

Global solutions to global problems:

Why EU legislation and a UN instrument on corporate accountability must be complementary

October 2021



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Business activities of EU and non-EU companies too often cause or contribute to human rights violations and environmental devastation in the world. While forthcoming EU legislation could tackle this problem to a certain extent, an international binding instrument to regulate the behaviour of corporations in international human rights law is also needed. This Treaty currently negotiated at the UN would be a step forward in closing the judicial void and avoiding a complex and uneven patchwork of standards and rules. This briefing argues that regional and global instruments are both needed and should complement each other, ensure effective prevention and guarantee robust enforcement, liability and access to justice for affected people.

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Ongoing impunity for human rights violations and environmental harm around the world

From Africa to Asia to Latin America, companies – especially those operating transnationally – can be involved in human rights violations and environmental harms such as land-grabbing,

The long road to justice: Nigerian farmers vs Royal Dutch Shell

Since Shell, one of the world's most powerful transnational corporations, arrived in the Niger Delta in the 1950s and began pumping up – and spilling – oil, hundreds of thousands of local Nigerian people have suffered from serious health problems – breathing toxic fumes, drinking poisoned water, farming contaminated soil, unable to earn a living. Life expectancy is ten years shorter than in the rest of [Nigeria](#).

In January 2021, three Nigerian farmers [won](#) the right to compensation from Shell, after a 13-year legal struggle to get justice for oil spills.

The case was a breakthrough, but it also revealed the huge barriers to justice that exist for claimants, including lengthy court cases, high costs and lack of access to evidence.

It also underlined why EU legislation must ensure that all companies are liable for their subsidiaries and companies throughout their global value chains. The case was the first time people affected by an EU parent company's pollution abroad have won justice and the possibility of compensation in the company's home country. However, the judgment rested on Dutch and Nigerian law, meaning there is no guarantee that similar cases could be brought in other EU jurisdictions.

attacks and intimidation of members of civil society, forced labour, deforestation, water, air or ground pollution¹. For example, companies' harmful activities, especially those of transnationally operating corporations in the energy sector, are at the core of the climate emergency – which in turn has been leading to violations of the rights of communities around the world.

These negative impacts are either caused directly by the actions of a company, or indirectly through its subsidiaries or other businesses which it controls or with which it has commercial relations. Because of **complex global value chains and webs of subsidiaries in multiple countries, access to justice for victims of corporate abuse remains largely an illusion** and, too often, business impunity prevails.

To try to achieve corporate respect for human rights, the international community has so far relied on voluntary guidelines and self-regulation that, evidence shows, have failed to prevent violations and harms around the world or to provide remedies to the affected people².

When EU or non-EU companies are implicated in violations or harms often affected people face huge obstacles to access and obtain justice [*see BOX 1*]. Even the EU's efforts to move towards a greener and more sustainable economy are at risk of contributing to these harms.

¹ See: <https://friendsoftheearth.eu/publication/do-no-harm-the-case-for-an-eu-law-to-hold-business-liable-for-human-rights-violations-and-environmental-harm/>; and https://www.fidh.org/IMG/pdf/loi_vigi763angweb.pdf; and <https://corporatejustice.org/publications/evidence-for-mandatory-human-rights-due-diligence-legislation/>; and <https://www.ecchr.eu/en/cluster/exploitation-global-supply-chains/>, <https://www.ecchr.eu/en/cluster/business-war-dictatorships/>, <https://www.ecchr.eu/en/cluster/social-rights-natural-resources/>

² <https://www.bii.cl.org/projects/european-commission-study-on-due-diligence-in-supply-chains>

There is growing evidence of risks of human rights violations and environmental harms in global value chains for green technologies which are essential for the European Green Deal. Impacts range from the raw materials used [see Box 2]³ to the use of forced labour in the production of solar panels⁴ or impacting indigenous peoples' rights when constructing wind parks⁵.

Despite decades of documented violations worldwide, often perpetrated by companies operating transnationally in the Global South, the global community lacks the laws and tools needed to prevent harm, hold businesses accountable for harms they are responsible for and provide access to effective remedy.

