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THE CONTRIBUTION OF THE UN BUSINESS AND HUMAN RIGHTS FRAMEWORK TO
ENHANCING THE PROTECTION OF HUMAN RIGHTS AND ENVIRONMENTAL
DEFENDERS

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**The contribution of the un business and human rights framework to enhancing the
protection of human rights and environmental defenders**Daniel Iglesias Márquez*
Universitat Rovira i Virgili*1. INTRODUCTION*

In contemporary societies, humanitarian, environmental, and climate crises, political instability, and pandemics like the recent one tend to exacerbate adverse impacts on human rights and inequalities. In this global context, defending human rights and protecting the environment has become an essential but dangerous and occasionally lethal task, because the people who carry it out lack defences and protections and are therefore highly vulnerable. This task is courageously undertaken by people (journalists, lawyers, academics, community leaders, and others) who, individually or collectively, put their bodily integrity and their lives at risk to encourage and advance the protection and realization of human and environmental rights, along with fundamental freedoms at the local, national, regional, and international levels.

More than twenty years on from the adoption of the landmark United Nations (UN) Declaration on Human Rights Defenders,¹ the difficulties and risks faced by those defending human rights and the environment have not diminished²—quite the contrary: the data paint a bleak picture of an exponential increase in the numbers and intensity of lethal and non-lethal attacks on human rights and environmental defenders (referred to as ‘HREDS’ from here on).³

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¹ UN General Assembly, *Resolution 53/144 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, A/RES/53/144, 8 March 1999.

² UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/73/215, 23 July 2018, para. 5.

³ See, among others, Global Witness, *Decade of Defiance. Ten years reporting on land and environmental activism worldwide* (London, 2022); Centro Mexicano De Derecho Ambiental, *Report on the situation of environmental human rights defenders, individuals and communities in Mexico, 2021* (Mexico City, 2022); IACHR, *El segundo cuatrimestre de 2022 registra la persistencia de la violencia contra personas defensoras* (2 November 2022) available at: <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2022/244.asp>; Business & Human Rights Resource Centre, *In the line of fire: Increased legal protection needed as attacks against business & human rights defenders mount in 2020* (London, 2021); Procuraduría de los Derechos Humanos y La Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en Guatemala, *Situación de las personas defensoras de derechos humanos en Guatemala: Entre el compromiso y la adversidad* (Guatemala, 2019).

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Not even the COVID-19 pandemic managed to stem the tide of violence against HREDs. The restrictions imposed by States to deal with the spread of the virus also paralysed the human rights movement and deprived it of many of its monitoring and fact-checking tools. This worsened the situation for HREDs, because there was an increase in attacks on defenders who disseminated information about mismanagement of the crisis, or who simply continued to carry out their human rights work on the ground, while many States relaxed environmental and social requirements for business activities.⁴

The attacks faced by HREDs range from death threats to online harassment; abusive use of force in social protest demonstrations; restrictions on the exercise of freedom of association; undue restrictions on access to State-held information; dissemination of false news aimed at undermining their social or professional image or prestige; attacks on their property; theft or burglary; raids on or destruction of premises, equipment, and documents; physical assault; stigmatization before their own families or the community; baseless criminalization; arbitrary arrest; the imposition of unjustified or disproportionate fines; the dismissal of officials committed to human rights; abduction; torture; and murder.⁵

It is important to take into account the additional and differing threats and obstacles faced by particular groups within the category of defenders, such as trade union leaders, women human rights defenders, campesino and community leaders, indigenous and Afro-descendant leaders, and defenders of LGBTI people, of migrant workers and their families, and of the environment and land.⁶ While women HR defenders often face the same risks as the stereotypical male defender, they face additional gendered, intersectional threats driven by stereotypes rooted in deeply entrenched heteropatriarchal ideas and norms about who women are and what they should be like. Both women HR defenders and their actions are often erased or their contributions marginalized. It is also common for issues related to sexuality to be used as a tactic for attacking women HR defenders: comments and insinuations about their sexuality, sexual orientation, and marital or reproductive status are used to discredit their work, while threats of violence, including sexual violence, are often used to silence them.⁷

