

TIME FOR A TREATY

Will Ireland support a UN Binding Treaty to tackle corporate impunity?

October 2022 sees UN Member States meet for the 8th year to develop a UN Binding Treaty to regulate the activities of transnational corporations and other businesses in international law.

The issue of binding rules on corporations for their impact on human rights and the planet has been high on the EU's political agenda since the publication in February 2022 of the European Commission's draft Corporate Sustainability Due Diligence Directive (CSDDD). Despite this, the EU has continually failed to develop a position on the UN Treaty and has not secured a mandate to negotiate on behalf of the bloc. Ireland has maintained a disappointing lukewarm position on the Treaty.

At the same time, EU and Irish companies are involved in human rights violations and environmental damage including modern slavery, land grabs, child labour, oil spills, deforestation, attacks on human rights defenders, and violence against women. A gender transformative UN Binding Treaty is urgently needed so that human rights violations and environmental harms are addressed in a comprehensive and coordinated way worldwide.

Nadiko Lopei Alim from Turkana, Northern Kenya, who lives close to oil installations built through communal land where community consent is in question.
 Photo: Garry Walsh



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Snapshot summary:

- **2022 is a crucial year for negotiating a Treaty:** October 2022 sees states gather in Geneva for the 8th session of negotiations on the UN Binding Treaty, as corporate harm continues and the climate crisis escalates.
- **Powerful companies, exploited communities:** Exploitation and abuse of communities by corporate actors remains unaddressed, as well as destruction of the environment, and EU and Irish companies are connected. Women, human rights defenders, and indigenous communities are particularly affected. Access to remedy is incredibly challenging for affected communities.
- **Calls of the Global South are being ignored:** widespread support across countries from the global south for a Treaty yet many of the countries and regions where large transnational corporations are headquartered have opposed the Treaty process and refused to engage in the negotiations.
- **EU yet to be constructive on the Treaty:** the 3rd draft of the Treaty published in 2021 is ready for negotiation, yet the EU has yet again failed to secure a mandate to negotiate at this year's session.
- **Global problems require global solutions:** the EU's forthcoming Corporate Sustainability Due Diligence Directive (CSDD) shows that the EU is moving from voluntary guidelines to mandatory rules for companies, yet a regional EU solution will only go so far. Supporting a UN Treaty would be complementary to the EU's CSDD Directive.
- **Ireland must play a role:** Ireland should push the EU to develop a mandate to participate in the negotiations. Ireland can also develop a clear supportive public position on the Treaty, and constructively engage in the negotiations in the absence of an EU position. Ireland also needs to champion the Treaty being gender-transformative.

Recommendations

The Irish Coalition for Business and Human Rights recommends that the Irish Government:

- Actively support and contribute to the development of an ambitious, effective and binding UN Treaty on business and human rights, to regulate the activities of transnational corporations and other business enterprises, with a strong gender perspective and provisions to empower human rights defenders;
- Develop and share a clear, constructive public position in support of the UN Treaty;
- Follow the lead of other EU Member States, such as France, and directly address the annual negotiations session on priority areas (in the absence of an EU negotiation mandate);
- Take action within the EU to ensure a constructive EU negotiation mandate for the next OEIGWG session.
- In tandem with the Treaty negotiation process, develop domestic legislation for mandatory, gender-responsive human rights and environmental due diligence legislation in Ireland, and also push to strengthen the EU's Corporate Sustainability Due Diligence (CSDD) Directive in line with recommendations from the ICBHR.

The Irish Coalition for Business and Human Rights (ICBHR) is a coalition of over 20 members including human rights, international development and environmental organisations, trade unions and academic experts, working collaboratively to progress corporate accountability, based on respect for human rights and the environment.

Members of the Coalition include Trócaire, Trinity Centre for Social Innovation, Comhlámh, Front Line Defenders, Fairtrade Ireland, Global Legal Action Network, Centre for Business and Society of University College Dublin, Oxfam Ireland, Latin American Solidarity Centre, Christian Aid Ireland, Irish Congress of Trade Unions, Friends of the Earth Ireland, National Women's Council of Ireland, AMRI Justice, Proudly Made in Africa, Partner Africa, and Rachel Widdis, School of Law, Trinity College Dublin.

