC allows these communities to give or withhold consent to projects which may affect them, their land or ancestral territory. This is protected in the

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UN Declaration on the Rights of Indigenous Peoples,<sup>71</sup> the Convention on Biological Diversity<sup>72</sup> and ILO Convention 169 on Indigenous and Tribal People.<sup>73</sup>

## SCOPE

All companies, regardless of their size can have severe negative human rights and environmental impacts through their operations and value chains. So too, every company may face risks of bribery or corruption.

The Directive should therefore apply to EU-based businesses as well as all other companies placing products or services on the EU's internal market or otherwise carrying on business in the EU, regardless of their sector. This also includes the finance sector.<sup>74</sup>

Global Witness has shown how the financial sector is often complicit in human rights and environmental harms. Our analysis of the financing of six agribusiness companies linked to the destruction of climate critical forests in the Amazon, Congo Basin and Papua New Guinea found that EU-based financial institutions were one of the main sources of funds and had backed **these companies to the tune of €7 billion** between 2013 and 2019.<sup>75</sup>

All companies established, domiciled or doing business in the EU must be required to undertake HREDD, which has the primary aim of preventing negative impacts. This is in line with the UNGPs and OECD Guidelines which clarify that all companies have a responsibility to respect human rights, and that the standards for responsible business conduct which cover environmental protection and good governance, apply to all companies.

Precedents for EU legislation which applies to a wide cross section of companies include:

- > Timber Regulation (995/2010) which relates to products placed on the internal market – see Article 2(b);

- > General Data Protection Regulation (2016/679), which applies extraterritorially to companies offering goods and services within the EU – see Article 3; and
- > Directive on unfair trading practices in agricultural and food supply chains (2019/633) which also creates obligations for companies based outside the EU – see Articles 1 and 2.

Small and medium sized companies (so called 'SMEs') make up the bulk of EU companies and will therefore make a significant contribution to the success of the new legislation. In addition, SMEs may cause, contribute to or be directly linked to human rights and environmental abuses or corruption, with some SMEs even operating in high-risk sectors. SMEs must therefore be within the scope of the new Directive.

HREDD is inherently proportionate and context specific. A 2020 study published by the European Commission confirmed that the costs associated with implementing HREDD would not be overly burdensome for companies.<sup>76</sup> In addition, there is evidence that there are clear benefits to conducting HREDD.<sup>77</sup>

## APPLICABLE STANDARDS

**The EU's forthcoming legislation must codify companies' responsibility to respect** human rights, the environment (including climate), and principles of good governance. As noted above, this will include a requirement for companies to conduct HREDD across their operations and value chains. The Directive should set out applicable standards for business as outlined below.

### Human Rights

Companies must be required to respect all internationally recognised human rights as established in the UNGPs and OECD Guidelines.

The new EU Directive should aim for the highest standard of human rights protections. Strong human rights standards help to provide better legal protections for the most vulnerable groups,

who are disproportionately impacted by harmful corporate activities.

All human rights are interdependent, interrelated and indivisible meaning that the fulfilment or full enjoyment of certain rights depends on the others. Therefore, it is not possible to include some while excluding others especially as there is also no hierarchy of human rights.

Instead, the law must adopt a holistic and inclusive approach to human rights protections which incorporates the standards included in:

- > The international bill of rights,<sup>78</sup> customary international law,<sup>79</sup> international humanitarian law, regional human rights treaties<sup>80</sup> and other instruments such as declarations, guidelines and principles adopted at the international level.<sup>81</sup>
- > International labour law including ILO Conventions, the ILO Declaration on Fundamental Principles and Rights at Work.
- > International human rights law, including the standards and legal protections for marginalised and vulnerable groups such as: Indigenous and Tribal Peoples; migrant workers; women and girls; children; gender non-conforming people; human rights, environmental and land defenders; and people with disabilities.
- > The Directive should also refer to the human rights standards in national laws as applicable standards where these exceed the protections afforded in international human rights law. Where national laws fall short,

companies are expected to “operate to the higher standard”<sup>82</sup> and in case of conflicting standards, companies should find ways to honour the principles of international human rights law.<sup>83</sup> The UNGPs and OECD Guidelines both affirm that international human rights law must remain the anchor for applicable standards for business.<sup>84</sup>

## Environment

The OECD Guidelines include environmental protection as an important component of responsible business conduct.<sup>85</sup> In addition, companies must be required to respect the environment to achieve the objectives on environmental protection included in the EU Treaties, **the EU’s international commitments** under the Paris Agreement and the ambitions of the European Green Deal.<sup>86</sup>

Several factors need to be taken into account when establishing applicable environmental standards. In contrast to the field of human rights, there is no comprehensive body of international law or standards on the protection of the environment. In addition, international environmental law generally creates obligations for States, with many instruments focusing on specific geographical areas.