Among the many risks faced by HREDs, however, the issue of killings has become a priority for the UN under the mandate of the current Special Rapporteur on the situation of human rights defenders, Mary Lawlor. The 2021 UN report *Final warning: death threats and killings of human rights defenders* notes that between 2015 and 2019, defenders were killed in at least sixty-four countries,⁸ representing almost a third of UN member States, and that

⁴ H. Gabbero, Y. Louanchi, D. Reculeau, and C. Ferrerons Galeano, *Human rights defenders and Covid-19: The impact of Covid-19 on human rights defenders and their work* (The Observatory for the Protection of Human Rights Defenders, 2022), p. 54.

⁵ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas* (Washington, D.C., 2011).

⁶ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, p.102.

⁷ UN Human Rights Council, *Situation of women human rights defenders - Report of the Special Rapporteur on the situation of human rights defenders, A/HRC/40/60*, 10 January 2019, paras. 35–57.

⁸ These countries include Afghanistan, Algeria, Argentina, Bahrain, Bangladesh, Belize, Bolivia (Plurinational State of), Brazil, Burkina Faso, Burundi, Cambodia, Chile, China, Colombia, Costa Rica, Democratic Republic of the Congo, Ecuador, Egypt, El Salvador, Fiji, Gambia, Ghana, Guatemala, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Kazakhstan, Kenya, Liberia, Libya, Malaysia, Maldives, Mexico, Mozambique, Myanmar, Nicaragua, Nigeria, Oman, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Senegal, Somalia, South Africa, State of Palestine, Sudan, Syrian Arab Republic, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, United Republic of Tanzania, Venezuela (Bolivarian Republic of), and Yemen.

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between 1 January 2019 and 30 June 2020, the Special Rapporteur sent communications to ten member States on the killing of one hundred defenders.⁹

As for the aggressors involved in attacks against HREDS, it is not only State agents and authorities that are involved, but various non-state actors too, including individuals, armed groups, organized crime groups, the media, and private business enterprises.¹⁰ The evident direct and indirect involvement of business enterprises and corporate actors in human rights abuses against individuals and communities working to protect fundamental rights and freedoms should be noted.¹¹ This occurs because some of the attacks and risks faced by HREDS arise from opposing and filing complaints against business activities with a strongly negative impact on human rights and the environment, such as resource exploitation (timber, mining, and large-scale agribusiness), hydroelectric dams, and the development of other infrastructure.¹²

Given the background described above, this article starts from the premise that HREDS are key to promoting respect for human rights in the context of business activities. At the same time, business enterprises have a responsibility to respect defenders' human rights. The objective of this article is to analyse the extent to which international instruments in the area of business and human rights, particularly the UN Guiding Principles (UNGPs) on Business and Human Rights and the draft of the international legally binding instrument on business and human rights, contribute to preventing and mitigating the attacks and dangerous situations faced by HREDS who oppose and file complaints against business projects and activities that harm human rights and the environment. To achieve this, the paper first examines the situation of people who defend human rights and protect the environment over corporate interests and profits. It then explores the current international framework for the protection of HREDS and its effectiveness in preventing business enterprises from being directly or indirectly involved in attacks against defenders. Thirdly, it analyses the extent to which the UN business and human rights framework currently takes HREDS into account. Finally, it reflects on the need to take HREDS into account in business and human rights instruments.

2. AN OVERVIEW OF THE SITUATION OF HREDS IN THE CONTEXT OF BUSINESS ACTIVITIES

In the context of business activities, HREDS can contribute to highlighting and correcting corporate actions and omissions that harm human rights and the environment, as well as supporting affected communities and individuals in seeking appropriate remedies where such harm has occurred as a result of business activities. However, business enterprises and

⁹ UN Human Rights Council, *Final Warning: death threats and killings of human rights defenders - Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor, A/HRC/46/35*, 24 December 2020, paras. 3–4.

