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A Matter of Justice: How European Legislation Can Make a Difference

Experiences and views from around the world on how to establish meaningful EU rules on corporate accountability

fidh

**ALTSEAN
BURMA**



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Glossary

ECCJ: European Coalition for Corporate Justice

EctHR: European Court of Human Rights

EBRD: European Bank for Reconstruction and Development

EU: European Union

FIDH: International Federation for Human Rights

HRD: Human rights defenders

HRDD: Human Rights and Environmental Due Diligence

IFI: International financial institution

SME: Small and medium enterprise

UN: United Nations

UNGPs: United Nations Guiding Principles on Business and Human Rights

Introduction

In May 2020, the EU Commissioner for Justice, Mr. Didier Reynders, announced for the first time that the European Commission would propose a legislative initiative on mandatory human rights and environmental due diligence in 2021, as part of its effort to promote sustainable corporate governance.¹

Effective EU legislation, which would establish a corporate duty to respect human rights and the environment – requiring companies to identify, prevent, mitigate and account for abuses and harm in their domestic and global operations – has been backed by civil society for many years. Such an instrument is necessary to set clear minimum standards defining responsible business conduct in practice, and to stimulate a much needed shift towards a fairer and more sustainable level playing field.

The current COVID-19 health and economic crises have been stark reminders that a model based on corporate self-regulation, voluntary commitments, and soft law instruments is simply not robust enough to protect fundamental rights and the environment. It is therefore of the utmost urgency to accelerate the implementation of binding domestic and international norms, which would ensure better prevention of human rights and environmental abuses linked to business activities, while providing effective access to justice for victims.

In this context, the European Commission's announcement has been welcomed by a wide spectrum of civil society organisations, trade unions, consumer organisations, investors and even progressive businesses.²

However, the International Federation for Human Rights (FIDH) and its member organisations call the attention of the stakeholders involved in this process, and particularly of lawmakers, to the fact that for such legislation to constitute a meaningful step towards a better protection of people and the planet, three key conditions need to be met:

- **the law needs to apply to all companies operating in the EU market, not only to those headquartered in the EU, and their operations in Europe and abroad;**
- **it should extend to the entire value chain, and contain specific provisions for companies operating in conflict and high-risk areas; and**
- **it needs to clearly establish that companies should be liable both for not complying with due diligence requirements and for the harm that they or the entities they *de facto* control either cause or contribute to.**

Any legislation that fails to take into account all three of these key aspects would, in our opinion and on the basis of our experience, fall short of achieving its objective. Worse, it would risk turning due diligence into a dangerous “box-ticking” exercise that would make it even more difficult for affected individuals, communities, and their representatives to make meaningful advancements towards effective prevention of human rights abuses in global value chains.

In order to illustrate the reasons for this firm warning, FIDH and its member organisations and close partners have worked together on this brief, which provides real life examples from our daily work with communities affected by economic projects in different countries around the world. Our views, grounded in these experiences, emphasize that the EU can do much better to protect human rights and the environment, within but also outside its borders.

1. ECCJ, Commissioner Reynders announces EU corporate due diligence legislation, April 2020, <https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation>.

2. BHRRC, Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society, November 2020, https://media.business-humanrights.org/media/documents/BHRRC_EUPresidency_mHREDD_Compedium_11-2020.pdf

The stakes go beyond European borders

This publication is the result of the joint work of FIDH and some of its 192 members and close partners (in Armenia, Brazil, Chile, Colombia, Germany, Peru, Golan Heights, the MENA region, Myanmar and Palestine). These are mostly organisations from the Global South who have been working for years with communities adversely affected by business activities and economic projects. We consider that the stakes of the debate on European legislation on mandatory due diligence go well beyond the borders of Europe. If properly implemented, European legislation could significantly further human rights and environmental protection in third countries. But for this to be a reality, the voices of those working on the ground and directly affected need to be properly taken into account.

This publication does not seek to present an extensive position on all facets of the future legislation, and the examples found herein are short illustrations rather than comprehensive case studies. Yet the paper compiles our views on key elements of the text, including those sometimes less discussed in mainstream debates, and a summary of our recommendations.

FIDH is also a member of the board of the European Coalition for Corporate Justice (ECCJ), and participates in the work of a group of NGOs actively involved in advocacy for mandatory due diligence at the EU level. This publication should be read in complementarity with other work published by ECCJ and other members of the group, which can provide more details on certain aspects of our position, notably the following three publications:

- CORE & ECCJ, [Debating mandatory Human Rights Due Diligence legislation. A Reality Check](#), November 2020
- ECCJ et al, [Principal elements of an EU due diligence legislation](#), September 2020
- Anti-Slavery International & ECCJ, [What if ? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet](#), September 2020

Part I.

The Time Has Come for Binding Norms

European companies invest massively in developing countries and the Global South, which stimulates job creation and economic development, but is also frequently accompanied by severe human rights abuses and sometimes even complicity in internationally recognised crimes. Worse, such abuses too often remain unpunished, due to the facts that they occur extraterritorially and that companies use complex corporate structures to shield themselves from liability on these grounds. In many cases, the parent or lead company cannot be held accountable in its country of origin because it is a legal entity separate from the company that is linked to the abuses on the ground. Meanwhile, it is often very difficult for affected communities and individuals in developing countries to gain access to effective justice and remedy in their domestic courts. The case below illustrates how companies can abuse human rights and environmental norms, in spite of their internal policies or commitments, and their responsibility to respect international law, with limited – if any – consequences.



The BBVA Continental office building in San Isidro, Lima Peru. @Qwertymith https://commons.wikimedia.org/wiki/File:Edificio_BBVA_Continental.jpg

Spanish Investments in Peru, documented by Equidad

Some of Spain's largest investors in Peru, and which are involved in key economic sectors, are operating with disregard for labour rights and causing serious environmental impacts. Their behaviour contradicts Spain's National Action Plan on Business and Human Rights, Spanish and Peruvian legislation, as well as their own voluntary corporate commitments.

Our work on this case

A member of FIDH in Peru, Equidad is an organisation that defends and promotes full implementation of human rights by supporting affected individuals and communities. Equidad has a broad range of activities, including research, training, dissemination, litigation and advocacy at the local, regional, and international level.

In March 2019, Peru Equidad published a study to assess respect for human rights by Spanish businesses operating in Peru in the telecommunication, energy and hydrocarbons, finance, and private security sectors.³ We analysed the labour rights impacts, fiscal responsibility, and environmental imprint of four Spanish companies: Telefonica, a firm in the telecommunications sector; Repsol, from the energy and hydrocarbon sector; BBVA Continental, a financial institution; and Prosegur, a private security company. The study concluded that all of these businesses had serious negative impacts either on labour rights or the environment.

What Telefonica, Repsol, BBVA Continental and Prosegur are accused of

Despite their public commitments to respect international standards, we found labour rights violations linked to the activities of these Spanish companies. Our study showed that limitations on freedom of association and collective bargaining are common: it documented attitudes of open hostility and the use of discriminatory policies against trade union leaders and members. Such limitations are reinforced by the abusive imposition of short-term contracts on a large portion of the employees of these companies, which creates a situation of labour instability. Persistent environmental impacts, with consequences on the right to health and to food were also identified, specifically in the energy and hydrocarbon sector. Gas production fields, which started operations more than 15 years ago in isolated areas of the Peruvian southern jungle, have affected the health of thousands of people. These abuses take place in a context in which Spanish investors benefit

3. Equidad, Impacto en los Derechos Humanos de empresas españolas que operan en el Perú, March 2019, https://db0a2585-5805-4090-be7c-cf01233b9cc7.filesusr.com/ugd/6f0244_fb78ac7751d142b59bab8c12657318b4.pdf.

from significant tax exemptions or reductions. Such benefits are not subject to any conditions – respect for human rights and the environment do not constitute a precondition for favourable fiscal treatment.

Why mandatory EU due diligence could make a difference

This case shows that National Action Plans on business and human rights, and voluntary corporate commitments are insufficient to prevent human rights abuses. The lack of enforcement and accountability mechanisms inherent in such instruments has proven to be the main reason for their ineffectiveness. European legislation on human rights and environmental due diligence could be an effective tool to transition from the current system, based on companies' discretion and willingness to uphold human rights, to a framework of mandatory mechanisms that would require corporations to live up to their commitments, and give states the means to punish the absence of adequate prevention mechanisms.



Prosegur truck in Peru. @ PSGES https://commons.wikimedia.org/wiki/File:Prosegur_peru.jpg

Our current model of corporate regulation is simply **not robust enough to protect fundamental rights**.⁴ As in the case above, a wide range of companies which subscribe on paper to human rights and environmental protection fail to live up to their commitments. Only mandatory norms will allow for widespread enactment of due diligence procedures among companies, and proper implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs).⁵

In accord with the Commission's declaration, the EU must live up to its values and choose a path that will meaningfully advance prevention, accountability, and access to justice in cases of corporate abuses.⁶



A boy affected by the Cerrejón mine in Colombia (see p.20) @ CAJAR

4. FIDH, Don't wash your hands of human rights obligations - Corporate due diligence in times of COVID-19 and lessons for the future, April 2020, <https://www.fidh.org/en/issues/globalisation-human-rights/don-t-wash-your-hands-of-human-rights-obligations-corporate-due>.

5. BHRRRC, Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society, November 2020, https://media.business-humanrights.org/media/documents/BHRRRC_EUPresidency_mHREDD_Compodium_11-2020.pdf.