Observers are ESCR-Net, Action Aid Ireland, Women's Aid, TerraJusta and Save Our Sperrins. The Irish Coalition on Business and Human Rights is a representative network of the European Coalition for Corporate Justice (ECCJ).

1. The need for a UN binding Treaty

David and Goliath: powerful companies, exploited communities

- The abuse of human rights in the pursuit of profit by powerful corporations is a critical injustice of the 21st century. The corporate race for natural resources, facilitated and encouraged by States, has put millions of people around the world at risk of exploitation and human rights abuses.
- The actions of irresponsible businesses are having devastating impacts, including violent evictions and displacement of communities from their land; environmental degradation and pollution causing the destruction of livelihoods; and the exploitation and sexual harassment of low paid workers.
- Communities seeking to resist the actions of corporations and complicit states are facing growing levels of violence and intimidation, with indigenous, environmental and land rights defenders at particular risk. Those who denounce abuses relating to extractive industries, agribusiness, infrastructure, hydroelectric dams and logging are facing brutal consequences, including killings, attacks, sexual violence, smear campaigns, criminalisation and repression.
- The number of attacks against human rights defenders in the context of corporate activities is shocking. 385 human rights defenders were killed in 2021: an average of over 7 defenders every week. Over 59% of killings were of those working to defend land, environmental and indigenous peoples' rights and these appalling killings are just the tip of the iceberg. The Business and Human Rights Resource Centre tracked 615 attacks against human rights defenders working to expose business related human rights abuse in 2021 ranging from judicial harassment, to threats, attacks and killings. The top five most dangerous sectors are all related to natural resources.
- Communities and human rights defenders that try and seek justice for abuses through legal means struggle to access remedy. It can be extremely difficult to hold transnational corporations to account in the state where the violation occurred or in the corporation's home state, or to hold parent companies accountable for the actions of subsidiaries. In particular, many indigenous women are precluded from access to the courts.

- Women are impacted by business-related human rights abuses in disproportionate ways. For example, indigenous women, who often have fewer formal rights to land, are vulnerable to eviction and dispossession to make way for large-scale development projects. Women are also over-represented in precarious work with poor working conditions and are vulnerable to exploitation and abuse, including sexual abuse.

EU and Irish companies trampling on people's rights

- EU companies have failed to address abuses perpetuated by subsidiaries or business partners in their global value chains, over whom they often have considerable control or influence.
- An extensive 2019 European Parliament study on abuses by European-based multinational companies in countries outside the EU, found that "cases involve allegations of gross human rights abuses such as murder and complicity to murder, war crimes and crimes against humanity, but also issues related to health, environmental justice and several labour rights related issues".
- In Ireland, several companies have been linked to human rights abuses abroad, including state companies. For example, the Electricity Supply Board (ESB) has purchased coal from a mine in Northern Colombia with a long and well-documented history of serious human rights abuses.
- Another example is Airbnb Ireland UC. In February 2020, the United Nations High Commissioner for Human Rights published a database on businesses connected to illegal Israeli settlements in the occupied Palestinian territory, listing companies engaged in economic activities connected with these settlements, which are illegal under international law and inextricably linked with human rights violations. One of these companies is Airbnb Inc., which provides an online platform for accommodation in the illegal settlements. Hosts and purchasers using the platform to find accommodation in the settlements contract with the Dublin-registered company, Airbnb Ireland UC.