¹⁰ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/65/223*, 4 August 2010, paras 9–12.

¹¹ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/71/281*, 3 August 2016, paras 41–46.

¹² UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders, A/72/170*, 19 July 2017, para. 16.

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their connections commit attacks on HREDs on a daily basis.¹³ According to the Business & Human Rights Resource Centre, between 2015 and May 2019, there were more than 4,295 documented attacks on HREDs reporting business-related abuses.¹⁴ By speaking out against the adverse impacts of corporate activities and supply chains, and by promoting business practices that move towards more sustainable economies, these HREDs put their own and their families' bodily integrity and lives at risk.

According to the Business & Human Rights Resource Centre's database, those most at risk of attacks related to protesting and filing complaints against abuses and harms committed in the context of business activities are indigenous women HR defenders. In many cases, they are leaders or members of indigenous communities who are defending their traditional lands against the damage caused by large-scale projects such as mining and dam construction. Attacks on indigenous leaders often take place in the context of the conflicts that arise when business enterprises fail to consult adequately and effectively with indigenous peoples and communities and fail to gain their free, prior and informed consent to the use of their lands and natural resources. According to data analysed by the Business & Human Rights Resource Centre, in 2021, at least 104 attacks on defenders were due to a lack of effective consultation or free, prior and informed consent, or to disagreements over impact assessments.¹⁵

Indigenous leaders are often considered to be and described as environmental human rights defenders, as their actions are often intended to protect environmental and land rights.¹⁶ It is worth noting the alarming trend of violence, intimidation, harassment, and criminalization of groups and individuals who strive to defend and promote environmental and land rights.¹⁷ The disturbing number of cases of violence against and killings of environmental human rights defenders is associated with continuing global demand for natural resources, production patterns, and a global energy system based on the burning of fossil fuels.

According to Global Witness, in 2021, 200 land and environmental defenders were killed, an average of almost four people per week. Around one in ten of the land and environmental defenders killed in 2021 were women, almost two-thirds of whom were indigenous. These figures reflect only a fraction of the violence faced by environmental human rights defenders, as many of the attacks and killings cannot be counted because they take place in remote areas with limited access to communications, or because they are not properly investigated or reported. The killings involve not only State actors but also business enterprises from a range of sectors and take place in all regions of the world.¹⁸ Against this background, the UN Human Rights Council, in its Resolution 40/L.22, expressed its 'concern at the situation of environmental human rights defenders around the world, and strongly condemns the killing

¹³ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/65/223, 4 August 2010, paras 9–12.

¹⁴ Business & Human Rights Resource Centre, *Human Rights Defenders & Civic Freedoms Programme*, available at: <https://www.business-humanrights.org/es/from-us/human-rights-defenders-database/>.

¹⁵ Business & Human Rights Resource Centre, *Protegiendo a las personas y al planeta en 2021: ¿Por qué sería bueno que los inversionistas apoyaran a defensores/as que impulsan la transición justa a las economías verdes?* (London, 2022) p. 4.

¹⁶ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/71/281, 3 August 2016, para. 2.

¹⁷ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/71/281, para. 3.

¹⁸ Global Witness, *Decade of Defiance*, p. 10.

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of and all other human rights violations or abuses against environmental human rights defenders, including women and indigenous human rights defenders, by State and non-State actors, and stresses that such acts may violate international law and undermine sustainable development at the local, national, regional and international levels'. At the same time, it 'stresses that human rights defenders, including environmental human rights defenders, must be ensured a safe and enabling environment to undertake their work free from hindrance and insecurity (...)'.¹⁹

While lethal and non-lethal attacks against HREDs are not exclusive to any particular sector, specialized databases and reports agree that business enterprises in land-grabbing sectors such as mining, agribusiness, oil, gas and coal, and dam construction are the most dangerous to defenders. This does not mean that HREDs working to address human rights abuses in other sectors, such as finance, information and communications technology, and garment manufacturing, are immune from threats and reprisals.