The new Directive must therefore:

- > Incorporate key principles of international and EU environmental law. In particular, the principle of prevention, the precautionary principle, the principle of sustainable

### KEY ENVIRONMENTAL LAW PRINCIPLES

- > Prevention: focus on protecting the environment and preventing harm first, rather than remedying it given the long term and often irreversible impacts of harms.
- > Precaution: measures should be taken to prevent environmental harm where there are threats of serious or irreversible damage, even in the absence of scientific certainty about the impact
- > Sustainable development: resources should be used sustainably to meet present needs and ensure that future generations can meet their needs
- > Polluter pays: the polluter should bear the costs of the pollution they caused.

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- development and the polluter pays principle should be treated as indispensable.
- > Incorporate international environmental law as applicable standards for companies. In the case of international law instruments such as the Paris Agreement Under the United Nations Framework Convention on Climate Change (Paris Agreement) and the Convention on Biological Diversity, the requirements can and should be translated into business obligations (see below). This approach was confirmed by the Dutch National Contact Point established under the OECD Guidelines in a 2019 statement.<sup>87</sup>
  - > Adopt broad definitions for the environment and environmental impacts to ensure adequate protection of the environment. This should incorporate an indicative, non-exhaustive list of adverse environmental impacts including climate change, air, land and water pollution, use and disposal of hazardous substances, the production of waste, deforestation and other damage to or loss of ecosystems, biodiversity, habitats and species. These definitions and lists should be developed in consultation with stakeholders and should leave room to accommodate the consolidation and development of this area of law.
  - > Refer to other environmental standards such as those in EU law and national law as a starting point. However, national laws often fail to provide adequate levels of protection. A 2020 study on climate change legislation found that most countries focus on sector specific interventions rather than developing **“strategic framework laws, which aim to create a unifying institutional structure to reduce greenhouse gas emissions or address physical climate risks, or often both.”**<sup>88</sup> With such gaps and variations persisting, the new EU law must include strong, clear provisions to define adverse environmental impacts and require the application of key principles of environmental law.
  - > Require companies to measure their adverse environmental impacts.<sup>89</sup> The new law or supplemental instruments must provide guidance on standards and modes of impact assessment.
  - > Include both direct and indirect emissions in requirements for companies to measure, reduce and mitigate their adverse climate impacts. In particular, it should include Scope 1 (direct emissions from owned or controlled sources), Scope 2 (indirect emissions from the generation of energy that is purchased and used by the company) and

#### TRANSLATING INTERNATIONAL LAW INTO BUSINESS OBLIGATIONS: PARIS AGREEMENT

- > Require companies to:
- > Measure their Scope 1, Scope 2 and Scope 3 greenhouse gas (GHG) emissions.
- > Reduce their total emissions in line with 1.5°C pathways. This must prioritise absolute emissions reductions in the near-term and limit reliance on carbon offsetting and carbon dioxide removal technologies.
- > Commit to updating GHG emissions reduction targets at intervals, in line with the best available science.
- > Monitor the effectiveness of the actions taken to reduce their GHG emissions.
- > Assess the impacts of their actions on efforts to ensure a just transition.
- > Apply key environmental law principles in the development of their environmental strategies.
- > Report on the steps that they have taken and the effectiveness of these.

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Scope 3 (all other indirect emissions occurring in **the company's value chain**) greenhouse gas emissions.<sup>90</sup>

## Good Governance

Companies must also be required to assess, address and communicate publicly on their adverse impacts on good governance as part of HREDD. EU Member States have ratified international agreements that prohibit corruption and bribery, and prescribe good governance standards that should be adopted by companies. These include the UN Convention against Corruption,<sup>91</sup> the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions,<sup>92</sup> and the Council of Europe Civil Law Convention on Corruption.<sup>93</sup> Along with other existing international standards and guidance<sup>94</sup> they provide a strong basis for establishing applicable standards for good governance in the new Directive.<sup>95</sup>

Other components of the **OECD's anti-bribery** framework such as the OECD Guidelines for MNEs and the Recommendation for Further Combatting Bribery of Foreign Officials in International Business Transactions<sup>96</sup> provide further support with prescribing applicable standards on good governance risks and impacts.

For example, Chapter VII of the OECD Guidelines for MNEs sets out the actions that companies should take in response to risks of bribery. The Recommendation (relating to combatting bribery of foreign public officials) clarifies that bribery should be prohibited whether it is done directly or through intermediaries.<sup>97</sup> Annex II of the Recommendation, adopted by the OECD as Good Practice Guidance in 2010, further specifies that measures designed to prevent and detect foreign bribery should extend beyond directors, officers and employees. Rather, it should include all controlled entities such as subsidiaries and **“where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants,**

representatives, distributors, contractors and **suppliers, consortia and joint venture partners”** also referred to as **“business partners”**.<sup>98</sup>

Together these provide a firm basis for introducing a due diligence requirement for risks of bribery throughout the corporate structure and entire value chain.