In a highly globalized economy, **many companies use the absence of international rules⁶ to avoid legal accountability for harm.** The lack of legal avenues to hold parent and outsourcing companies liable in their home countries for harms they cause or fail to prevent in their global value chains is a key barrier to justice and remedy⁷. Even in jurisdictions which allow such companies to be held liable in one form or another, claimants from third countries face further insurmountable barriers to justice⁸, for example high costs and fees, not having legal standing, being subject to unfair time limitations and bearing extremely high burdens of proof in court.

Human rights risks rampant in 'green' value chains

Wind and solar energy are key to achieving an urgent and just transformation to a fossil free energy system. According to the European Commission, [wind energy](#) is the technology expected to provide the largest contribution to the EU renewable energy targets for 2020 and beyond, and [solar has the potential to meet 20% of the EU electricity demand in 2040.](#)

Raw materials such as zinc, cobalt, copper, manganese and nickel are needed to produce solar panels and wind turbines. [The World Bank](#) estimates a 250% rise in demand for key minerals used in wind turbine, and 300% for solar panels.

Yet according to the [Green Transition Minerals Tracker](#), a project of the Business & Human Rights Resource Centre (BHRRC), there are widespread allegations of human rights violations already linked to these key minerals.

In zinc mining, the tracker shows that the top 5 companies engaged in mining have a total of 27 allegations against them and are headquartered outside the EU in Japan, China, Canada, the UK and Switzerland. Similarly In the case of cobalt mining, the top 5 companies have a total of 31 allegations and are headquartered in China, Russia and Brazil.

³ <https://friendsoftheearth.eu/publication/green-mining-myth-report/> and FIDH's 2017 report on the Cuyamel II hydroelectric plant project I Honduras and risks of irreversible harm to Protected Areas: <https://www.fidh.org/en/region/americas/honduras/a-high-risk-hydroelectric-dam-project>

⁴ Chinese Solar Companies Tied to Use of Forced Labor. Available at: <https://www.nytimes.com/2021/01/08/business/economy/china-solar-companies-forced-labor-xinjiang.html>

⁵ Wind park in Mexico: French firm disregards indigenous rights. Available at: <https://www.ecchr.eu/en/case/wind-park-in-mexico-french-firm-disregards-indigenous-rights/>

⁶ See the Mind the Gap resource which tracks the strategies deployed by corporations to escape responsibility for human rights violations: <https://www.somo.nl/mind-the-gap/>

⁷ See ECCJ report on civil litigation cases and barriers to justice: <https://corporatejustice.org/publications/suing-goliath/>

⁸ See the studies by the DROI committee of the European Parliament on access to legal remedies for corporate abuses: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) and by the EU Fundamental Right Agency: [Business and human rights – access to remedy \(europa.eu\)](https://businessandhumanrights.europa.eu/)

EU legislation on the way

In April 2020, EU Commissioner for Justice and Consumers Didier Reynders announced plans to bring forward a sustainable corporate governance directive⁹. This legislation would make it mandatory for companies operating in the EU to conduct human rights and environmental due diligence to address risks of harms occurring in their global value chains around the world. A law that is drafted with rightsholders in mind **should include robust provisions on the effectiveness of the due diligence obligations, enforcement, liability and access to judicial remedy**. The inclusion of such provisions has the support of EU citizens¹⁰, and could ensure that companies operating in the EU are held accountable for preventing and/or redressing harms they are responsible for in their global value chains.

Because of the complex structures of value chains, and of the aggregate impact of EU businesses on people and the environment, **the legislation should be as ambitious as possible and apply to business enterprises**, both public and private, including financial institutions, **of all sizes and across all sectors**, domiciled or based in, operating, or offering a product or service, within the EU¹¹.

However, to radically change companies' behaviour in their global value chain, and to offer hope to those seeking justice, we need a global instrument. The EU law and the UN Legally Binding Instrument (LBI) are two important pieces of a larger puzzle.

Indeed, although the EU is a large common market and a major global player, the problem of business accountability is of a much larger scale, and **a regional law alone will leave many affected people unprotected**. Outside the EU, it remains the duty of the home countries of companies to guarantee and facilitate access to justice within their jurisdiction for affected people. For example, non-EU countries like Switzerland, Japan and Canada are home to mining corporations with numerous human rights allegations linked to 'green' mining as described in *Box 2*.