6. FIDH, FIDH advocates for the adoption of an international legally binding instrument to regulate the activities of corporations in relation to human rights, <https://www.fidh.org/en/issues/globalisation-human-rights/fidh-advocates-for-the-adoption-of-an-international-legally-binding>.

Part II.

The Scope and Nature of Due Diligence Obligations

The following chapter seeks to contribute to two key areas of debate regarding the EU legislation on human rights and environmental due diligence: (1) What rights and what actors should be covered by the bill? (2) How should lawmakers define, in the law, the objectives, the steps, and the procedures that constitute due diligence? This chapter features examples from Armenia and the occupied Golan Heights which emphasize the importance of including financial institutions and investors within the scope of the law, but also the necessity to protect human rights defenders (HRDs or “defenders”), who play a critical role in ensuring that human and environmental rights are upheld.

Investors allow economic projects to move forward. The choice of activities and firms they support can have a key impact on local populations and ecosystems. In this sense, they too have a responsibility for any human rights and environmental violations that they cause or contribute to, or to which they are directly linked. One key category of investors are international financial institutions (IFIs), who still operate without comprehensive human rights policies with adequate standards of implementation. Under pressure in recent years, IFIs have adopted “complaint” mechanisms which may lead to adjustments in the projects they finance, such as the payment of higher compensation packages than those initially offered by corporations. However, these mechanisms do not directly provide reparations to victims, and are often incapable of providing adequate remedy for victims of serious human rights violations. The Amulsar case offers a convincing example of why such institutions – and investors in general – must fall under the scope of mandatory due diligence obligations and see their responsibility further established in law.⁷

7. FIDH, *Corporate Accountability for Human Rights Abuses. A Guide for Victims and NGOs on Recourse Mechanisms*, 3rd edition (May 2016), p. 439, https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf



The neighboring town of Jermuk, @ Narek Aleksanyan

The Amulsar Gold Mine, documented by the Civil Society Institute

Approved amid accusations of corruption, the Amulsar gold mine project is moving forward in spite of the negative impacts and major risks it carries for communities and for the sensitive environment of Southern Armenia. The project, conducted by Lydian Armenia CJSC, has been fiercely opposed by experts, local authorities, as well as affected communities and human rights defenders, who started a blockade of the mine construction site in June 2018.⁸ In response, Lydian launched a vigorous campaign to silence its critics.⁹

Our work on this case

The Civil Society Institute (CSI) is a non-governmental organisation based in Yerevan which aims to assist in and promote the establishment of a free and democratic society in Armenia. Established in 1998 and formerly known as the Civil Society Development Union, CSI has implemented a series of programs, research and publications surrounding the principles of democracy and human rights. CSI is a member organisation of FIDH.

With FIDH, CSI conducted a fact-finding mission to Amulsar in 2019. It confirmed that the human rights and environmental concerns voiced by experts and HRDs were well-founded, and that the risks highlighted two years earlier by the Compliance Advisor Ombudsman of the International Finance

8. Thomas Rowley, Major bank investment in disputed Armenian gold mine to end, August 2020, <https://www.opendemocracy.net/en/odr/major-bank-investment-disputed-armenian-gold-mine-end>.

9. CSI & FIDH, Amulsar Mine in Armenia: Government Must Avoid Potential Environmental and Human Disaster, June 2019, <https://www.fidh.org/en/region/europe-central-asia/armenia/amulsar-mine-in-armenia-government-must-avoid-potential-environmental>.

Corporation, following community complaints, had not been sufficiently addressed by the company or the government. Our organisation has also been monitoring the situation of defenders, and called out Lydian for its systematic judicial harassment and defamation campaigns against journalists and critical voices, as well as security forces for their repeated arbitrary arrests of protesters.¹⁰

What Lydian is accused of, and what role development banks have played

Local communities claim that they were inadequately consulted before the start of the project.¹¹ In the years since, critics have been subject to growing intimidation, harassment, and arbitrary arrests. Residents allege that mining operations have already affected their health as well as their livelihoods, by weakening the tourism industry. Land buyout procedures and the right to water are also sources of concern. Lydian has been accused of damaging water pipes in the neighbouring town of Gndevaz, leading to water pollution for several days.¹² Moreover, part of the mine is located within an Emerald site under the Bern Convention, and any accident could endanger the biodiversity-rich environment and critical water systems in the area. Yet the Environmental Impact Assessments conducted by the company have been shown to be deficient, and their conclusions unreliable.¹³

The project was initially supported by development banks. The International Financial Corporation was one of the main shareholders in Lydian (7.9%), and invested US\$13 million in the project at various stages since 2007. It withdrew financing a decade later. The European Bank for Reconstruction and Development (EBRD) invested €4 million equity for an exploration and development program and feasibility studies in 2009, then extended €7 million to Lydian in 2017, to finance Environmental and Social Mitigation Measures.¹⁴ In 2020, the EBRD decided to end financing of the mine as well, citing reputational risks.¹⁵

Why mandatory EU due diligence could make a difference

Lydian Armenia CJSC is a fully owned subsidiary of Lydian International, a company registered in Jersey (a UK island) and headquartered in the USA. Although it doesn't operate on EU territory, its projects were financed by the EBRD, which is owned by the EU, its member states, and the European Investment Bank. The United Nations Guiding Principles on Business and Human Rights (UNGPs) make clear that financiers also bear a responsibility for human rights and environmental violations which they cause, contribute to, or to which they are directly linked, yet investment banks are rarely held to account for their activities.¹⁶ Here, by financing a project, then withdrawing because of reputational risk, the EBRD behaved in a manner which contradicts the UNGPs, according to which it should have carried out risk assessments prior to financing, then sought leverage to prevent and mitigate negative impacts, and take remedial measures if needed. This case shows the need for international financial institutions partly or fully owned by EU states or institutions to be properly covered by the instrument; to be required to conduct proper due diligence when funding projects; and to exercise leverage when they are aware of actual or potential negative impacts or risks linked to the projects they finance.

10. Observatory for the Protection of Human Rights Defenders, Armenia: Arbitrary arrest of several environmental rights defenders, August 2020, <https://www.fidh.org/en/issues/human-rights-defenders/armenia-arbitrary-arrest-of-several-environmental-rights-defenders>.

11. Compliance Advisor Ombudsman, CAO Investigation of IFC's Environmental and Social Performance in Relation to Investments in Lydian International (Amulsar Gold Project), Armenia, June 2017, http://www.cao-ombudsman.org/cases/document-links/documents/LydianComplianceInvestigationReport-06192017_forwebsite.pdf.

12. Bankwatch, Amulsar gold mine, Armenia, last consulted 24 November 2020, <https://bankwatch.org/project/amulsar-gold-mine-armenia>.

13. CSI & FIDH, Armenia: Expert Report Should Not Be Green Light for Harmful Mining to Resume, August 2019, <https://www.fidh.org/en/region/europe-central-asia/armenia/armenia-audit-report-confirms-serious-deficiencies-in-mining-company>.

14. Bankwatch, Amulsar gold mine, Armenia, last consulted 24 November 2020, <https://bankwatch.org/project/amulsar-gold-mine-armenia>.

15. Thomas Rowley, Major bank investment in disputed Armenian gold mine to end, August 2020, <https://www.opendemocracy.net/en/odr/major-bank-investment-disputed-armenian-gold-mine-end>.

16. See for example Rishi Gulati, The Immunities of International Organisations: The End of Impunity?, March 2019, <http://opiniojuris.org/2019/03/01/the-immunities-of-international-organisations-the-end-of-impunity>.

Human rights defenders play a key role in preventing and denouncing human rights and environmental abuses; they are fundamental to meaningful due diligence processes. Yet defenders and civil society organisations are often prevented from carrying out their work by intimidations, slur campaigns, abusive arrests, or even attacks and killings. In some cases, as we illustrate below, companies also launch strategic lawsuits against public participation (also known as “SLAPP actions”) to censor, intimidate and silence critics.



Windfarm in the Golan Heights. @ Har_Bnei_Rasan https://upload.wikimedia.org/wikipedia/commons/8/8b/Har_Bnei_Rasan_03.jpg

The Energix case, documented by Al-Marsad - Arab Human Rights Center in Golan Heights

With the Law for Prevention of Damage to State of Israel through Boycott (commonly called the “anti-BDS law”), Israel has established new legal means for private actors seeking to attack organisations that oppose economic projects developed in illegal Israeli settlements in the territory it occupies since 1967. The lawsuit by Energix Renewable Energies Ltd. (“Energix”) – a company headquartered in Israel, but which operates in the EU – against Al-Marsad - Arab Human Rights Center in Golan Heights illustrates the dangers facing human rights organisations who dare to document violations of international law relating to private business activities on occupied lands.

Our work on this case

Al-Marsad - Arab Human Rights Center in Golan Heights is an independent, not-for-profit international human rights organisation located in Majdal Shams, and the only human rights organisation in the Occupied Syrian Golan. The centre was founded in October 2003 by a group of lawyers and professionals in the fields of law, health, education, journalism and engineering, along with defenders and other community members. It became an FIDH member in 2016.