Preventive measures against corruption should be integrated into the due diligence duty for companies under the new EU Directive.<sup>99</sup> For this, the applicable standards should be developed based on existing instruments as outlined above. However, this must complement rather than substitute the urgent and necessary efforts to **strengthen the EU's anti-corruption legal framework** and increase levels of implementation and harmonisation across Member States.<sup>100</sup>

## ADVERSE IMPACTS

The Directive should set out what would constitute adverse or negative human rights, environmental (including climate) and governance impacts.

In the case of human rights, an adverse impact occurs when the ability to enjoy the right is reduced or removed.<sup>101</sup>

For adverse environmental impacts, a non-exhaustive list should be included in the new Directive, as noted above. For each of these impacts, the scope should include actual or potential impacts, whether temporary or permanent and of any magnitude, duration or frequency.<sup>102</sup>

Such a scope would make all companies by virtue of their carbon footprint responsible for an adverse climate impact. Therefore, as a subset of environmental impacts, adverse climate impacts for business should be assessed in line with the goals of the Paris Agreement. The Directive must prioritise the near-term reduction of absolute emissions rather than the setting of net zero targets for decades from now when assessing



Kuching, Malaysia – 16 MAY 2015. Deforestation. Photo of tropical rain forest in Borneo being destroyed to make way for oil palm plantation. *Rich Carey/Shutterstock*

**companies' adverse climate impacts** or their responses. Net zero targets have been used to maintain the status quo rather than take effective action against climate change.<sup>103</sup> Provision on climate impacts will also need to account for future scientific developments.

Adverse governance impacts will include corruption and bribery in line with international law prohibitions on these practices as well as grand corruption, petty corruption, small bribes or facilitation payments and business to business corruption.<sup>104</sup>

Often business activities result in interrelated or simultaneous adverse impacts. For example, negative impacts on the climate which have contributed to climate change, also result in negative impacts on a range of human rights including the right to life, health, food, water, sanitation and development.<sup>105</sup> Similarly, corruption may lead to or facilitate commercial activity that negatively impacts the environment

and human rights in local communities. Corruption also often exacerbates or expedites human rights and environmental harms.

Finally, human rights abuses and environmental damage frequently occur together. Global Witness has reported extensively on how human rights abuses including displacement, threats and killings of land and environmental defenders often occur in the shadow of polluting or environmentally destructive commercial activity such as mining and large-scale monocrop agriculture.<sup>106</sup>

## LIABILITY AND ENFORCEMENT

Strong mechanisms for enforcement and liability are indispensable elements of the forthcoming law which must include effective, proportionate and dissuasive sanctions.

Voluntary measures have neither changed **companies' behaviour nor held them** accountable for their actions. Ten years after the introduction of the UNGPs and the revision of the OECD Guidelines that included human rights, much remains the same. Several studies have shown that most companies have not taken effective action to address the human rights violations and environmental harms including climate change, that are occurring in their operations and value chains.<sup>107</sup> A 2020 study on due diligence requirements through the supply chain published by the European Commission, found that only 16% of the 334 business respondents surveyed were undertaking due diligence which took into account human rights and environmental impacts across the entire value chain.<sup>108</sup>

The Directive should therefore provide for a model of liability that applies as follows:

### Civil Liability

- > for human rights harms that a company, or any company that they control or have the ability to control, has caused or contributed to.
- > for human rights and environmental harms that a company is directly linked to through its business relationships, unless it can show that it has taken all reasonable measures and exercised due care to prevent these harms.

### Civil and Administrative Liability

- > for environmental harms that a company, or any company that they control or have the ability to control, has caused or contributed to.
- > for breaches of the due diligence duty or failure to carry out adequate human rights and environmental due diligence.

### Criminal Liability

- > for a failure to prevent serious human rights abuses or severe environmental damage that rises to the level of environmental crimes.
- > for repeated non-compliance with the due diligence duty.

EU Member States have existing international obligations on the prohibition and prevention of corruption and bribery which require the imposition of effective and dissuasive sanctions (including criminal penalties) against legal persons for these offences.<sup>109</sup> This must be affirmed in the new Directive since implementation across EU Member States remains low.<sup>110</sup>

*Controlled companies* should include those which are economically dependent on the relationship.

### Key Requirements for Liability Provisions

The proposed model for liability will help to create routes to remedy for victims of corporate abuse, catalyse the necessary changes in business conduct and end the prevailing lack of corporate accountability for the harms resulting from business activities. This subsection sets out ten key requirements to ensure that liability and enforcement provisions are effective.

1. Both actions and omissions may form the basis for liability. This is important to prevent the creation of perverse incentives for inaction from companies.
2. The Directive must expressly indicate that successful implementation of HREDD will not automatically absolve companies from liability for harms. Instead, liability will need to be assessed on a case-by-case basis. This will consider factors such as the extent to which the measures in place were designed and implemented to prevent the harm(s) from occurring.