According to the Business & Human Rights Resource Centre, over the last seven years, mining has been the most dangerous sector for HREDs. It says the scale of attacks linked to the mining sector is particularly worrying, given the unprecedented growth in the production of transition minerals needed by the renewable energy sector to achieve the goal of net zero carbon emissions by mid-century.²⁰ Global Witness similarly notes that mining was the sector linked to the highest number of killings, with twenty-seven cases of killings of land and environmental defenders in 2021.²¹ To cite some examples, in October 2022, in Ecuador, Alba Bermeo Puin, a conservationist active against gold mining activities polluting the water in the parish of Molleturo (Cuenca canton, Azuay province) was murdered in her fifth month of pregnancy by people involved in mining activities.²² Also in 2022, in South Africa, prominent campaigner Sikhosphi Rhadebe was murdered at his home, reportedly after being put on a hit list of opponents of mining activities in Xolobeni.²³ In 2021, in Mexico, José de Jesús Robledo Cruz and María de Jesús Gómez Vega were found dead. They had previously been abducted and tortured because of their human rights work. Both were opponents of a mining project that was destroying the social fabric of the communities in its vicinity. Death threats to other opponents of mining operations were found next to their bodies.²⁴ Agribusiness and hydroelectric dams are also among the most dangerous sectors for HREDs.²⁵ Within the

¹⁹ UN Human Rights Council, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*, A/HRC/40/L.22/Rev.1, 20 March 2019.

²⁰ Business & Human Rights Resource Centre, *Protegiendo a las personas y al planeta en 2021*, p. 3.

²¹ Global Witness, *Decade of Defiance*, p. 11.

²² A. J. Paz Cardona, 'Minería ilegal de oro cobra la vida de una defensora ambiental en Ecuador y desata violencia', *Mongabay*, 3 November 2022, available at: <https://es.mongabay.com/2022/11/mineria-ilegal-de-oro-cobra-la-vida-de-una-defensora-ambiental-en-ecuador/>; Alianza por los Derechos Humanos, *Denuncia pública urgente. Asesinato de Defensora de la Naturaleza embarazada en Molleturo*, 23 October 2022, available at: <https://ddhhecuador.org/2022/10/23/documento/denuncia-publica-urgente-asesinato-de-defensora-de-la-naturaleza-embarazada-en>.

²³ UN Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: [Universal Periodic Review]: South Africa*, A/HRC/WG.6/27/ZAF/1 (Geneva: 11 April 2017).

²⁴ Business & Human Rights Resource Centre, *Protegiendo a las personas y al planeta en 2021*, p. 3.

²⁵ Business & Human Rights Resource Centre, *Protegiendo a las personas y al planeta en 2021*; Global Witness, *Decade of Defiance*, p. 11.

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agribusiness sector, there are cases such as Brazil, where activity has grown exponentially despite social tensions in the country. Global Witness records that 42 of the 342 environmental rights defenders killed in Brazil in the last decade were demonstrating against agribusiness.²⁶ In the hydroelectric dams sector, we should recall the well-known environmental activist Berta Cáceres and her colleague Nelson García, of the Civic Council of Popular and Indigenous Organizations of Honduras, who were murdered in March 2016 for having opposed the construction of hydroelectric dams in the basin of the sacred Gualcarque River.²⁷ Corporate agents of the company Desarrollos Energéticos S.A., which was responsible for the Agua Zarca hydroelectric project opposed by Cáceres, have been convicted of the murder.²⁸ A more recent example is the murder of Filogonio Martínez Merino in Mexico in October 2022. He had been an agent for the ejido of Paso de la Reyna from 2008 to 2011 and a defender of the Río Verde against the Paso de la Reina and Río Verde hydroelectric projects for fifteen years.²⁹