Since 2018, Al-Marsad has been documenting and reporting on the consequences of a massive renewable energy project that Energix plans to build on the already limited land allocated to indigenous Syrians in the Occupied Syrian Golan. Energix has proposed building 31 wind turbines, each 220 meters high, on Syrian agricultural lands directly adjacent to the village of Majdal Shams, the largest remaining Arab village in the area. The turbines will permanently alter the environment, made up of small scale farms, orchards, and cottages. The energy produced will supply the Israeli electric grid, with minimal benefits to the local population. When initial news of the project reached

Majdal Shams, members of the community asked Al-Marsad to investigate Energix's actions. We subsequently published a report in January 2019 detailing the health and environmental impacts of the wind farm, which concluded that by approving such a project, Israel would contravene its obligations under international human rights and humanitarian law. Al-Marsad called on the international community to hold Israel accountable for its actions, and asked consumers and Energix's partners to demand that the company halt the project.¹⁷

What Energix is accused of

Energix responded by launching an intensive campaign to silence opposing viewpoints. Among other acts of intimidation, in June 2019 the company filed suit against Al-Marsad under Israel's anti-BDS law, seeking around €226,000 in damages from the organisation. This marks the first time the law has been used to silence the speech and activities of a human rights organisation. Alarming, Energix seems to suggest in the complaint that Al-Marsad's efforts to oppose the wind farm and to demand that Energix comply with international law amount to a boycott. It inaccurately characterizes Al-Marsad as working in tandem with the BDS movement and "anti-Zionists." Three Special Rapporteurs expressed their concern that the lawsuit and the smear campaign appear to be "judicial harassment," and were "aimed at curtailing the organisation's ability to carry out its legitimate human rights activities, damaging its reputation and forcing it to cease its ... activities."¹⁸

Why mandatory EU due diligence could make a difference

Israel's efforts to criminalize critics of its illegal settlement enterprises are particularly concerning. They occur in a global context where lawsuits aimed at silencing critical voices, and more broadly, where intimidations, harassment or attacks against human rights defenders working on economic projects are on the rise. Any meaningful due diligence bill must further protect defenders and organisations because their work is critical to ensuring corporate respect for human rights and the environment. Energix is headquartered in Israel, but also has operations in Poland, an EU member state.¹⁹ The scope of EU legislation should cover organisations headquartered in the EU, but also those that operate or offer goods and services to EU markets. In this way the European legislation would be able to exercise true leverage on non-EU companies, and contribute to levelling the global playing field. Such a law could advance global human rights protection and either prevent cases similar to Energix or provide access to remedy in European fora for defenders.



17. Al-Marsad, Windfall. The Exploitation Of Wind Energy In The Occupied Syrian Golan, January 2019, <http://golan-marsad.org/wp-content/uploads/Windfall-%E2%80%93-The-Exploitation-of-Wind-Energy-in-the-Occupied-Syrian-Golan.pdf>.

18. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25009>. The case is still pending before the Nazareth Magistrate's Court. The Court has encouraged the parties to settle, which would require Al-Marsad to retract portions of its report. Al-Marsad has refused to do so on the grounds that it would set a dangerous precedent. In addition to the lawsuit against Al-Marsad, Energix sued five private individuals for defamation, all of whom had expressed opinions critical of its energy project. Energix has now withdrawn all five lawsuits, and the Court has demanded that Energix provide financial compensation to each individual.

19. See: <https://www.energix-group.com/Wind/>.

Our views on the scope and the nature of the due diligence obligations

In order for EU legislation to be centred on the reality of those affected by corporate human rights abuses, it should have a wide scope both in relation to the types of actors to which it applies, and to the rights it covers.

It should reaffirm, in law, that economic actors have a **responsibility to respect** human rights and the environment. This must **cover all internationally recognised human rights**, including labour rights and indigenous rights.²⁰ The legislation should emphasise the right of peoples to self-determination and the principle of permanent sovereignty, access, and control over their natural resources.²¹ But **environmental rights and standards** must also be fully recognised as part of the scope, in order for a broad range of environmental abuses to be remediated, whether they directly impact humans or not.²² Climate change, perhaps the most pressing threat to human rights in the decades to come, should also be properly addressed, and this legislation should provide a framework for regulating business conduct in view of implementing European commitments under the Paris Agreement.²³

The law needs to apply to **all companies operating in the EU market**, not only to those headquartered in Europe. While addressing the complex regulatory challenges posed by transnational corporations is a priority of such legislation, human and environmental rights must be protected in all circumstances. Financial institutions and investors' responsibilities under the UNGPs must be reflected in the instrument, to prevent or remediate situations like Amulsar. Both domestic and international operations must be covered. The place of small and medium enterprises (SMEs) in the future bill is vigorously debated. If some have claimed that due diligence obligations would be too burdensome for small firms, others have shown that many SMEs are actually better positioned to mainstream a culture of human rights and environmental protection in their operations.²⁴ "It has been well-demonstrated that there are no countries or sectors which pose no risks at all to people, the environment or the planet," according to the study conducted for the European Commission before its initiative on due diligence was announced.²⁵ It follows that **efforts to shield smaller actors from liability or due diligence obligations could be dangerous**, especially given the fact that 99% of European business are SMEs, and that their activities do have long-reaching extraterritorial impacts on people and their environment.²⁶ We recommend that lawmakers focus on how to support proper implementation of due diligence by SMEs and take into account their more limited means, rather than diminishing their responsibilities with regards to human rights and the environment.²⁷

20. ECCJ et al, Principal elements of an EU due diligence legislation, September 2020, <https://corporatejustice.org/principal-elements-of-an-eu-mhrdd-legislation.pdf>.

21. European Parliament, Opinion of the Committee on Foreign Affairs for the Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability, November 2020, 2020/2129(INL), para 31, https://www.europarl.europa.eu/doceo/document/AFET-AD-655782_EN.pdf.

22. Lucie Chatelain, Sherpa & Paul Mougeolle, Towards EU Legislation on Corporate Accountability: the Need to Address Environmental Harms, in BHRRC, Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society, November 2020, pp. 59-62, https://media.business-humanrights.org/media/documents/BHRRC_EUPresidency_mHREDD_Compendium_11-2020.pdf.

23. HRW, Q & A on the Proposal for an EU Legislation on Mandatory Human Rights and Environmental Due Diligence, November 2020, <https://www.hrw.org/news/2020/11/09/q-proposal-eu-legislation-mandatory-human-rights-and-environmental-due-diligence#Two>.

24. Francis West, On Mandatory Due Diligence, SMEs Don't Need a Free Pass; They Need Flexibility, in BHRRC, Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society, November 2020, pp. 32-34, https://media.business-humanrights.org/media/documents/BHRRC_EUPresidency_mHREDD_Compendium_11-2020.pdf.

25. European Commission, Study on due diligence requirements through the supply chain, January 2020, p. 262, <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

26. HRW, Q & A on the Proposal for an EU Legislation on Mandatory Human Rights and Environmental Due Diligence, November 2020, <https://www.hrw.org/news/2020/11/09/q-proposal-eu-legislation-mandatory-human-rights-and-environmental-due-diligence>.

27. CORE & ECCJ, Debating mandatory Human Rights Due Diligence legislation. A Reality Check, November 2020, pp. 12-13, <https://corporatejustice.org/debating-mhrdd-legislation---a-reality-check.pdf>.

Due diligence obligations should **concern both products and services, and cover the entire value chain of businesses**. Identifying abuses or risks must not be restricted to the first layer of suppliers, but must reach other tiers. They must also incorporate further rules on disclosure.²⁸

Moreover, the passage of European legislation is an opportunity to codify an ambitious definition of due diligence procedures. In this sense, we recommend aligning the text with the steps of human rights due diligence outlined in international standards such as the UNGPs and the OECD Guidelines on Multinational Enterprises. We also recommend formulating the objectives of due diligence in a way that establishes a clear separation between companies' obligations to "prevent and mitigate risks" and their obligations to "prevent abuses," to avoid ambiguous notions of the "mitigation of abuse" or "mitigation of negative impacts." In other words, it is important to avoid any confusion about the fact that abuses should not merely be mitigated if they do occur, but rather prevented or fully remediated. This language is consistent with General Comment 24 of the UN Committee on Economic Social and Cultural Rights.²⁹

Lastly, the legislation must include **protection of human rights defenders** as a key element of an effective prevention of human rights abuses and violations in the context of business activities, and must explicitly clarify that defenders, members of the LGBTIQ+ community, peasants and other rural people, ethnic and linguistic minorities, and local communities and their representatives should be meaningfully consulted throughout the planning, implementation and follow-up of a given economic project.³⁰

28. HRW, Q & A on the Proposal for an EU Legislation on Mandatory Human Rights and Environmental Due Diligence, November 2020, <https://www.hrw.org/news/2020/11/09/q-proposal-eu-legislation-mandatory-human-rights-and-environmental-due-diligence>.

29. FIDH, Second Revised Draft of Binding Treaty. Reflections on the text in preparation of the 6th Session of the IGWG, October 2020, https://www.fidh.org/IMG/pdf/fidh_reflection_second_revised_draft_prior_to_6th_session.pdf.

30. *Ibid.*



Mountains surrounding the Amulsar mine (see p.12). @ Soghomon Matevosyan https://commons.wikimedia.org/wiki/File:Amulsar_S-N_04.jpg

Part III.