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3. The Directive must establish joint and several liability for both human rights and environmental harms that result from corporate activity. It should further clarify that the liability of one company (be it a parent, controlling, supplier or subcontracting company) will not preclude or replace the liability of another.
  4. Neither administrative liability nor criminal liability can substitute for civil liability. Instead, these systems should be viewed as complementary. A key reason for this is that civil liability offers remedies directly to those who are affected. For example, court orders in civil cases may prohibit or stop the harmful conduct, require restitution and/or provide financial compensation to victims. In contrast, findings of administrative liability or criminal liability in these contexts result in fines and other sanctions which focus on penalising the company or individuals involved rather than responding to the victims.
  5. Administrative or criminal proceedings or decisions against a company must not preclude civil claims (or vice versa) against the same company, or in respect of the same impacts. Further, a finding of corporate criminal liability should be without prejudice to individual criminal liability of directors and/ or senior managers where applicable.
  6. Victims who suffer harm within or outside of the EU must be able to bring cases in EU courts against EU-based defendants.
  7. The Directive must reverse the burden of proof or establish a presumption of liability in civil claims against companies. In most cases, victims do not have and struggle to obtain the critical information needed for their case which is held by the company. In addition to the major imbalance of financial and human resources, this provides a major hurdle for victims seeking access to justice for corporate harms.
  8. Limitation periods for bringing legal actions must be extended to account for the complexity of the cases and other

peculiarities of transnational litigation.<sup>111</sup> In addition, in some instances, particularly in the case of environmental or climate harms, the impact may not be evident for several years.

9. Liability provisions must be established without prejudice to existing or future liability regimes. This will confirm that these provisions will not be weakened or undermined by subsequent legislation. Article 3.2 of the Environmental Liability Directive (2004/35/EC) provides an example of such a provision.<sup>112</sup>
10. Provision for financial support for victims should be included. Litigation invariably involves high costs to claimants which are often prohibitive. This is exacerbated as well-resourced companies regularly fight tooth and nail in claims against them. In addition, Global Witness has documented how companies use a range of measures to criminalise and intimidate opponents.<sup>113</sup>

## Public Enforcement: National Competent Authorities

A robust public monitoring and enforcement system must be established at the EU Member State level to complement judicial enforcement mechanisms. Key proposed features and functions for a national competent authority (CA) are set out below.

An overreliance on private litigation for enforcement is undesirable and ineffective.<sup>114</sup> However, to ensure that public enforcement mechanisms are effective under the new law, it should address the well-known shortcomings of similar systems. For example, the EU Timber Regulation (995/2010) provides for competent authorities (CA) to conduct compliance checks and enforcement functions however, major challenges remain for implementation: Authorities lack sufficient resources, knowledge and skills to undertake the compliance checks or follow up on enforcement actions;<sup>115</sup> and the limited penalties and powers of these authorities

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remain insufficiently dissuasive forms of enforcement.

#### DESIGN

To ensure the independence and impartiality of CAs, they must be established independently from government ministries, particularly those with mandates relating to the promotion of business interests. This will help to prevent conflicts of interest and potential bias.

CAs must also be adequately resourced through financial support and staff with appropriate training and expertise. To ensure their effectiveness, budgets and resources will need to match their functions and powers, and account for training and capacity building of staff.

#### MONITORING AND ENFORCEMENT

Central functions of the CA will be to monitor the compliance of companies with the HREDD requirement, assess the quality of their performance – including through investigations – and enforce the HREDD requirement.

Monitoring due diligence practices should include procedural monitoring (checking compliance with reporting requirements) and substantive monitoring (assessing the quality and adequacy of due diligence practices). Experts suggest that the CAs should review a sample of reports on a regular basis, pairing this with a responsive approach through which they carry out additional reviews and investigations when stakeholders raise concerns or complaints.<sup>116</sup> To support this, it should maintain a list of companies with reporting obligations and a public repository of reports matched against it.

The new directive should therefore require the establishment of a reporting mechanism that allows third parties to submit complaints or concerns. Article 32 of the Market Abuse Regulation (594/2014)<sup>117</sup> imposes such a requirement for States to enable reporting of actual or potential infringements of the Regulation.

The new Directive should further provide that CAs are required and empowered to respond to and/or investigate complaints from third parties. This will overcome a major shortcoming of the EU Timber Regulation which does not *require* the CA to act. A reliable and effective procedure for substantiated concerns should also be included, building on the EU Timber Regulation model.<sup>118</sup>

In addition to responding to complaints that a company has breached its due diligence obligations and/or caused harm, CAs must be empowered to investigate on their own initiative. To ensure its effectiveness, CAs must also be allowed to summon people to provide testimonies, request information, inspect premises and sanction companies for non-cooperation.

CAs must be empowered to enforce due diligence requirements through an administrative liability function. However as noted above, this must be without prejudice to civil or criminal liability for harm. Together, such measures will support better monitoring, prevention of harms and accountability.