With regard to the countries where lethal and non-lethal attacks on HREDs take place in the context of business activities, the databases and reports agree that countries in the Global South, especially in Latin America and Asia, are the most dangerous.³⁰ This is not to deny the responsibility of the countries in the Global North where the business enterprises whose projects or business connections in the Global South are associated with attacks on HREDs are domiciled or headquartered. The Business & Human Rights Resource Centre notes that in 2020, there were worldwide attacks on HREDs associated with European business enterprises, either through their operations or their supply chains. The majority of attacks associated with European business enterprises in 2020 took place in Cambodia, Indonesia, the Philippines, Mexico, and Uganda.³¹

Latin America and Asia-Pacific record the highest numbers of cases of violence against HREDs in the context of business activities. According to the Business & Human Rights Resource Centre, the highest numbers of attacks are recorded in India, Mexico, and the Philippines, while the highest numbers of murders take place in Mexico and Brazil.³² Global Witness confirms the danger of filing complaints against and resistance to corporate power in

²⁶ Global Witness, *Decade of Defiance*, p. 25.

²⁷ See United Nations, *Honduras murders: UN Expert urges independent investigation into killings of rights defenders*, 22 April 2016, available at: <https://www.ohchr.org/en/press-releases/2016/04/honduras-murders-un-expert-urges-independent-investigation-killings-rights>; 'Action needed to stop Honduras turning into a lawless killing zone for human rights defenders', 18 March 2016, available at: <https://www.ohchr.org/en/press-releases/2016/03/action-needed-stop-honduras-turning-lawless-killing-zone-human-rights>; and *Berta Cáceres' murder: UN experts renew call for Honduras to end impunity*, 11 April 2016, available at: <https://www.ohchr.org/en/press-releases/2016/04/berta-caceres-murder-un-experts-renew-call-honduras-end-impunity>.

²⁸ *El Mundo*, *Condenan a 22 años y medio de prisión al ex presidente de la hidroeléctrica DESA como 'coautor' del asesinato de la activista Berta Cáceres*, 21 June 2022, available at: <https://www.elmundo.es/internacional/2022/06/21/62b101d321efa02d228b45f3.html>.

²⁹ Oaxaca denuncia, *¡Exigimos justicia para Paso de la Reyna!*, Mexico, 28 October 2022, available at: <https://oaxacadencia.org/exigimos-justicia-para-paso-de-la-reyna/>.

³⁰ Business & Human Rights Resource Centre, *Protegiendo a las personas y al planeta en 2021*, p. 4; Global Witness, *Decade of Defiance*, p. 11; General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/72/170, 19 July 2017, para. 10.

³¹ UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/72/170, 19 July 2017; Business & Human Rights Resource Centre, *In the line of fire*, p. 7.

³² Business & Human Rights Resource Centre, *Business and human rights defenders in Asia-Pacific*, London, 2022, p. 2.

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these countries. It reports that more than three-quarters of the recorded attacks against environmental human rights defenders occurred in Latin America, in countries such as Mexico, Colombia, Brazil, Nicaragua, Honduras, Peru, Guatemala, Venezuela, Ecuador, Chile, Bolivia, and Argentina. Mexico is the country with the highest number of murders on record, with defenders killed every month. In 2021, a total of fifty-four murders were recorded there; more than 40 per cent of those killed were indigenous and more than a third of the total were enforced disappearances.³³

On the plight of HREDs in Latin America, the former Special Rapporteur on the situation of human rights defenders, Michel Forst, noted that in almost all Latin American countries, the government and corporate actors are involved in the killing of and attacks on defenders.³⁴ The bodies within the Inter-American Human Rights System (IAHRS) have also repeatedly expressed their concern about the attacks experienced by HREDs. The IAHRS has made an urgent call for the protection of HREDs who oppose activities with serious adverse impacts.³⁵ In *Kawas Fernandez v. Honduras*, the Inter-American Court of Human Rights (IACtHR) commented on the positive and relevant role of defenders and noted that ‘the defense of human rights is not limited to civil and political rights, but necessarily involves economic, social and cultural rights monitoring, reporting and education’.³⁶ IACtHR case law has developed the obligations of States to respect and guarantee the human rights of defenders, including the duty to provide the necessary means for them to carry out their activities freely, protect them when they are threatened, refrain from imposing obstacles that hinder the performance of their work, and investigate violations committed against them.³⁷