Liability and Access to Justice

Decades of work to further corporate accountability and to support victims of corporate-related human rights abuses have led us to the following conclusion: new corporate accountability norms will make a meaningful difference only if they significantly improve access to justice and remedy for those who suffer harm, and if they start tackling the great power imbalances and procedural challenges faced by victims. Accountability gaps have left countless communities unable to obtain redress in their country of origin or in the home countries of multinationals. Some of these gaps are created by the complex corporate structures of multinational companies, and the liability-avoidance strategies frequently used by global groups. The Cerrejón mine case offers a good illustration of such strategies, but also of the necessity to establish the responsibility of European corporate actors who buy products abroad, to avoid contributing to abuses in their supply chain.



The Patilla pit of the Cerrejón coal mine. @ Hour.poining https://commons.wikimedia.org/wiki/File:Cerrej%C3%B3n_mine.JPG

The Cerrejón mine case, documented by the “José Alvear Restrepo” Lawyers’ Collective

Cerrejón is an open-pit mine in Colombia, and the largest coal mine in Latin America. Run by the company Carbones del Cerrejón, owned by mining giants Anglo American, BHP, and Glencore, it has been responsible for immense environmental and human rights damage. The case of Cerrejón also illustrates the strategies used by transnational corporations to avoid liability, and the lack of accountability of clients in Europe, where a large part of the coal is consumed.

Our work on this case

A member of FIDH, the “José Alvear Restrepo” Lawyers’ Collective (CAJAR) is an NGO which defends human rights in Colombia. It acquired its legal status in 1980, becoming one of the first human rights organisations in Colombia made up of lawyers. It has consultative status with the Organization of American States and the UN. It defends and promotes human and peoples’ rights and environmental rights, with the aim of contributing to the construction of a just and equitable society.

For more than 15 years, CAJAR has assisted indigenous and Afro-Colombian communities who denounce the systematic abuses and serious human rights violations committed by open-pit mining in the largest coal mine in Latin America, located in their ancestral territory of the Guajira in

Colombia. We have documented repeated human rights and environmental abuses, and litigated against Compañía Carbones del Cerrejón and its owners to seek legal recognition of their corporate responsibility. Although there have been domestic rulings recognising the damages and violations caused by Carbones del Cerrejón, the truth is that they do not have a significant impact on the human rights and environmental due diligence practices of the mining companies, who export the coal for consumption in Europe.

What Carbones del Cerrejón is accused of

The Guajira is the district with the second-highest poverty rate in Colombia. It is a semi-desertic area that is experiencing serious humanitarian and climate crises, as well as a water shortage. Yet its most fertile lands were granted as concessions for the extraction of coal, which has destroyed and devastated the local water sources, ecosystems, culture, health, and food sources, and profoundly affected the well-being of communities. These projects have been developed in a context of profound asymmetries in power, collusion and corruption, all of which have hindered effective access to justice and comprehensive reparations for the victims.³¹

Why EU mandatory human rights due diligence could make a difference

Carbones del Cerrejón, the mine operator, belongs to three transnational mining companies: BHP, Glencore and Anglo American. Each owns 33% of the firm. The three owners are businesses based or listed in the UK, Switzerland and Australia. In court, the companies have repeatedly sought to evade their responsibility for the abuses in Guajira, arguing that Carbones del Cerrejón is managed independently and autonomously from its shareholders. In our litigation proceedings, Carbones del Cerrejón has referred to these foreign companies as *third parties unconnected* to its activity, who should thus be considered unaccountable to the Colombian State. Instead of acting with due care to prevent abuses in their value chain, the parent companies also created a complex corporate network aiming to restrict and limit the liability of its shareholders: Carbones del Cerrejón is in fact a branch of a parent company whose main office is in Anguilla, a British territory recognised as a tax haven.

In this case, EU legislation should provide a forum for victims who are denied their right to remedy and to access to justice. A large part of Carbones del Cerrejón's coal is sold and distributed in Europe by the Irish-based trading company CMC-Coal Marking, which is also equally owned by Anglo American, BHP and Glencore. If European companies market and benefit from coal extracted with such dire impacts, they must also be responsible for monitoring their supply and commercialisation chain, and take appropriate action if harm is identified. A failure to comply with HRDD requirements, or the causation of or contribution to harm by suppliers that a company controls, should open way to liability in Europe. Binding European legislation should also draw on notions of environmental justice, to avoid deepening historical discrimination against ethnic or socio-economic groups that suffer disproportionately from the burden of environmental and human rights impacts of international trade activities. This implies the need for enhanced due diligence when investments and activities affect particularly vulnerable communities and territories.

31. See CAJAR, "La demanda contra Cerrejón busca frenar el impacto social y ambiental de la minería en La Guajira," August 2019, <https://www.colectivodeabogados.org/La-demanda-contra-Cerrejon-busca-frenar-el-impacto-social-y-ambiental-de-la->; CAJAR, Diez verdades sobre Carbones de Cerrejón, 2019, https://www.colectivodeabogados.org/IMG/pdf/diez_verdades_sobre_carbones_de_cerrejon.pdf; Christian Aid, Socavando los Derechos Humanos: Irlanda, el ESB y Carbones del Cerrejón, February 2020, https://www.christianaid.ie/sites/default/files/2020-06/CAI_Cerrejon_Spanish.pdf and OHCHR, Experto de la ONU pide el cese de la minería en controvertido sitio de Colombia, September 2020, <https://www.ohchr.org/sp/NewsEvents/Pages/DisplayNews.aspx?NewsID=26306&LangID=s>.

Responsibility for harm is rarely borne by a single actor. In cases like the following, the responsibility of European audit and certification companies is under scrutiny, as is the current limited means for victims to use European courts to litigate disasters like Brumadinho, described below, despite the involvement of European firms. The TÜV SÜD case should also act as a reminder: implementation of due diligence legislation may lead companies to over-rely on external certification and audit companies, which “must not become a surrogate for the human rights and environmental due diligence of companies”³² or be used as a shield from liability.

TÜV SÜD’s role in the Brumadinho dam failure in Brazil

In January 2019, a tailings dam burst at an iron ore mine near the small Brazilian town of Brumadinho, killing 272 people. Toxic sludge contaminated large sections of the Paraopeba River, poisoning the drinking water of thousands of people. The dam was owned by Brazilian multinational company Vale SA, which is under investigation in Brazil.

Our work on this case

This case was submitted by partner human rights defenders in Brazil working to further accountability in the mining sector, as well as by the European Center for Constitutional and Human Rights.

If in the Brumadinho case, Vale has a primary responsibility, we found that it wasn’t the only actor to have created the conditions for the disaster to happen: just four months before the rupture, the Brazilian subsidiary of TÜV SÜD, a German certification company, confirmed the dam’s safety, despite knowing about major risks. In order to clarify the certifier’s responsibility, ECCHR, Misericórdia, Associação *Comunitária* Jangada, and the International Articulation of People Affected by Vale assisted five Brazilians who lost close family members in Brumadinho in filing a complaint against TÜV SÜD and one of its officials.³³

What TÜV SÜD is accused of

Brazilian employees of TÜV SÜD found during an inspection that the dam failed to meet the stability factor required for their certification. Yet instead of alerting the authorities, the employees looked for new calculation methods to make the dam appear to be stable, and issued a certification of stability. After that, neither the mine operator nor the authorities initiated adequate stabilisation or

32. ECCJ, ECCHR & Initiative Lieferkettengesetz, Evidence-Based Law-Making: What Lessons Have We Learnt for an Effective Due Diligence Law?, in BHRRC, Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society, November 2020, p. 15, https://media.business-humanrights.org/media/documents/BHRRC_EUPresidency_mHREDD_Compendium_11-2020.pdf.

33. Brazilian organizations Associação Jangada and International Articulation of People Affected by Vale support the complaints.

evacuation measures.³⁴ The complaint accuses a TÜV SÜD employee of negligence in causing a flood, negligent homicide, and private bribery. The company is accused of violating its supervisory duties, under which TÜV SÜD had a duty to prevent crimes from being committed by entities of its corporate group.

Why mandatory EU due diligence could make a difference

In Germany, employees who commit crimes abroad are criminally liable. In addition, companies can be held administratively liable, and in some cases liable under civil law. Yet EU-level mandatory due diligence legislation would have clarified civil liability standards to include the possibility of access to justice for a wider range of human rights violations when a company causes or contributes to harms. Survivors, but also surviving dependants, property-owners, and people whose rights to water and land, or whose cultural rights have been affected, would have access to legal remedy. Such legislation would also have a preventive effect: companies would be legally obligated to conduct human rights due diligence and take measures to protect people and the environment along their supply chain, and would be sanctioned if they failed to comply. Although auditing and certification companies, such as TÜV SÜD in the Brumadinho case, only participate in the second or third stage of a production cycle, they play a critical role in avoiding abuses or allowing them to be perpetrated. In this respect, they could be held liable if it is proven that they contributed to harm. Moreover, such companies must implement their own human rights due diligence processes (and be sanctioned if they fail to); they should thus fall under the scope of the legislation.



House destroyed by the tailings (Brumadinho, June 2019). © Lavite & Müller-Hoff

34. Although engineers from the Brazilian subsidiary declared the dam stable, witnesses reported that a TÜV SÜD employee from Munich regularly visited Brazil.

Adopted in 2017, the French law on the “duty of vigilance” has created mandatory human rights due diligence obligations for certain multinational companies incorporated in France, and opened avenues for victims of extraterritorial human rights and environmental abuses linked to the supply and value chains of French companies to seek remedy in civil courts. Among recent examples of litigation under this law is the Ossorno case against SUEZ, described below. If it is still early to draw comprehensive lessons from the French law, the law has nevertheless clearly shown the need for victims of corporate harm around the world to be provided means of access to justice.