⁹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en

¹⁰ <https://friendsoftheearth.eu/press-release/strong-eu-law-hold-companies-liable-human-rights-violations-environmental-harms/>

¹¹ There is also legislation forthcoming that will apply to all companies placing certain products on the EU market with a high risk of being linked to deforestation. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12137-Deforestation-and-forest-degradation-reducing-the-impact-of-products-placed-on-the-EU-market_en

The UN Treaty: a people-driven movement for justice at the UN

In June 2014, the Human Rights Council of the UN adopted [resolution 26/9](#) “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”.

The aim of this process is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises and thereby guarantee the human rights of affected people and communities worldwide. On one hand, this means **preventing violations** by corporations – especially those operating transnationally – from occurring in the first place. On the other hand, individuals and communities must be provided paths to **claiming adequate and effective remedy** when violations and harms do occur. Global civil society, supporting states and social movements see this process as an opportunity to tackle the power and strategies deployed by corporations to operate transnationally without accountability, as well as to address the fact that **despite thousands of trade and investment agreements existing to protect the rights of foreign investors, no binding international human rights instrument exists to regulate them and protect the rights of affected people**¹².

For the past six years, this UN process has enabled States and civil society organisations to discuss concrete provisions to regulate transnational corporations and other business enterprises with regard to human rights in international law, and to provide access to justice and effective remedy to affected people. Civil society organisations, workers and affected communities from all over the world have made their voices heard through that process, and have submitted very concrete proposals. **While setting rules for its companies abroad, the EU, a major global player, should support this process that has been in part driven by affected people** and communities and ensure that global loopholes perpetuating corporate impunities are closed.

¹² As noted by the joint statement by UN experts on human rights ahead of the 7th session of the legally binding instrument: “This instrument could also help in addressing asymmetry created by international trade and investment agreements which confer legal rights on businesses but no corresponding human rights obligations”. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27672&LangID=E>

How EU legislation and UN LBI can be effective and complementary

There is a growing push from some EU member states and non-EU countries to introduce corporate accountability legislation¹³. In a joint statement ahead of the 7th session of the LBI, UN human rights experts underlined that while regional instruments such as the EU directive are on the way, “the process to negotiate an international instrument provides an opportunity for States to create a global level field” and “avoid fragmented approaches to corporate responsibility”¹⁴.

If regions legislate in an uncoordinated way and come up with diverging standards of conducts for companies, this could lead to an uneven patchwork of rules worldwide that make the situation more complex and un-equal for both affected people and companies, create new loopholes for companies to escape responsibility, create regulatory uncertainty and allow them to opt to invest in countries with low protection standards.

An international binding instrument is needed to provide protection to rightsholders all around the world, and avoid that transnationally operating companies have different human rights and environmental obligations in different countries and regions.

In addition, boundary-transcending crises like the climate emergency, biodiversity collapse and related issues like deforestation require global solutions. For instance, to meet already agreed goals in multilateral environmental agreements such as the Paris agreement, a coordinated effort is needed to legally oblige companies to reduce their GHG emissions.

The European Parliament resolution on corporate due diligence and corporate accountability of March 2021 also called on EU to finally engage in the negotiations for the UN LBI¹⁵. And in a cross-party letter to the European Commission, 75 MEPs¹⁶ noted that to be effective and workable, EU level regulation must be complementary and aligned with the UN LBI. **To avoid a race to the bottom on standards, both processes must align towards an upward harmonisation and work to effectively prevent and remedy harms.**

¹³ See for example in Switzerland: <https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/>, and in Canada: <https://cnca-rcrc.ca/campaigns/business-human-rights-legislation-hrdd/>; and a summary map and a table of the growing momentum in the EU MS: <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe/>

¹⁴ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27672&LangID=E>

¹⁵ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf

¹⁶ <https://friendsoftheearth.eu/wp-content/uploads/2021/09/Request-for-negotiation-mandate-EU-UN-Treaty.pdf>

1) Corporate accountability goes beyond due diligence

The UN LBI draft that is currently being negotiated reflects legislative reforms envisioned at EU level. Article 6 of the third revised draft¹⁷ of the LBI includes provisions on preventing harm which would require states to put in place obligations for companies to conduct **“human rights due diligence** proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships – and to assess, prevent, mitigate and monitor and communicate on ‘any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships’. It requires states to put in place strong enforcement measures to ensure companies comply with these obligations.