In its report titled *Business and Human Rights: Inter-American Standards*,³⁸ the Inter-American Commission on Human Rights (IACHR) and its Special Rapporteur for Economic, Social, Cultural and Environmental Rights (REDESCA) assert that the right to defend human rights and the environment is a fundamental criterion that should be considered and included in the legal and political frameworks developed by States in the domain of business and human rights. They therefore identify a series of standards that have the scope and special application of ensuring the work and rights of individuals who protect the right to a healthy environment and other interdependent rights in the context of extraction activities.³⁹ In this context, States must ensure that violations against defenders are prevented, identified, and punished.⁴⁰ To this end, they must ‘establish a clear legal framework that provides for sanctions against businesses that are involved in criminalization, stigmatization, abuses, and violence against those who

³³ Global Witness, *Decade of Defiance*, p. 10.

³⁴ UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/71/281, 3 August 2016, para. 29.

³⁵ IACHR, *IACHR issues call for OAS States to Protect Defenders of the Land and Environment*, 5 June 2017, available at: https://www.oas.org/en/iachr/media_center/PReleases/2017/072.asp.

³⁶ IACtHR, *Case of Kawas Fernández v. Honduras Judgment of April 3, 2009, Merits, Reparations and Costs*. Series C No. 196.

³⁷ See IACtHR, *Case of Escaleras Mejía et al. v. Honduras. Judgment of September 26, 2018*. Series C No. 361, paras. 56–61.

³⁸ IACHR, *Business and Human Rights: Inter-American Standards* (Washington, D. C., 2019). For an analysis of this report, see D. Iglesias Márquez, ‘Estándares interamericanos sobre empresas y derechos humanos: Nuevas perspectivas para la conducta empresarial responsable en las Américas’, *Anuario De Derechos Humanos*, vol. 16, n. 2, 2020, pp. 347–379.

³⁹ IACHR, *Business and Human Rights: Inter-American Standards*, para. 237.

⁴⁰ IACHR, *Business and Human Rights: Inter-American Standards*, para. 143.

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defend human rights, including private security business enterprises and contractors who act on behalf of the company involved.⁴¹

Similarly, IACHR Resolution No. 3/2021 on the Climate Emergency recognizes that defenders of the land and nature play an important role at the national and regional levels in the fight against climate change. In this resolution, the IACHR asserts that States must act forcefully and decisively ‘to prevent attacks, threats, intimidation, or killings and effectively investigate and punish those responsible, including those directly or indirectly related to business’.⁴²

Finally, it is worth noting the types of attack that HREDs face in the domain of business activities. Businesses can be involved in various types of lethal and non-lethal attack, such as threats, physical assaults, and smear campaigns, among others, but legal harassment and criminalization are among the types most commonly used to silence and curb opposition to their projects⁴³ and are carried out through strategic lawsuits against public participation (SLAPPs). SLAPPs are a strategy employed by corporate actors all over the world to curb and weaken those who oppose their activities or file complaints about their bad practices. The Business & Human Rights Resource Centre has identified more than 350 such cases worldwide since 2015.⁴⁴

SLAPPs can take the form of both criminal and civil legal proceedings and are brought by businesses in various sectors, but particularly by those in the mining, agribusiness, timber production, and palm oil industries. They are intended to intimidate and silence the opposition and divert resources away from HREDs. SLAPPs are often accompanied by campaigns that can have a significant impact on the reputations of women human rights defenders. Throughout the mandate of the UN Special Rapporteur on the situation of human rights defenders, it has been noted that ‘human rights defenders are increasingly being subjected to legal action because of their activities for the promotion and protection of human rights and fundamental freedoms.’⁴⁵ The trials to which HREDs are subjected are often lengthy and do not meet due process standards.