The SUEZ Case in Ossorno, documented by the Observatorio Ciudadano

On 10 July 2019, 2,000 litres of oil were spilled into the Caipulli drinking-water treatment plant operated by ESSAL (at the time a subsidiary of French multinational SUEZ). This contaminated the entire water supply of 140,500 inhabitants of Osorno, Chile – 97.9% of the town’s population – as well as two nearby rivers. A health emergency was declared and inhabitants were deprived of tap water for ten days. The plant had a history of malfunctions and failures, which had been repeatedly flagged by the Chilean inspection bodies.

Our work on this case

The Observatorio Ciudadano (Citizens’ Rights Watch) is a non-profit and non-governmental organization devoted to the advocacy, promotion, and documentation of human rights. It was founded in September of 2004, in the city of Temuco, Chile, as the Observatorio de Derechos de los Pueblos Indígenas (Indigenous Peoples’ Rights Watch). Since 2008 its mandate has broadened to address new emerging human rights challenges, always orientated by the guidelines contained in the current international instruments of human rights and of the rights of indigenous peoples. The Observatorio Ciudadano has offices in Temuco and Santiago, Chile. It is a member of FIDH.

Along with local organisation Red Ambiental Ciudadana de Osorno, the French Ligue des Droits de l’Homme, and FIDH, the Observatorio Ciudadano sent a formal legal notice to SUEZ’s CEO in July 2020.³⁵ It asked him to provide details of the company’s plan regarding its activities in Chile, and to include necessary measures to respond to repeated failures and illegalities in its provision of drinking-water to Osorno, as well as to prevent other health emergencies in the city or elsewhere in Chile. Any failure to respond to this formal notice or to introduce appropriate measures could be followed up with legal action before French courts.

35. FIDH, In wake of Osorno health emergency in Chile, SUEZ is served notice to amend vigilance plan, July 2020, <https://www.fidh.org/en/issues/globalisation-human-rights/in-the-wake-of-the-osorno-health-emergency-in-chile-suez-is-served>.

What ESSAL and SUEZ are accused of

For ten days, Osorno residents, but also the city's essential services such as hospitals, health centres, dialysis services and retirement homes were deprived of their drinking-water supply, which prompted a major health crisis. It only grew worse following the delayed and incomplete installation of alternative water-supply points by ESSAL, whereby insufficient quantities of poor quality water were delivered. Water-supply services were not fully restored until 21 July 2019, and authorities declared a health emergency in Osorno which lasted a total of 51 days. This episode was hardly an accident. Since 2018, the public inspection body in Chile has raised the alarm about the many infrastructure irregularities at the water plant. Over the past five years, authorities imposed 360 fines on the company, which nonetheless carried on with its negligent behaviour. ESSAL failed to prevent the Osorno disaster, but also failed to enact sufficient measures to remedy and guarantee non-repetition of such harms. Through its subsidiaries, French multinational SUEZ held over 43% of the Chilean water-supply market at the time of the catastrophe. ESSAL, although an independent company, is controlled by SUEZ. Under French law, SUEZ has a "duty of vigilance" to prevent human rights and environmental abuses arising from its actions but also those of its subsidiaries. Its subsidiaries' sustained negligence should have prompted it to act to remedy problems identified in the water supply and to prevent further harm.

Why mandatory EU due diligence could make a difference

The French Law on Corporate Duty of Vigilance could inspire European legislation. It allows communities around the world affected by the actions of a French multinational to instigate civil actions against companies, following acts in their supply and value chains. In this case, we formally notified SUEZ of our demand that it publish a new "vigilance plan" including detailed and adequate measures to mitigate and prevent the risk of human rights abuses, as well as provide a mechanism for monitoring the effective implementation of these measures in Chile. A civil court case could follow if SUEZ fails to act accordingly.

Demonstration in Osorno. © Observatorio Ciudadano



Our views on liability and access to justice

“A regulation without sanctions is not a regulation,” noted European Commissioner of Justice Didier Reynders. We would add that **a regulation that fails to ensure access to justice and remedy** for those who experience corporate abuse would lose much of its purpose.

The internal due diligence process is necessary to the effort to prevent causing and contributing to abuses, and to minimizing the risks thereof. States will naturally need to ensure that all companies play their part and guarantee a level playing field by creating state-based monitoring mechanisms with the authority to undertake independent investigations, to receive third party complaints, to issue penalties for non-compliance, and to impose interim measures in cases involving a risk of irreparable harm.

In addition, the above-mentioned examples show us that any legislation seeking to meaningfully further accountability and respect for human rights should also address the great challenges in access to justice and remedy for victims of abuses. Victims of harm in a third country must be able to access courts in a European country, where a parent company is headquartered. **Regarding enforcement and civil liability, two separate tracks should be envisaged.** On the one hand, third parties should be able to file complaints before competent authorities for failures to implement proper due diligence requirements, as outlined in European and domestic legislation. On the other hand, companies should be liable for the harm that they cause or contribute to, either directly or through entities they *de facto* control, regardless of internal due diligence procedures. In such cases, companies should be asked to prove that *they acted with due care (did everything they could)* to avoid harm, not that *they had due diligence procedures in place*. **This is key for several reasons.** First, there is an important risk that due diligence could become a mere “box-ticking” exercise intended to limit the liability of corporations, which would subvert its role as an ongoing preventive mechanism. Second, it could create further obstacles for victims in court, focusing the discussion on proving that internal procedures were implemented or sufficient, without guaranteeing victims access to the documents needed to prove their case. Third, if due diligence can act as a shield from liability, there is a tangible risk that in some cases the implementation of European legislation may further the impunity of parent companies and deny remedy to victims who have suffered harm.³⁶

The legislation should also pay particular attention to the **obstacles faced by communities when seeking remedy**, whether practical or procedural. The text should include a provision stating that the burden rests on the defendant business enterprise to demonstrate that it took every reasonable step to avoid causing or contributing to a human rights violation or abuse, or to prevent such violation or abuse.³⁷ A provision establishing a rebuttable presumption of effective control by the parent company when it has direct or indirect ownership or controlling interest over the entities part of a group, should also be introduced. This kind of presumption is already used in other areas of law, for example in EU competition law.³⁸ Lack of access to information is one of the most serious and recurrent barriers limiting access to justice and effective remedy for victims of corporate-related human rights abuses and violations. Disclosure of company documents and information, notably about a group’s corporate structure, governance and operations, is therefore also essential.³⁹

36. Olivier de Schutter, Towards Mandatory Due Diligence In Global Supply Chains, p. 4, https://www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf.

37. *Ibid.*

38. See European Court of Justice, Case C-97/08 Akzo Nobel NV and Others v Commission, 10 September 2009, and related doctrine.

39. FIDH, Second Revised Draft of Binding Treaty. Reflections on the text in preparation of the 6th Session of the IGWG, October 2020, https://www.fidh.org/IMG/pdf/fidh_reflection_second_revised_draft_prior_to_6th_session.pdf.

The cases in parts II and III illustrate the extent to which human rights and environmental abuses are often the result of acts or omissions by a complex web of actors, each bearing a specific responsibility, which complexity should be reflected in the due diligence bill. Whether a certification company or a purchaser of abusively-extracted minerals, European companies should be held responsible when they can prevent abuses and fail to do so.

In the worst cases, when companies commit or are complicit in crimes, they must also face **criminal liability**, as the next chapter will demonstrate.

When establishing a civil liability regime, French law can to a certain extent serve as an inspiration. One interesting provision of the Duty of Vigilance bill is that any interested party may call upon a judge with proper jurisdiction to demand that a company align its vigilance plan with the requirements of the law. In addition, when harm occurs as a consequence of a company's actions, victims have the right to access French tribunals and seek redress. Some areas of the law, however, would have benefited from clearer provisions to limit legal uncertainty and differing interpretations. One of these is the choice of competent court – as it stands, legal battles are still underway to resolve this issue, and it is possible that commercial courts, not civil courts, will be chosen to adjudicate a number of these cases in France. The law would also have highly benefited from a **reversal of the burden of the proof** – as was provided for in initial versions of the text.⁴⁰

40. For more on the lessons of the duty of vigilance law, see CCFD et al, Towards an EU Legislation on Corporate Accountability. Recommendations from French NGOs and trade unions that advocated for the French law on the duty of vigilance, December 2020, https://ccfd-terresolidaire.org/IMG/pdf/2020-12-10_-_recommandations_french_ngos_-_towards_eu_framework_corporate_accountability_-__.pdf.



ILVA - Production unit of Taranto - Italy - 25 Dec. 2007 (see p. 38). @ Mafe de Baggis https://commons.wikimedia.org/wiki/File:ILVA_-_Unit%C3%A0_produttiva_di_Taranto_-_Italy_-_25_Dec_2007.jpg

Part IV.

Business and Human Rights in Conflict Areas

Conflict-affected areas, including situations of occupation, are particularly risky for companies, as typical due diligence procedures are insufficient and often difficult to implement, and the potential for involvement in abuses of a grave nature, including war crimes and crimes against humanity, is higher. The cases below offer several examples, from Myanmar and the Occupied Palestinian Territory, of the alleged involvement of European companies in abuses and grave violations committed in conflict settings.