The current framework isn't working

- Despite the negative human rights impacts that corporations can have, there is a major gap in the regulation of international corporate activity by states, particularly regarding access to remedy for victims of human rights violations. The vast majority of human rights violations perpetrated by corporations go unpunished.
- The size, influence and complexity of corporations, along with the transnational nature of much business, pose major challenges for states and affected people seeking to hold them to account. A lack of strong corporate accountability laws, alongside complicated corporate structures and convoluted supply chains, make it difficult, often impossible, to hold these companies accountable.
- While the UN Guiding Principles on Business and Human Rights (UNGPs) have recommended a smart mix of regulatory measures, regulation has largely developed in the form of voluntary guidance and implementation of these voluntary, soft law guidelines has been marginal and ineffective.
- Voluntary mechanisms have failed to bring about the change in practice that is required to protect people from the most negative impacts of corporations. There is no binding international legal framework to establish the liability of transnational corporations with respect to human rights and the environment, and stronger regulation is needed internationally to ensure justice for affected communities.
- The most recent Corporate Human Rights Benchmark, which assesses 230 of the largest publicly traded companies in the world on a set of human rights indicators, reveals poor levels of implementation of the UNGPs. Nearly half of the companies assessed in 2020 (46.2%) failed to show any evidence of identifying or mitigating human rights issues in their supply chains.
- Recent research from Trinity College Dublin's Centre for Social Innovation has shown that half of the top 60 companies in Ireland, including many multinationals, as well as Ireland's ten-largest state-owned enterprises, scored less than 20 percent on their human rights policies when measured against the non-binding UN Guiding Principles on Business and Human Rights. 34 percent of the companies benchmarked scored zero on embedding respect for human rights in their operations.



African Palm is used to create Palm Oil which is found in many every day foods, cosmetics and other products. However it is driving deforestation and land grabs. Photo: Eoghan Rice

2. The road to a Treaty – progress to date

Historic negotiations

- Global civil society, supporting states and social movements have been calling for binding international rules for businesses for decades. Creating a Binding Treaty would be an opportunity to address the power imbalances and strategies that allow corporations to operate transnationally without accountability.
- 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.
- In 2014, hundreds of civil society organisations and affected communities worldwide welcomed the United Nations Human Rights Council historic resolution (26/9), proposed by Ecuador, to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. This vote to elaborate a Treaty was hugely significant, as it followed many years of failed attempts to pursue approaches for binding international regulation for corporations. The resolution established a new working group to elaborate the proposed UN Treaty (the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, OEIGWG).
- This UN process has enabled States to negotiate on the shape of a potential Treaty. To date there have been seven annual sessions of the OEIGWG, each year in October at the Human Rights Council. Three drafts of the Treaty have been elaborated by Ecuador, as chair of the working group, and states have had the opportunity to provide feedback on these drafts. Debates have been dedicated to discussing the content, scope, nature and form of the proposed Treaty.
- While there is widespread support across UN Member States for the Treaty, there has been significant opposition from others. Some countries, where many large transnational corporations are headquartered, have opposed the process, and refused to engage in the negotiations, including the US and Canada.
- Members of civil society across the world, representing the experiences of communities and human rights defenders, have mobilised and advocated for a Treaty. The Global Treaty Alliance consists of more than 1,100 organisations who recognise the potential of this new instrument to enhance protection for victims against human rights violations and to provide effective access to remedies. 211 parliamentarians from across the world have declared their support for the Treaty.
- The current third draft of the Treaty is a promising text that offers great potential to realising the vision of a transformative Treaty. While the third revised draft still needs to be improved in various details to be more precise and effective enough to protect human rights and the environment, expert legal analysis has shown that the draft provides a useful, appropriate and sufficiently clear basis for substantial negotiations.
- Ahead of the 2022 eighth session of negotiations, Ecuador has created a 'Friends of the Chair' group with states representing different regions. The States currently in the 'Friends of the Chair' group include: Azerbaijan, France, Indonesia, Portugal and Uruguay. There will be no new draft of the Treaty in 2022. However, Ecuador will focus the 2022 negotiations on specific articles (articles 6 to 11) of the 3rd draft of the Treaty, and will provide new suggested compromise wordings on these articles ahead of the negotiation session.
- Articles 6 to 11 cover areas including prevention, access to remedy, legal liability and adjudicative jurisdiction. Civil society organisations (including CIDSE, ITUC and FIDH) have provided detailed analysis on these articles in the 3rd draft of the Treaty.