#### SANCTIONS

To ensure the effectiveness of this enforcement mechanism, CAs must have the power to impose sanctions for non-compliance or breaches of standards and for harms.

An absence of penalties has been shown to result in low levels and poor quality of compliance by the private sector.<sup>119</sup>

The Directive should provide for escalating penalties for non-compliance and environmental damage. This should include a range of measures such as: fines (as a percentage of turnover); temporary or permanent bars on trading; withdrawal of the license to operate; inclusion on a public list of non-compliant companies; bar on access to public benefits such as public procurement contracts, export credit and public finance; referral to the courts or prosecutors.

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Repeated failures should constitute a criminal offence.

Such an approach is adopted in the Dutch Child Labour Due Diligence Law which imposes fines for non-compliance which may escalate to criminal sanctions in instances of repeated violations.<sup>120</sup>

#### FURTHER MEASURES

In addition, to help prevent negative impacts and improve outcomes for those negatively affected, CAs should establish an early warning system and facilitate claims for civil remedies.

An early warning mechanism allowing human rights, environmental and land defenders, rights-holders and other parties to raise concerns can help to prevent escalation of issues and prevent abuses. These should trigger a quick response from the CA which should reach out to the company to demand information and appropriate corrective or protective actions.

Finally, CAs should be empowered to facilitate efforts of victims to pursue civil remedies in court. Following a finding of non-compliance with due diligence requirements for example, the law should facilitate the use of such a decision as the basis for or in support of civil liability claims against the company. This will help to afford remedies to affected persons and communities. As noted above, a finding of administrative (or criminal) liability cannot preclude a civil claim against the company in respect of the same or related damage.

#### EU-Level Body

The new Directive should establish an EU-level oversight body with monitoring, capacity building, advisory and standard setting functions.

This will help to fill gaps in implementation, provide harmonised guidance for CAs and map performance over time. Further, it will help to ensure consistent, robust practices are implemented across national CAs, promoting

greater harmonisation between Member States. This is particularly important given that many companies operate in multiple EU Member States and therefore coordination and cooperation between national CAs will be crucial to ensuring effective enforcement.

To improve legitimacy and effectiveness, this body should have a multi-stakeholder structure, including with representatives of rightsholders and regularly receive stakeholder and expert input.

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The above section set out our proposals for effective liability and enforcement mechanisms under the new law. However, at present, local communities that suffer the awful impacts of corporate activities on their rights, livelihoods and land are almost always left without recourse against those responsible. Communities seeking justice face long, difficult and expensive legal battles with uncertain outcomes. The following case study provides one such example.

### OUR CHILDREN'S FUTURE – THE COST OF TAKING ON AN AGRIBUSINESS GIANT

In January 2019, a BBC reporter arrived at Sahn Malen in southern Sierra Leone to find it deserted. Thousands of people had fled after two men were allegedly shot and killed by state forces in a dispute about land grabbing for palm oil. The soldiers were reportedly deployed to protect European agricultural company Société Financière des Caoutchoucs (Socfin).<sup>121</sup>

The community explained how, shortly afterwards, the police and military carried out a series of raids – people were beaten and their homes looted. Fifteen people were arrested, including the local MP, who was later charged with conspiracy and incitement and ordered to pay a fine of 60,000,000 Leones (€13,000) or face six months in jail.<sup>122</sup>

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A woman called Mama Kobau told the BBC, "Two soldiers came here and repeatedly hit my door... They asked me to give them 300,000 Leones [roughly €65]. I told them I had no money. They took away my phone and asked my son to kneel down before they beat him mercilessly."<sup>123</sup>

This community is one of many in the Global South that says Socfin or its subsidiaries were given their land without their consent, or that they were coerced into signing it away. Countless people have been evicted from their land to make way for Socfin plantations, some violently. As a result, protests have been ongoing for years in Sierra Leone, Cameroon, Liberia, Nigeria, Indonesia and Cambodia. Many have been met with violence or arrests.<sup>124</sup>

The Socfin Group is a major global trader in agricultural products, headquartered in Luxembourg and listed on its stock exchange.<sup>125</sup> Its companies preside over 400,000 hectares of land across Africa and Southeast Asia, much of it palm oil and rubber plantations.<sup>126</sup> That's roughly equivalent in size to the Chinese capital Beijing.<sup>127</sup>

Socfin is controlled by two European families – those of Belgian businessman Hubert Fabri and renowned French tycoon Vincent Bolloré, who is currently worth an estimated US\$ 7.3 billion.<sup>128</sup> Through a network of companies registered in Luxembourg, Belgium and Switzerland, Hubert Fabri and the Bolloré Group own 93% of Socfin's shares.<sup>129</sup>