A Rohingya refugee camp in Cox's Bazar, Bangladesh © Tauheed https://commons.wikimedia.org/wiki/File:Rohingya_Camps_in_Cox%27s_Bazar,_Bangladesh.jpg

The cases of LafargeHolcim and Schiebel in Myanmar, documented by ALTSEAN-Burma

The Myanmar military (known as the Tatmadaw) has a long history of committing human rights violations and large-scale atrocities against civilians, including but not limited to widespread killings, rape and other forms of sexual violence, forced displacement, cruel treatment, forced labour, and torture.⁴¹ At present, the human rights situation of Rohingya Muslims and other minorities in Myanmar is being investigated by the UN Independent Investigative Mechanism for Myanmar.⁴² Moreover, Myanmar is currently being sued at the International Court of Justice for violating the Genocide Convention, through the acts of Myanmar's military and security forces, and persons or entities acting on its instructions or under its direction and control.⁴³

Our work on these cases

ALTSEAN-Burma is an NGO working to support national and grassroots movements in Burma/ Myanmar working for human rights and democracy. One of its core missions is atrocity prevention. It closely monitors and denounces cases of corporate involvement in the conflicts and related crimes in Myanmar.

In the next paragraphs, ALTSEAN-Burma provides illustrations of different forms of corporate involvement in crimes committed in conflict settings, which have been documented either by civil society activists or international institutions. Work is being done to research and engage with a company about one of the cases below, seeking clarifications regarding the group's due diligence procedures and whether it had breached the EU sanctions regime, which includes an embargo on arms and equipment that can be used for internal repression, and an export ban on dual-use goods for use by the military and guard police.

41. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 1. Link to website: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>.

42. United Nations Human Rights Council: Independent Investigative Mechanism for Myanmar, <https://www.ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx>.

43. International Court of Justice, The Gambia v. Myanmar, <https://www.icj-cij.org/en/case/178>.

Funding the military in Myanmar: LafargeHolcim's business links with the Tatmadaw

What LafargeHolcim is accused of

The French/Swiss company LafargeHolcim, the world's largest cement manufacturer, owns Thilawa Cement. The latter has a commercial relationship with and shares board leadership with Sinmynn Cement, a production and development company which is a subsidiary of the Myanmar Economic Holdings Company (MEHL).⁴⁴ MEHL has been classified by the Independent International UN Fact-Finding Mission as one of the Tatmadaw's two principal conglomerates.⁴⁵ The report of its fact-finding mission documents that "all shares in MEHL are held and managed by current or former military officers, regiments and units, and organizations led by former service members."⁴⁶ It is thus clear that the profits from MEHL and its subsidiaries directly benefit the Tatmadaw leadership. LafargeHolcim, by directly or indirectly engaging in business with the Tatmadaw, is "at high risk of contributing to, or being linked to, violations of international human rights law and international humanitarian law. At a minimum, it is contributing to supporting the Tatmadaw's financial capacity."⁴⁷

Why mandatory EU due diligence could make a difference

The business relationship between French/Swiss company LafargeHolcim and the Myanmar military shows the necessity of having a mandatory EU due diligence law. In cases where companies operate or have business relationships in conflict areas, such a law should provide for an *enhanced* due diligence process to prevent involvement in business dealings that enable or contribute to serious human rights violations, including serious international crimes. Furthermore, such legislation could contain provisions on criminal and civil liability to facilitate access to justice for victims of human rights violations, particularly in cases of serious international crimes. Conducting enhanced due diligence processes in conflict areas would also protect EU-based corporations from exposure and risks for the corporations, their leadership and boards, and their shareholders.



Schiebel Camcopter S-100 https://commons.wikimedia.org/wiki/File:Schiebel_Camcopter_S-100_at_ILA_2010.jpg © MatthiasKabel

44. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 143.

45. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 6.

46. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 53.

47. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 145.

Selling weapons to Myanmar: the Schiebel case

What Schiebel is accused of

According to the Independent International UN Fact-Finding Mission report, Schiebel, the Austrian-based technology company, sold to the Tatmadaw an “[u]narmed aerial vehicle, advertised as having military use: Camcopter S-100,” at a cost of US \$17,868,114.90.⁴⁸ By supplying this military-grade surveillance drone to the Myanmar military, Schiebel has directly supported an organisation involved in serious offences, regardless of its use. Schiebel’s website extensively promotes the military application of this technology. Furthermore, it is probable that the equipment was used for intelligence-gathering preceding aerial strikes or other attacks. Given the conflict situation and the Tatmadaw’s track record, it would very likely be involved in violations of international humanitarian law as a result. During January-November 2020 alone, the Myanmar military conducted at least 39 aerial strikes, resulting in 34 civilian deaths and 2,700 individuals displaced.⁴⁹

The product that Schiebel exported can be categorized as dual-use technology and is therefore subject to EU controls on exports of military technology and equipment. Austria is also part of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, under which “participating States are expected to apply export controls to all items on its list of dual-use goods and technologies.”⁵⁰ The business operation between Schiebel and the Tatmadaw may thus be violating existing trade regimes.

Why mandatory EU due diligence could make a difference

A comprehensive due diligence law would reinforce and complement existing frameworks such as the EU controls on exports of dual use technology and equipment or the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. Legislation providing for enhanced effective human rights due diligence in conflict areas would also have a preventive effect: business involved in the sale of arms and dual-use goods would determine whether or not they can put in place preventive or mitigation measures (such as restrictions on where and how the equipment could be used, transparency requirements, conditionality, and insurance regarding end users) before investing. Furthermore, rules regarding licensing processes remain insufficient, as the enforcement of sanctions regimes and legislation could establish clearer responsibilities for a broad range of actors, including for the private sector. Of course, the circumvention of embargoes and bans should be severely punished when it happens. But mandatory due diligence requirements and efficient liability regimes are also key to cover all difficult situations and risks linked to conducting trade and investment in conflict-affected areas, or with actors implicated in international crime. For instance, a precise identification of actors perpetrating genocide, crimes against humanity, and international crimes in company value chains, and of measures to avoid aiding or abetting them in committing crime or perpetuating illegal situations, are key requirements when operating within conflict zones.⁵¹

48. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, page 110.

49. ACLED, Armed conflict location event database Data Export Tool, <https://acleddata.com/data-export-tool/>

50. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 176.

51. The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar (A/HRC/42/CRP.3), 5 August 2019, paragraph 174.



After the Brumadinho disaster. © Movimento dos Atingidos por Barragens / Ricardo Sturk

Many contemporary cases of business-related abuses in conflict-affected areas relate to economic projects in occupied territories. The case of the Occupied Palestinian Territory is particularly challenging, given Israel's policy of allowing the development of economic projects in settlements in areas of occupation, which continues despite their illegal character under international law, as recognized by a diversity of multilateral institutions and courts.

Agribusiness and illegal settlements in the Jordan Valley of the occupied West Bank: the case of Zorganika, documented by Al-Haq and the CIHRS

Agriculture is the leading economic sector for settlements in the Jordan Valley of the occupied West Bank. It is estimated that settlement exports to the EU account for approximately US \$300 million of revenue annually. The growth and export of dates offers a good example of such activities. Israel is the world's largest exporter of this fruit. 60% of its dates are grown in the occupied Jordan Valley and 80% are exported, including to Europe.⁵² Zorganika is one of the numerous date-producing companies involved.⁵³

About our work

*Al-Haq strives to protect and promote human rights and the rule of law in the Occupied Palestinian Territory and focuses a portion of its research and advocacy on the nexus between economic incentives, business interests, and Israel's occupation. It has published different reports denouncing the links between agribusiness and illegal settlements in the Jordan Valley, analysing their responsibility under international human rights and humanitarian law. These include *Feasting on the Occupation* and *Business and Human Rights in Palestine*.⁵⁴*

The Cairo Institute for Human Rights Studies (CIHRS) is an independent regional non-governmental organisation which aims to promote respect for the principles of human rights in the Arab region.

What Zorganika is accused of

Zorganika is an international date brand, owned by two settlers, which cultivates 100 hectares of organic date groves in the occupied Jordan Valley.⁵⁵ The land used and cultivated by Zorganika

52. Agricultural Research in the Jordan Valley, available in Hebrew at: http://www.mop-bika.org.il/130651/haklaut_babika.

53. For a list of associated companies, see: Who Profits from the Occupation: "Made in Israel: Agricultural Exports from Occupied Territories," April 2014, pp. 30-81, https://whoprofits.org/wp-content/uploads/2018/06/old/made_in_israel_web_final.pdf.

54. See Al-Haq, *Business and Human Rights in Palestine*, <http://www.alhaq.org/publications/8063.html> and Al-Haq, *Feasting on the Occupation*, 2013, <http://www.alhaq.org/publications/Feasting-on-the-occupation.pdf>.

55. Who Profits from the Occupation: "Made in Israel: Agricultural Exports from Occupied Territories," pp. 80-81.

since 1999⁵⁶ was confiscated from the Palestinian owners through a military order for alleged security purposes,⁵⁷ and later declared a nature reserve.⁵⁸ 90% of the organic Medjoul dates grown by Zorganika are exported through the Hadiklaim Date Grower Cooperative⁵⁹; dates are in turn sold “in leading European chain stores, such as Marks & Spencer, Tesco and Waitrose in the UK, Migros and Coop in Switzerland and Albert Heijn in the Netherlands.”⁶⁰ Zorganika, among other Israeli and international companies which are involved in agribusiness in illegal settlements, is violating Palestinian rights under international law.⁶¹ These companies are an integral part of EU supply chains.