What an effective Treaty would look like

- An ambitious, effective Treaty has the potential to address the serious accountability gap that enables corporate impunity, by asserting clear, legally binding obligations for businesses to respect human rights.
- To be effective and transformative, the Treaty must seek to build a culture of respect for human rights by all corporate entities, and move beyond a set of voluntary UN guiding principles towards a mandatory system with clear obligations. It should establish a clear framework for businesses, including state enterprises, to be held accountable and address issues of complex corporate structures and jurisdiction that often pose significant barriers to justice. It must be gender transformative and have the experience of affected communities and rights-holders at its core.

8 KEY PRINCIPLES

for an effective UN Treaty

1 Cover a broad range of human rights abuses: To affectively address abuses, the Treaty must cover all internationally recognised human rights. At a minimum, it should include rights expressed in the International Bill of Human Rights (The Universal Declaration, ICCPR & ICESCR), as well as the ILO Declaration on Fundamental Principles and Rights at Work.

2 Protect people and planet: The Treaty must rise to the challenge posed by climate change, and provide clear protection for the right to a safe, clean, healthy environment.

3 Apply to businesses of all size and structure: all businesses, regardless of their size, structure or operations, have the responsibility to respect human rights and the Treaty must reflect this. It must require businesses to respect human rights in their own operations, as well as in their supply chains and wider business relationships. As a priority, the Treaty must address transnational corporate activity, due to the major accountability gaps in the context of complex business structures, extensive supply chains, issues of jurisdiction and avoidance of legal liability by parent companies.

4 Mandatory, not voluntary prevention: The Treaty must establish a corporate duty to respect human rights and the environment. Under an effective Treaty, states must require companies to identify, assess, prevent and mitigate the risks posed by their own activities, as well as throughout their supply chains and business relationships (what's termed 'mandatory human rights and environmental due diligence').

5 Liability and effective penalties: the measures in the Treaty need teeth. States must establish a comprehensive and adequate system of administrative, civil and criminal liability for business-related human rights abuses, including effective penalties.

6 Real access to justice: the Treaty must ensure fair procedures and address barriers to participation, including the provision of adequate and comprehensive legal aid. It should provide for collective redress, reverse the burden of proof for victims, and require corporations to disclose relevant information and material.

7 Centre affected communities and human rights defenders: it is crucial that this Treaty puts in place adequate provisions to prevent attacks on those defending human rights and our planet in the face of corporate abuse. The Treaty should protect human rights defenders from the range of attacks and harassment they face when speaking out about business-related harm.

8 Be gender-responsive: The Treaty should encompass an inclusive, integrated and gender-responsive approach, which tackles underlying causes, including multiple and intersecting forms of discrimination, and unequal gender-based power relations. This should include requiring companies to undertake gender-responsive human rights and environmental due diligence, meaningful consultations with affected women and gender experts, the collection of gender disaggregated data, the protection of women human rights defenders, and addressing the particular barriers that women face in accessing remedy whilst providing gender responsive reparations.