**"We haven't** just lost our land, we lost so much more. Our **children's** education and our **children's** future."

Srong Prou, Cambodia

Srong Prou is an indigenous farmer from Cambodia who says she lost her land after Socfin-KCD began developing rubber plantation in 2008. At the time, Socfin-KCD was a joint venture

between Cambodian company Khaou Chuly Development Co (KCD) and Socfin's Asian arm Socfinasia. It is now solely owned by Socfinasia.<sup>130</sup> More than 800 families were impacted by the plantation, with many evicted from their land.<sup>131</sup> Srong Prou used to grow rice and was able to produce and sell 60-70 sacks a year. With the land she had left she could only make ten.<sup>132</sup>

Angry at the crippling effect this has had on her family, Srong Prou decided to join local protests against Socfin. As a result, she says she was charged with destroying company property and provoking a fight, and was summoned to appear in court in 2009 - and again in 2017.<sup>133</sup>

#### ELUSIVE JUSTICE

Communities in Cambodia, Cameroon and Liberia have been trying for years to seek justice for the harms inflicted on them as a result of the activities of the Socfin Group.

Indigenous Cambodians have launched a civil case against the Bolloré Group in France, calling for compensation for land they say was taken from them by Socfinasia.<sup>134</sup> The case was initially delayed because after a court summons from France, Cambodian plaintiffs were denied visas by the French embassy.<sup>135</sup>

Cameroonian groups and international NGOs have attempted litigation in France too. In 2019, they tried to sue Bolloré for reneging on a 2013 agreement to improve the working and living conditions around the palm oil plantations of Socfin's local subsidiary Socapalm.<sup>136</sup> This followed a complaint made to the OECD in 2010 cataloguing harms inflicted by the company including contaminating local water sources, blocking communities' access to their crops, and physical abuse by security guards working for the company.<sup>137</sup>

Socfin was found to have violated the OECD Guidelines and was presented with a number of recommendations for making good on the damage done. But the case ran aground in 2017,

after the Socfin Group refused to independently audit its operations and failed to fully comply with the remediation plan that had been agreed to in 2013.<sup>138</sup>



Paris, France. 1 June 2017. Several dozens of activists gathered outside the headquarters of Bolloré, where the annual Board of Directors meeting was held to protest against the irresponsible exploitation of industrial plantations in several African countries. *LE PICTORIUM/ Alamy Live News*

Meanwhile, in 2019 indigenous Liberian communities filed a complaint with the International Finance Corporation, which had previously given Socfin a US \$10 million loan. The 60-page complaint listed a myriad of abuses inflicted on those who lived near or worked on the plantations, including that female employees were habitually blackmailed and coerced into having sex. A conflict resolution process was proposed but Socfin rejected it. Socfin has denied that its security forces and staff committed gender-based violence.<sup>139</sup>

In the face of these struggles for justice – seemingly none of which have so far been successful – the agricultural giant has fought back hard against attempts to smear its name. Since 2009 Bolloré and Socfin brought more than 20 defamation lawsuits against NGOs, journalists, media companies and authors who had denounced the company’s practices - including France 2, Libération, Greenpeace and Sherpa.<sup>140</sup>

Socfin has rebutted criticisms made against it, claiming that its aim is to further development by ensuring that local communities and workers benefit from its operations.<sup>141</sup> It is also accepted

that Socfin is able to acquire and cultivate land because of decisions made by local officials in countries where the rule of law is weak.

## THIS CANNOT WAIT

For decades, businesses have profited from human rights abuses and destructive practices that have polluted the environment and wrecked the planet. Those who have tried to stop them have paid with their jobs, and their lives. Global Witness reported that in 2018, 167 land and environmental defenders were killed for standing up to harmful corporate projects.<sup>142</sup> That number rose to 212 in 2019, with the worst violence recorded in mining and agri-business sectors.<sup>143</sup>

Companies have also played an unparalleled role in creating the climate crisis<sup>144</sup> and though the international community acknowledges that we are now at tipping point, this has not stopped. Tropical deforestation is responsible for approximately 8% of annual global greenhouse gas emissions, yet EU-based banks were the biggest provider of international finance to six of the most harmful agribusinesses involved in the destruction of climate-critical forests to the tune of **€7 billion between 2013 and 2019**.<sup>145</sup>

The dominant economic and business models based on infinite growth and prioritising short-term profits and shareholder value are wholly unsustainable. We desperately need a change in the way that companies do business. The new EU Directive can help to achieve that by introducing a HREDD requirement with effective, proportionate and dissuasive sanctions for companies. It must make it possible to hold companies accountable for their actions and give victims of corporate abuse access to remedies that they have been denied for decades.

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<sup>54</sup> OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide* (2012), page 5. [https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf)

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<sup>56</sup> European Parliament, *Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability*, 2020/2129(INL), Annex, Article 3 (5) [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)

<sup>57</sup> This language is used in the OHCHR *Responsibility to Respect: An Interpretive Guide*, page 8 and the European Parliament 2020/2129 (INL) Report, Annex, Article 3. See: [https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf) and [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)

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<sup>60</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), page 18.