Why mandatory EU due diligence could make a difference

Already-existing decisions and guidelines are not sufficient to prevent settlement products from being sold in European markets. Mandatory due diligence legislation should allow EU companies involved in the import/export business with settlements to seek advice from their home state as well as credible international organisations and mechanisms, and ensure that the companies’ management and operational-level personnel have a full understanding of the applicable international human and humanitarian law standards throughout their business operations and relationships. Moreover, due diligence legislation should require EU companies to operate in line with international human rights and humanitarian law, and other relevant instruments, through an ongoing assessment process of its impacts. EU companies should also be required not to pursue operations in situations in which due diligence cannot be conducted and/or must guarantee that they will not be complicit in or contribute to violations that may amount to grave breaches of international law or internationally recognized crimes.

Settlement date farm, Jordan Valley ©Al-Haq



56. See Zorganika's promotional video, published on 23 November 2008, <https://www.youtube.com/watch?v=pGETtUI-PF8>.

57. See attached HCJ 6427/13 Court Decision in Annex 2.

58. Lies and Barriers; Who Profits, Made in Israel, p. 81.

59. Hadikalim – Israel Date Growers' Cooperative LTD, Overview, <http://www.hadiklaim.com/about-us>; Who Profits, *Hadikalim – Israel Date Growers Cooperative*, last updated 4 May 2014, <https://whoprofits.org/company/hadiklaim-israel-date-growers-cooperative>.

60. Who Profits from the Occupation: “Made in Israel: Agricultural Exports from Occupied Territories,” p. 74.

61. United Nations, Human Rights Council Resolution on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, A/HRC/RES/31/36, 20 April 2016, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/082/57/PDF/G1608257.pdf?OpenElement>.

Our views on provisions regarding conflict-affected and high-risk areas

The EU has a strong history of appreciating the connections between business activity and conflict, as reflected in its involvement in the matter of conflict minerals within the extractive industry. Recent initiatives by member states such as Germany and France aimed at bolstering respect for international humanitarian law as well as developments in transparency around arms sales, reflect a reaffirmation of this conviction.⁶² It is our view that this spirit should continue to evolve and be reflected in the HRDD legislation process. In order to reconcile political rhetoric with action, the domains of economic activity and business involvement must be taken into account in order to **ensure that businesses do not end up driving conflict or contributing to its perpetuation.**

As stated in the UNGP 14, “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and *with the severity of the enterprise’s adverse human rights impacts.*”⁶³ In conflict-affected and high-risk contexts, the likelihood and severity of human rights violations and abuses is significantly higher, the management of risks is harder, and holding to account perpetrators or those who contribute to crimes is more challenging. Moreover, vulnerable groups are even more disproportionately affected by these impacts. In many cases, stakeholder engagement is difficult, due to increased barriers to access.⁶⁴ Therefore, companies cannot rely on a standardised and traditional approach: “HRDD in conflict-affected and high-risk settings also requires different and additional considerations.”⁶⁵ In order to be effective, legislation regulating human rights due diligence processes should require companies to conduct a **thorough, robust and enhanced process** in these types of contexts, in regard to both their operations and their whole supply chain.

In conflict-affected and high-risk areas companies are required to respect internationally recognized human rights, as well as the **standards of international humanitarian law and international criminal law**⁶⁶ – which should be clearly re-affirmed by due diligence legislation.

Companies should be aware that the concept of “conflict-affected and high-risk” is broad. It does not only include situations of armed conflict, occupation, annexation or armed violence, but also post-conflict situations and contexts of social unrest, which can seem peaceful but are prone to conflict.⁶⁷ The UN Working Group on Business and Human Rights, in its recent report, “Business, human rights and conflict-affected regions: towards heightened action,” pointed to the European Union guidelines on conflict-affected and high-risk areas in the context of conflict minerals, as well as to United Nations’ framework of analysis for the prevention of atrocity crimes, as resources that indicate when heightened due diligence is warranted.⁶⁸

Conflict affected or high-risk settings are complex, and encompass a variety of actors, drivers and motivations. Thus, it is critical to require companies to have a thorough understanding of

62. See https://eeas.europa.eu/headquarters/headquarters-homepage_en/87534/Arms%20exports%20control:%20launch%20of%20online%20database%20increasing%20transparency%20on%20EU%20arms%20exports and <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/multilateralism-a-principle-of-action-for-france/alliance-for-multilateralism/article/a-call-for-action-to-bolster-respect-for-international-humanitarian-law>.

63. https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf (emphasis added).

64. International Alert (2018): “Human rights due diligence in conflict-affected settings,” p. 15, https://www.international-alert.org/sites/default/files/Economy_HumanRightsDueDiligenceGuidance_EN_2018.pdf.

65. International Alert (2018): “Human rights due diligence in conflict-affected settings,” p. 10.

66. UN Working Group on Business and Human Rights “Business, human rights and conflict-affected regions: towards heightened action,” A/75/212, 21 July 2020, <https://undocs.org/en/A/75/212>, para 9-12.

67. International Alert (2018): “Human rights due diligence in conflict-affected settings,” pp. 10-13.

68. UN Working Group on Business and Human Rights, “Business, human rights and conflict-affected regions: towards heightened action,” para. 14-21.

the conflict and to integrate conflict analysis into their human rights impact assessments.⁶⁹ A **gender-sensitive approach** is also essential, during both the conflict analysis and the HRDD process.⁷⁰

In many cases, host-state authorities are either directly responsible for the human rights violations occurring, or unable or unwilling to respect and protect human rights. In these situations, companies can become complicit in violations of international human rights, humanitarian, and criminal law. As a result, companies should be required to develop stronger and more effective measures to prevent and address potential and actual adverse human rights impacts, as well as stronger and more effective mechanisms and procedures to provide or cooperate in providing remedy. In cases where companies **cannot put in place measures to prevent or address negative impacts, companies should not operate or have business relations** with companies operating in conflict-affected areas. In cases where business were already operating in such contexts and decide to disengage, they should “anticipate and plan a clear exit strategy in advance. This will allow the business to identify and assess the impacts of disengagement with affected people, including business partners and communities, and to develop mitigation strategies.”⁷¹

When they cause or contribute to crimes recognised under international law, European companies and involved individuals should face **criminal liability**.

HRDD processes in these contexts should also include an analysis of how the company’s business activities and the measures taken as part of the HRDD process relate to the conflict situation, to make sure that they are not exacerbating tensions or causing additional harm.

It is important to require companies, and particularly those operating in conflict-affected and high-risk contexts, **to consult and engage during the whole HRDD process** with external stakeholders, especially national and local ones, who are experts on the specific context, and with local communities, in order to understand the context, analyse their operations’ impacts, and define and create policies and procedures applicable to the situation, to prevent, mitigate and remediate human rights impacts.⁷² Specific attention should be given to human rights defenders, who face increased risks in these contexts. Given the difficulties in implementing typical due diligence procedures and in properly assessing risks, home states have a particular duty to support businesses in these situations.

Finally, the legal requirement to conduct enhanced HRDD in conflict-affected and high-risk settings should apply to companies in all sectors. Traditionally, the development of HRDD processes in these areas has focused on extractive and mining companies. As the case examples included in this paper show, however, companies in all sectors operate in these contexts and, therefore, should be required to conduct enhanced HRDD.

69. UN Working Group on Business and Human Rights, “Business, human rights and conflict-affected regions: towards heightened action,” para. 44.

70. UN Working Group on Business and Human Rights, “Business, human rights and conflict-affected regions: towards heightened action,” para. 62-63.

71. UN Working Group on Business and Human Rights, “Business, human rights and conflict-affected regions: towards heightened action,” para. 65.

72. UN Working Group on Business and Human Rights, “Business, human rights and conflict-affected regions: towards heightened action,” para. 52-54.



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Conclusion: The ILVA case, or why the EU still has much to do to further corporate accountability, including to protect its own residents

The ILVA plant in Taranto, Italy, was inaugurated in 1964. It is the largest steel plant in Europe and one of the largest in the world. In 2018, it had about 11,000 employees and accounted for 75% of the GDP of the Province of Taranto. For over half a century, ILVA has had severe impacts on the environment and the health of the population of Taranto, as well as that of its employees. This case exemplifies the weaknesses of the current European system of corporate regulation, and shows how EU due diligence can, and should, apply to protect European residents.

Our work on this case

In April 2018, FIDH, its member organisation Unione Forense Per La Tutela Dei Diritti Umani (UFTDU) and partner organisations Peacelink and Human Rights International Corner (HRIC) published *The Environmental Disaster and Human Rights Violations of the ILVA steel plant in Italy*.⁷³ The report underlines that serious violations committed by the company in the decades during which the plant was operated under private management have been widely documented and known to the authorities since at least the 1990s, and that the Italian State negligently delayed the adoption of preventive and precautionary measures to limit the risks deriving from exposure to polluting emissions. This negligence is in violation of its obligations under international and European law. Our organisations have called on the government to adopt urgent measures to limit and contain the current human and environmental disaster caused by the ILVA steel factory.