However, the LBI recognises that a more holistic approach to corporate accountability is necessary, beyond a due diligence obligation. It includes a broader range of provisions designed to ensure prevention measures are effective and that access to remedy and justice is secured for affected people in the event of harms. By including provisions on companies’ liability, obstacles to justice and remedy and prevention, the LBI would constitute a further level of protection for communities and individuals affected by corporate harm worldwide.

The LBI recognises that liability is critical to holding companies accountable, and includes provisions aimed at holding companies civilly, criminally and administratively liable for harms in their own operations or in their business relationships (Art. 8). It also includes provisions guaranteeing the rights of victims and improving access to judicial remedy e.g. through addressing the burden of proof and improving access to information (Arts. 4, 5, 7, 10).

One notable strength of the current LBI draft that the EU legislation could take inspiration from is that it insists on the **separation between due diligence and liability for harm:** “Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses”.

2) Global problems require global solutions

The **treaty includes a range of provisions to tackle transnational obstacles to access to justice,** which include tackling issues of jurisdiction, which country’s law applies in transnational cases, as well as provisions for states to cooperate in providing mutual legal assistance and judicial cooperation across borders, including in civil, administrative and

¹⁷ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

criminal cases, and to cooperate in implementing and fulfilling their obligations under the LBI (Arts. 9, 11, 12). Although insufficient, it also contains a provision about the need to protect policies from undue influence, and in particular that of business enterprises.

By responding to a legal and governance gap at the global level, the **LBI has the potential to contribute to achieving transnational accountability and justice**, a key added value of the EU agreeing to an international binding instrument, **as this cannot be addressed comprehensively in EU legislation alone**. Indeed, the provisions in the LBI are aimed at ensuring that transnationally operating corporations cannot escape responsibility through loopholes or gaps that prevent victims worldwide from successfully bringing a court case against a company in another jurisdiction (for example the home country of the company).

Moreover, an international instrument would offer a level playing field for companies operating worldwide, limiting risks of **so-called 'forum shopping'** -- where companies could choose to invest or move operations to regions where accountability standards for human rights and environmental abuses are weaker -- which will be increasingly prevalent as domestic and regional due diligence standards develop.

The current draft of the LBI still contains gaps, and needs to be strengthened to guarantee the effectiveness of this treaty¹⁸ but the **third revised draft is a strong basis for the negotiation** of international standards on corporate accountability encompassing the full range of solutions required to address the serious impact of corporate human rights violations and environmental harms.

3) What the EU process can learn from the LBI negotiation

While the UN LBI will cover corporate abuses globally, an EU instrument remains necessary to realise the aims and provisions of the treaty at EU level and fill the gaps in one of the largest common markets in the world. EU legislation would assure that companies operating or placing products on the common market have strong, clear and homogenous rules – ensuring clarity both for companies and for victims. However, it is important that EU legislation works in tandem with UN rules, **avoiding non-complementary legislation** and possible clashing and/or inadequate standards. For this reason, legislative reforms in **the EU must take inspiration from the UN LBI to go beyond procedural due diligence obligations and legislate for substantive obligations as well as a broader range of provisions designed at effectively preventing and remedying harm**.

¹⁸ Civil society have developed several expert analyses on the 3rd revised draft including: <https://bit.ly/Global-Campaign-Amendments> and <https://www.cidse.org/wp-content/uploads/2021/10/EN-Binding-Treaty-legal-analysis.pdf> and <https://www.cidse.org/2021/10/20/cidse-engagement-in-the-7th-session-of-the-un-binding-treaty/> and https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/binding-treaty-on-business-and-human-rights-fidh-s-preliminary?var_mode=calcul

In terms of prevention, EU legislation proposes to establish obligations on companies to address risks to human rights and the environment in their global value chains. This must not be a box-ticking obligation, it must amount to a **substantive and effective duty on all companies** to respect human rights and the environment, with penalties and sanctions, including criminal sanctions in cases of harms, robust enough to act as adequate deterrents. Moreover, when conducting due diligence, affected communities and other relevant stakeholders must be able to make their voices heard, and must be put in a position to consent or say no to investments when they would clearly compromise their human rights, livelihoods and the UN-recognised right to a clean, healthy and sustainable environment¹⁹.