<sup>61</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), page 50.

<sup>62</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011) 'Commentary on General Policies', para 25. <http://www.oecd.org/daf/inv/mne/48004323.pdf>

<sup>63</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), page 49. <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>64</sup> Columbia Center on Sustainable Investment, *Transparency for whom? Grounding land investment transparency in the needs of local actors*, March 2021, page 30. See also on page 30 of the report that dialogues present additional challenges including that they may replicate existing power imbalances, may lead to frustration if they do not produce different outcomes for affected communities.

<http://ccsi.columbia.edu/files/2021/03/4020-CCSI-Land-Investment-Transparency-report-06-mr.pdf>

<sup>65</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), page 50 to 51. <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>. Note also that relevant experts on human rights, the environment or specific issues should also be consulted as part of effective stakeholder engagement processes.

<sup>66</sup> Columbia Center on Sustainable Investment, *Transparency for whom? Grounding land investment transparency in the needs of local actors* page 30. <http://ccsi.columbia.edu/files/2021/03/4020-CCSI-Land-Investment-Transparency-report-06-mr.pdf>

<sup>67</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), page 51 see 'How can an enterprise engage with potentially vulnerable stakeholders'. <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>68</sup> Global Witness, *Defending Tomorrow*, July 2020, pages 8, 13 and 23. <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>; See also UN Office of the High Commissioner for Human Rights (OHCHR), *Women Human Rights Defenders in 'Information Series on Sexual and Reproductive Health and Rights'*, Updated 2020. [https://www.ohchr.org/documents/issues/women/wrgs/sexualhealth/info\\_whrd\\_web.pdf](https://www.ohchr.org/documents/issues/women/wrgs/sexualhealth/info_whrd_web.pdf)

<sup>69</sup> Global Witness, *Defending Tomorrow*, July 2020, page 10. <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>

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<sup>71</sup> UN Declaration on the Rights of Indigenous Peoples, 13 September 2007, Article 19. See also Articles 10, 28, 29, 32.

<sup>72</sup> Convention on Biological Diversity, 29 December 1993, Article 8.

<sup>73</sup> ILO, Convention on Indigenous and Tribal Peoples Convention, C-169, 1989, Article 16.

<sup>74</sup> See for example UN Office of the High Commissioner for Human Rights (OHCHR), OHCHR, *Response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, 'Advice Note'* (2017). [https://www.banktrack.org/download/letter\\_from\\_ohchr\\_to\\_banktrack\\_on\\_application\\_of\\_the\\_un\\_guiding\\_principles\\_in\\_the\\_banking\\_sector/banktrack\\_response\\_final.pdf](https://www.banktrack.org/download/letter_from_ohchr_to_banktrack_on_application_of_the_un_guiding_principles_in_the_banking_sector/banktrack_response_final.pdf)

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<sup>79</sup> Customary international law derives from a general practice accepted as law by States and is considered as a binding source of international law. It contrasts with Treaty-based international law which only binds the States which expressly consent to be so bound.

<sup>80</sup> Regional human rights instruments include the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the Charter on Fundamental Rights of the European Union and the European Convention on Human Rights.

<sup>81</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) points out the importance of such declarations, principles and guidelines for contributing to the understanding implementation and development of international law. See for example: <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>.

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<sup>86</sup> Speech by Commissioner Reynders in RBC Webinar on Due Diligence, 30 April 2020. <https://responsiblebusinessconduct.eu/wp/2020/04/30/s>

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<sup>87</sup> National Contact Point- the Netherlands, *Final Statement Oxfam Novib, Green Peace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*, 19 April 2019. “As such, the NCP observes that the OECD Guidelines demand that ING, and other commercial banks, put effort into defining, where appropriate, concrete targets to manage its impact towards alignment with relevant national policies and international environmental commitments.” <https://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing/20190419+NGOs+vs+ING+-+FS+%28WCAG%29.pdf>

<sup>88</sup> Shaikh M. Eskander, Sam Fanhauser, Joana Setzer, *Global Lessons from Climate Change Legislation and Litigation*, Working Paper 27365, National Bureau of Economic Research Working Paper Series, June 2020, page 7. [https://www.nber.org/system/files/working\\_papers/w27365/w27365.pdf](https://www.nber.org/system/files/working_papers/w27365/w27365.pdf)

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<sup>91</sup> UN Convention Against Corruption, 31 October 2003.

<sup>92</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), 17 December 1997.

<sup>93</sup> Council of Europe Civil Law Convention on Corruption, 4 November 1999. The Convention has been ratified by 22 EU Member States. Denmark, Germany, Ireland, Luxembourg, Portugal have not ratified the Convention.

<sup>94</sup> OECD, *Frequently Asked Questions: How to address bribery and corruption risks in mineral supply chains* (2021) <https://mneguidelines.oecd.org/faq-how-to-address-bribery-and-corruption-risks-in-mineral-supply-chains.pdf>

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<sup>98</sup> OECD, *Good Practice Guidance on Internal Controls, Ethics and Compliance*, 18 February 2010.