The largest numbers of SLAPPs occur in Latin America (39 per cent), followed by Asia and the Pacific (25 per cent), Europe and Central Asia (18 per cent), North America (9 per cent), Africa (8.5 per cent), and the Middle East and North Africa (0.5 per cent). Nearly three-quarters (73 per cent) of cases occurred in countries in the Global South.⁴⁶ The case of the women HR defenders belonging to the Organización Fraternal Negra Hondureña (OFRANEH) (Black Fraternal Organization of Honduras), who defend ancestral Garífuna land against

⁴¹ IACHR, *Human Rights Defenders and Social Leaders in Colombia* (Washington, D.C., 2019); *Políticas integrales de protección de personas defensoras* (Washington, D.C., 2017); *Criminalization of Human Rights Defenders* (Washington, D.C., 2015); *Second Report on the Situation of Human Rights Defenders in the Americas* (Washington, D.C., 2011); *Report on the Situation of Human Rights Defenders in the Americas* (Washington, D.C., 2006).

⁴² IACHR, *Resolution No. 3/2021 Climate Emergency: Scope of Inter-American Human Rights Obligations* (Washington, D.C., 2021), para. 28.

⁴³ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/72/170*, 19 July 2017, para. 17.

⁴⁴ Business & Human Rights Resource Centre, *SLAPPed but not silenced. Defending human rights in the face of legal risks* (London, 2021), p. 10.

⁴⁵ UN General Assembly, *Human rights defenders, A/56/341*, 10 September 2001, para. 20.

⁴⁶ Business & Human Rights Resource Centre, *SLAPPed but not silenced*, p. 10.

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tourism projects, is an example of the processes to which HREDs are exposed. These defenders were charged with an alleged offence of libel and slander against the businessman who owns the tourism developments. They have also been subjected to arbitrary detention with excessive use of force.⁴⁷ Another paradigmatic case is that of Energy Transfer, the operator of the Dakota Access Pipeline, which filed a lawsuit against several human rights and environmental organizations such as Greenpeace, BankTrack, and the Earth First! movement, as well as against individual defenders, accusing them of illegal misrepresentation with the intention of affecting the company and inflicting investment losses on its pipeline. This case was dismissed by the US courts.⁴⁸ These are just a few examples of the experiences which HREDs face in the context of business activities.⁴⁹

Finally in relation to SLAPPs, we should also refer to the complicity of governments, which have often adopted judicial or administrative decrees prohibiting organizations from operating, which facilitates the prosecution of organization members in accordance with laws and regulations.⁵⁰ In Latin America, the IACHR has expressed concern regarding the criminalization of HREDs through the improper use of criminal law, with the aim of hindering their defence work and thus impeding the legitimate exercise of their right to defend human rights. The IAHRs has stressed that American States should ensure that definitions of criminal offences in their legislations are formulated in accordance with the principle of legality. States should also respect the rights of defenders and organizations to manage their resources, including their funding, in compliance with legitimate laws and to draw up their programmes of activities completely independently and without undue interference from the authorities.⁵¹

3. THE FRAMEWORK FOR THE PROTECTION OF HREDs AND ITS SCOPE IN THE CONTEXT OF BUSINESS ACTIVITIES

HREDs carry out their work by exercising rights, particularly civil and political rights, that are recognized in both the universal and regional systems. These are the right to participate in public life, including the promotion and protection of human rights, and the rights to freedom of expression, opinion, association, and assembly, among others. However, reality shows us that the mere fact of States protecting these rights against abuses by businesses and other third parties is not sufficient to ensure a safe and enabling environment in which individuals, groups, and organizations promoting and defending human rights and the environment can operate free from threats, restrictions, and insecurity. Quite the reverse: enhanced protection is needed to ensure that these people can continue to exercise their rights without putting their lives at risk.