What ILVA is accused of

The activities of ILVA have had a severe impact on the population of Taranto, the plant's workers, and the local environment. One of several alarming studies showed that children living in affected areas are 54% more likely to develop cancer than the regional average, men 30% more likely, women 20%.⁷⁴

73. FIDH, HRIC, Peacelink, and UFTDU, *The environmental disaster of the ILVA steel plant in Italy and its Human Rights Violations*, April 2018, <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/the-environmental-disaster-of-the-ilva-steel-plant-has-also-violated>.

74. Italian National Institute of Health, S.E.N.T.I.E.R.I (National Epidemiological Study of Territories and Settlements Exposed to Pollution Risks), *Assessment of epidemiological evidence*, 2010, <http://www.epiprev.it/pubblicazione/epidemiol-prev-2010-34-5-6-suppl-3>.

In January 2019, the European Court of Human Rights (ECtHR) published a landmark decision in the *Cordella and Others v. Italy* case, recognising that Italy failed to protect the right to private life and to an effective remedy for its citizens who are dramatically affected by the extreme pollution levels caused by the activities of ILVA in the city of Taranto. The decision also stressed that victims were not able to obtain redress for these violations since the Italian government authorised the activities to continue despite several judicial decisions. The ECtHR called on Italy to implement, as soon as possible, all the necessary measures to ensure environmental and health protection for the population.

Why mandatory EU due diligence could make a difference

The ILVA case is emblematic for several reasons. First, it shows that European residents can also suffer blatant abuses of their human rights and destruction of their environment. They too need to be protected by the future EU legislation, with European companies and supply chains falling under the scope of the legislation. Second, ILVA benefited from years of impunity while victims were denied redress due to negligence and laissez-faire on the part of the state, which imposed only limited and ineffective sanctions on the company and its managers. Italy adopted a National Action Plan on Businesses and Human Rights in 2016, and has a decree in force establishing corporate responsibility for crimes perpetrated in the interest or to the advantage of a legal entity, which could serve to inspire European debates.⁷⁵ Yet these frameworks have proven clearly insufficient to guarantee access to justice and remedy, even in cases of harms committed in Europe.

EU due diligence can make a difference. It can further access to justice and allow victims in Europe and around the world to seek remedy from companies who too often benefit from a system of abuse-ridden supply and value chains. It can thus finally create a robust framework to prevent human rights and environmental abuses and further corporate accountability. In announcing new legislation, the EU Commission has raised hopes that decades of corporate impunity could finally be challenged. This paper has shown the negative impacts that many European companies are having in Europe and around the world. The EU has a responsibility to adopt a framework that will remedy this situation.

The next chapter offers a summary of our recommendations to achieve meaningful due diligence legislation.



75. FIDH & HRIC, Italian Legislative Decree No. 231/2001: A model for Mandatory Human Rights Due Diligence Legislation?, November 2019, https://media.business-humanrights.org/media/documents/files/documents/report_231_2001_ENG.pdf.

A summary of our recommendations

A broad scope is key to effective due diligence: The legislation needs to apply to all companies operating in the EU market or headquartered in the EU, regardless of sector or size. It should concern both goods and services, and extend to the whole value chain and within business relationships, concerning operations in Europe and outside it. SMEs should not be excluded from the legislation, but rather supported in the process of complying with its provisions. Investors, financial institutions, and state-owned companies should fall under its scope. All internationally recognised human rights, labour and environmental rights must be protected. This should include particular provisions on climate due diligence.

The “responsibility to respect” must become law: Business enterprises must have an obligation to respect human rights and the environment in their own operations, in their global value chains, and within their business relationships.

The provision on due diligence should set out clear objectives and steps: The legislation should require businesses to exercise effective due diligence to identify, cease, prevent, and report corporate abuse and identify and mitigate risks of abuses throughout their global value chains and business relationships. Business enterprises must monitor the implementation and effectiveness of the adopted measures. General Comment 24 of the UN Committee on Economic, Social and Cultural Rights, together with the UNGPs and OECD Guidance on Human Rights Due Diligence, should provide inspiration in wording the objectives and steps of due diligence in EU legislation.

Communities and civilians in conflict-affected areas must be protected: The legislation should contain provisions for companies operating in conflict-affected and high-risk areas. This includes implementing thorough risk assessments, gender-sensitive, enhanced due diligence procedures, and meaningful consultation with local communities and civilians in such contexts. In cases where businesses cannot put in place measures to prevent or address negative impacts, or avoid contributing to crimes, they should not operate or maintain business relationships with companies operating in these contexts.

No accountability without access to justice: Access to justice and remedy for victims of corporate abuses should be at the front and centre of the legislation. The bill needs to establish two clearly separate paths for liability and enforcement: companies should be sanctioned for not complying with HRDD requirements *and* be liable for the harm that they or their *de facto* controlled entities cause or contribute to.

The multiple procedural barriers faced by victims must be addressed, by allowing for a reversal of the burden of the proof, better access to information, and presumptions of control by parent companies in certain cases.

Involvement in grave violations of human rights and international crimes should be punished by the implementation of criminal liability for causing or contributing to such acts.

EU legislation should be a part of a broader effort to further corporate accountability. European mandatory due diligence legislation must be viewed in complementarity with other related international developments on the subjects of corporate accountability and business and human rights. The EU must support and actively participate in the UN negotiations on the establishment of a binding treaty on business and human rights. It should also take into due consideration the development of United Nations reports or databases on business activities related to situations of international concern and the work of UN special procedures on business and human rights. Finally, domestic mandatory due diligence bills should be enacted in states of the Global South, where European businesses often operate, to further strengthen human rights and environmental protection. The EU should support the implementation of binding norms worldwide in its effort to seek proper implementation of the UNGPs.



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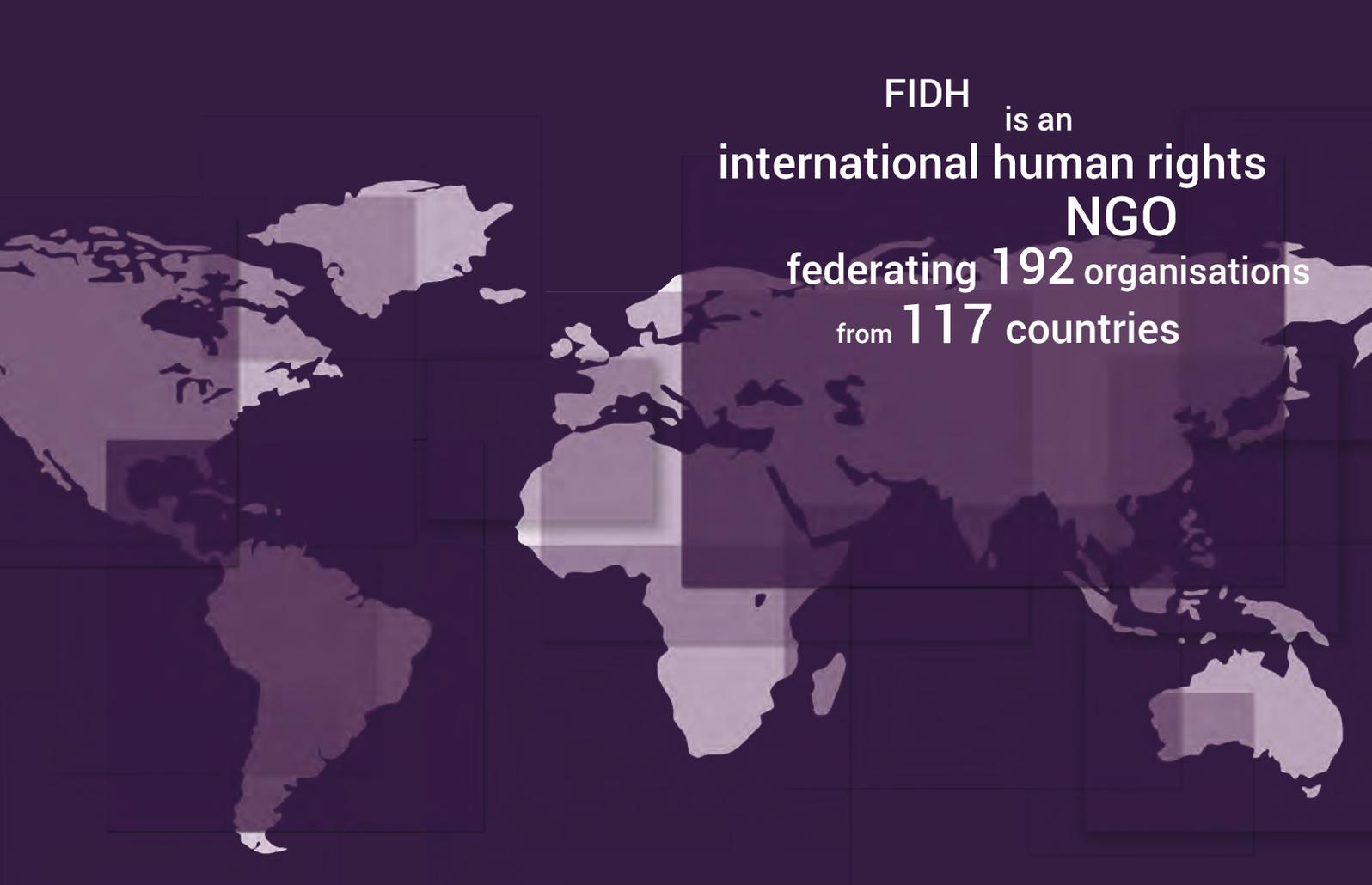
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