Oil spill in Kebgara in the Niger Delta. Photo: Luka Tomac/FOE International

3. Ireland and the EU's position

The EU's approach

- EU Member States have engaged in the Treaty negotiations as a bloc, and have historically stood in opposition to the Treaty. For the EU to be in a position to fully engage in the UN Treaty negotiations, a formal negotiation mandate is required by EU law, a mandate that the EU has once again failed to achieve in advance of the eighth session of negotiations in October 2022. There are a number of EU Member States, including Ireland, that are pushing for increased EU engagement, including a formal mandate for negotiations.
- In the absence of a formal negotiation mandate, the EU has had partial engagement in the Treaty process. During the 2021 sessions, EU delegates, for the first time, suggested changes in the text to safeguard important provisions on human rights defenders, gender, and the environment. This is a welcome step, but the policy of partial engagement is extremely limited and a formal negotiation mandate is needed that is fully supportive of the Treaty.
- Individual EU member states have engaged in the Treaty process in the absence of an EU mandate. Two EU Member States, France and Portugal, have joined the 'Friends of the Chair' group in 2022. This is a group of sympathetic countries set up to support Ecuador in pushing states towards consensus on the draft Treaty. France has also directly engaged in the annual negotiation sessions. Ireland has yet to make any statement at the sessions.
- Given that the EU has proposed a new Corporate Sustainability Due Diligence (CSDD) Directive to require 'due diligence' checks throughout businesses' supply chains for human rights and environmental impacts, it is crucial that the EU brings this experience and expertise to the Treaty negotiations. It is inconsistent that the EU would support binding measures for corporate accountability within the EU region, yet not support a global Treaty.
- If regions legislate in an uncoordinated way and come up with diverging standards of conduct for companies, this could lead to an uneven patchwork of rules worldwide that make the situation more complex and unequal 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.
- Furthermore, while the CSDD Directive has yet to be finalised by the EU's institutions, the draft from the European Commission is weak and contains significant shortcomings. It will cover only 1% of EU businesses and their value chains, and it will have limited coverage of EU financial institutions. Barriers to access to justice remain unaddressed. A UN Treaty would fill the major gap left by the CSDD on access to justice for victims, for example, by setting international standards on applicable law and choice of jurisdiction, two major barriers at present in seeking justice through transnational court cases against companies.
- 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 still leave many affected people unprotected. The CSDD Directive and the UN Treaty are two important pieces of a larger puzzle, and the EU supporting the UN Treaty would be very complementary to the EU developing the CSDD directive. As such, the EU should support both a robust international standard and a robust regional standard that are aligned, that meaningfully addresses the human rights violations on the ground, and that also provides a global level playing field for business.



Berta Caceres was killed in her home in March 2016. She was an outspoken champion of the rights of indigenous people. She was murdered for opposing the construction of the Agua Zarca hydro-electric dam in Honduras. Photo: Giulia Vuillermoz

Ireland's position

- Ireland's position in relation to the Treaty largely mirrors that of the EU position. Minister for Foreign Affairs, Simon Coveney, has set out Ireland's views on the content of a potential Treaty in 2020 as follows:

"Ireland is open to looking at options for progress on a legally binding treaty. With regard to its scope, we believe that all economic operators, whether transnational or purely domestic, should be treated in a non-discriminatory manner. We would also wish to see essential human rights principles reflected in any possible instrument, which should reaffirm the universality, indivisibility and interdependence of human rights and stress the primary responsibility of States under existing human rights obligations to protect against human rights violations. We would also like to see any new initiative build on, rather than duplicate, existing measures such as the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Above all we believe that it should be rooted in the UN Guiding Principles on Business and Human Rights."

- Furthermore, on the process and lack of EU mandate, in 2022 Minister Coveney indicated that Ireland supports constructive EU engagement in the negotiations:

"We have made clear in Brussels and Geneva that Ireland favours constructive engagement in the treaty negotiations. During the most recent negotiation session in Geneva, the EU offered to assist the chairperson and rapporteur of the working group to explore ideas for a consensus-based, legally binding instrument. As the EU made clear in the negotiations in Geneva, if any proposed treaty is to be effective, it will need to attract wide, cross-regional support. This is essential for the proposed legally binding instrument to ensure it will be effectively implemented in a way that protects victims of business-related human rights violations and creates a more global level playing field."

While these statements contain positive elements, clear and unambiguous support for the Treaty process and detailed constructive engagement with the latest draft would be welcome. Given Ireland's positive work on civil society space and human rights within the UN Human Rights Council, Ireland should be playing a more active role in the Treaty process.

In this context, the Irish Coalition recommends that the Irish Government:

- Actively support and contribute to the development of an ambitious, effective and binding UN Treaty on business and human rights, to regulate the activities of transnational corporations and other business enterprises, with a strong gender perspective and provisions to empower human rights defenders;
- Develop and share a clear, constructive public position in support of the UN Treaty;
- Follow the lead of other EU Member States, such as France, and directly address the annual negotiations session on priority areas (in the absence of an EU negotiation mandate);
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Israeli settlers seized land that belong to Awni Shaaeb (70) and there is now an Airbnb listing on the settlement on his land. Photo: Human Rights Watch.