To be effective at holding companies accountable for violations and harms, EU legislation must also ensure companies are liable in their home countries for human rights violations and environmental harms occurring in the course of their operations, and in those of companies they control or have the ability to control directly or indirectly, and in their global operations and value chains and investments. Criminal liability, for instance in cases of complicity in international crimes or egregious harm to the environment and human rights, should be included.

Researchers have warned that new **due diligence legislation must not create immunity from liability through 'safe harbour'**, "providing companies with a tool that they hitherto did not have to show respect for human rights and rebut charges of liability with little bearing on effective respect for human rights on the ground."²⁰ Moreover, for effective legislation, due diligence obligations should be independent from companies' liability for harms: while companies should be liable for the failure to conduct due diligence, having conducted due diligence must not absolve them from their separate liability for harm.

To ensure remedy and restoration for affected people, EU legislation must prioritise not only liability but further improving access to justice for affected people around the world. As noted, there are immense and well-documented barriers to people seeking justice through the courts, and these barriers are intensified in transnational cases. Given the focus of the forthcoming EU legislation on global value chains, such legislation is an appropriate place to include provisions that would reduce transnational barriers to justice including addressing statutes of limitations, providing standing to a range of actors, reversing the burden of proof and looking at reforms to international private law rules, especially on the applicable law in transnational court cases.

Finally, EU and UN instruments should both guarantee the **primacy of human rights and environmental protection over trade and investment agreements**.

¹⁹ <https://news.un.org/en/story/2021/10/1103082>

²⁰ See <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/rise-of-mandatory-human-rights-due-diligence-a-beacon-of-hope-or-a-doubledgedged-sword/34FB600B4B6939BC04895BF871E96BA3>. See also Oliver DeSchutter: <http://opiniojuris.org/2020/09/10/bhr-symposium-the-requirement-to-practice-due-diligence-a-floor-not-a-shield/>

Conclusion

An international legally binding instrument (UN LBI) is needed so that human rights violations and environmental harms are addressed in a comprehensive and coordinated way worldwide. The EU should engage in this process to ensure that the EU's regional reforms get inspiration from and complement reforms at the international level – in particular regarding corporate liability and barriers to justice - and that people affected by violations are not left without protection, while avoiding that rightsholders and companies could be subject to conflicting standards from region to region.

This briefing has indicated the important areas where complementarity should be sought: further analysis is needed of how concretely domestic, regional and international instruments should complement, and a **follow up expert analysis will be commissioned by us after the European Commission's proposal on sustainable corporate governance is published.** In any case, additional legislation beyond the EU's sustainable corporate governance initiative may be necessary to address corporate impunity and ensure access to justice. For instance, in relation to reforming international private law rules governing third country claimants' access to EU courts.

Recommendations

The European External Action Service (EEAS) and European Commission should:

- **Submit a recommendation to the Council to agree a common position and obtain a mandate to engage in the negotiations for the UN LBI in time for the 8th session of the Open-ended intergovernmental working group (OEIGWG) in October 2022;**
- Coordinate with Member States to ensure active participation in the negotiations that strengthens the position of right-holders and affected communities;
- Ensure participation of civil society organisations, right-holders and affected communities in the elaboration of the common position, mandate and during the inter-governmental negotiations;

- Conduct and publicise an EU analysis of the UN LBI and a strategy to ensure that key provisions for example on liability and access to justice will be safe-guarded and strengthened;
- Conduct an analysis of how the provisions of the UN LBI can be implemented in the EU – including analysis of the division of EU and member state competences for the various provisions;
- Actively and publicly encourage other like-minded states to participate in the negotiations for the UN LBI.

EU member states should:

- Demand the EEAS and Commission to submit a recommendation to obtain a common position and a mandate to engage in the negotiations for the UN LBI;
- Participate actively in the process for a mandate and in the negotiations for the UN LBI;
- constructively engage to ensure an ambitious position from the Council of the EU in the negotiations for a Sustainable Corporate Governance (SCG) Directive;
- Ensure that national level legislative initiatives on corporate accountability are ambitious enough and adequate to complement the aims of the EU and UN level instruments, for example by going beyond reporting and due diligence, implementing substantive obligations and ensuring the inclusion of strong liability provisions and access to justice and effective remedy for affected people.

The European Parliament should:

- Ensure that the text of the SCG negotiated with the Council and the Commission includes strong provisions regarding liability and access to justice and remedy for affected individuals and communities.