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<sup>100</sup> Olivier De Shutter, Global Witness, Transparency International EU, *The Prevention of Corruption as Part of Mandatory Due Diligence in EU Legislation*, April 2021, page 27.

<sup>101</sup> OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide* (2012), page 5. [https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf)

<sup>102</sup> Australia (Queensland) Environmental Protection Act 1994, section 14(1) defines ‘environmental harm’ as “any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.” (emphasis added). This provides a basis for developing an EU level definition for adverse environmental impacts. It is noted that analogous phrases are not defined in the Environmental Liability Directive (2004/35/CE).

<sup>103</sup> ActionAid, Corporate Accountability, Friends of the Earth International, Global Campaign to Demand Climate Justice, Third World Network, What Next?, *Not Zero: How ‘net zero’ targets disguise climate inaction*, October 2020. See especially pages 3, 4 and 7. [https://actionaid.org/sites/default/files/publications/NOT%20ZERO\\_Joint%20Technical%20Briefing.pdf](https://actionaid.org/sites/default/files/publications/NOT%20ZERO_Joint%20Technical%20Briefing.pdf)

<sup>104</sup> Transparency International, ‘Corruptionary’. Accessed in April 2021. At: <https://www.transparency.org/en/corruptionary#G>; OECD, *Frequently Asked Questions: How to address bribery and corruption risks in mineral supply chains* (2021), page 9. <https://mneguidelines.oecd.org/faq-how-to-address-bribery-and-corruption-risks-in-mineral-supply-chains.pdf>

<sup>105</sup> See for example: Institute for Human Rights and Business (IHRB), *Connecting the Climate Change and Business and Human Rights Agendas*, December 2020. [https://www.ihrb.org/uploads/briefings/IHRB%2C\\_Connecting\\_the\\_Climate\\_Change\\_and\\_BHR\\_Agendas%2C\\_Dec\\_2020.pdf](https://www.ihrb.org/uploads/briefings/IHRB%2C_Connecting_the_Climate_Change_and_BHR_Agendas%2C_Dec_2020.pdf)

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Commission, February 2020, page 48.

<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1>

<sup>109</sup> UN Convention Against Corruption, 31 October 2003, Articles 15, 26(2), 26(4); OECD Anti-Bribery Convention, Articles 1, 2, 3(2). See also Olivier De Shutter, Global Witness, Transparency International EU, *The Prevention of Corruption as Part of Mandatory Due Diligence in EU Legislation*, April 2021, pages 12, 13, 24 and 25.

<https://www.globalwitness.org/en/campaigns/holding-corporates-account/preventing-corruption-through-eu-legislation/>

<sup>110</sup> Significant discrepancies in legislation on corruption and bribery remain across EU Member States. Only three of 27 Member States (DE, FR, IT) impose legal obligations on larger enterprises relating to the prevention and detection of corruption. See Olivier De Shutter, Global Witness, Transparency International EU, *The Prevention of Corruption as Part of Mandatory Due Diligence in EU Legislation*, April 2021, pages 1, 17 and 27.

<sup>111</sup> In 2021, a UK Court found that Nigerian claimants were time barred from bringing a claim against Shell for a 2011 oil spill in Nigeria despite the oil remaining on their land, allowing the harm to continue for years. See for example Bevan Brittan, *An insight into continued nuisance: Jalla and others v Shell International and others [2021] EWCA Civ 63*.

<https://www.bevanbrittan.com/insights/articles/2021/an-insight-into-continued- nuisance-jalla-and-others-v-shell-international-and-others-2021-ewca-civ-63/>

<sup>112</sup> Environmental Liability Directive (2004/35/EC), Article 3.2 provides that this Directive shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of this Directive...”

<sup>113</sup> Global Witness, *Enemies of the State?*, July 2019, see especially page 29, see also pages 27 to 33. [Enemies of the State? | Global Witness](#)

<sup>114</sup> Amnesty International, CCFD Terre Solidaire, Collectif Ethique sur l’etiquette. Friends of the Earth France, Sherpa, *The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies Must Do Better*, February 2019, pages 46 and 47.

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<sup>115</sup> Global Witness, *Total Systems Failure: Exposing the global secrecy destroying forests in the Democratic Republic of Congo*, June 2018.

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<sup>116</sup> Rachel Chambers and Anil Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, (2021) *Chicago Journal of International Law*: Vol 21: No. 2.

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<sup>117</sup> Market Abuse Regulation, Regulation (596/ 2014).

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>

<sup>118</sup> See for example: Expert Group on the EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation. *Guidance Document – Substantiated Concerns*.

<https://ec.europa.eu/environment/forests/pdf/Guidance%20-%20Substantiated%20concerns.pdf>

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