The global plight of HREDs has given rise to an international framework for their protection that recognizes and protects the right to defend. As a starting point and catalyst for

⁴⁷ Iniciativa Mesoamericana de Mujeres Defensoras de Derechos Humanos, *Criminalization of Garifuna OFRANEH members for Territorial Defense*, 14 August 2017, available at: <https://im-defensoras.org/2017/08/whrdalart-honduras-criminalization-of-garifuna-ofraneh-members-for-territorial-defense/>.

⁴⁸ Greenpeace, *US Federal Court dismisses \$900 million pipeline company lawsuit against Greenpeace*, 15 February 2019, available at: <https://www.greenpeace.org/international/press-release/20993/us-federal-court-dismisses-900-million-pipeline-company-lawsuit-against-greenpeace/>.

⁴⁹ For more examples, see Business & Human Rights Resource Centre, *SLAPPed but not silenced*, p. 10.

⁵⁰ UN General Assembly, *Human rights defenders*, A/56/341, 10 September 2001, para. 20.

⁵¹ IACHR, *Criminalization of the Work of Human Rights Defenders* (Washington, D. C., 2015), paras 93–212.

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this international framework, reference should be made to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (known as the Declaration on Human Rights Defenders), adopted by the UN General Assembly on 9 December 1998.⁵² Article 1 states, ‘Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.’ The Declaration on Human Rights Defenders has acted as an inspiration and foundation for other specific instruments and mechanisms, at the universal and regional levels, and even at the national level,⁵³ intended to recognize and promote the protection of HR defenders. Key regional instruments include the Grand Bay (Mauritius) Declaration and Plan of Action, adopted in 1999 at the African Union Ministerial Conference on Human Rights; the Kigali Declaration (2003) of the African Union Ministerial Conference on Human Rights;⁵⁴ the European Union Guidelines on Human Rights Defenders, adopted by the Council of the European Union in 2004 and revised in 2006 and 2008;⁵⁵ the 2008 Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities;⁵⁶ the Organisation for Security and Cooperation in Europe (OSCE)’s 2014 Guidelines on the Protection of Human Rights Defenders;⁵⁷ and the Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’).⁵⁸

In relation to the specific situation of women HR defenders, in 2013, the UN General Assembly adopted the Resolution on the Protection of Women Human Rights Defenders.⁵⁹ This historic resolution recognizes the valuable work of women HR defenders and ‘urges States to acknowledge publicly the important and legitimate role they play in the promotion and protection of human rights, democracy, the rule of law and development, as an essential

⁵² UN General Assembly, *Resolution 53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*.

⁵³ A. Pigrau Solé, ‘Mecanismos nacionales de protección de las personas defensoras de derechos humanos y del medio ambiente en América Latina: Especial referencia al caso de México’, *Actualidad Jurídica Ambiental*, n. 102, 2020, pp. 426-455.

⁵⁴ See *Kigali Declaration, 2003*, available at: <https://www.achpr.org/legalinstruments/detail?id=39>.

⁵⁵ See Council of the European Union, *European Union Guidelines on Human Rights Defenders* (Brussels, 10 June 2009), available at: <https://data.consilium.europa.eu/doc/document/ST-16332-2008-REV-2/en/pdf>.

⁵⁶ See Council of Europe Committee of Ministers, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities*, n.d., available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3e52.

⁵⁷ See OSCE, *Guidelines on the Protection of Human Rights Defenders*, 2014, available at: <https://www.osce.org/files/f/documents/c/1/119633.pdf>.

⁵⁸ See *Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’)*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022H0758>.

⁵⁹ UN General Assembly, *Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms: protecting women human rights defenders*, A/RES/68/181, 30 January 2014.

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component of ensuring their protection, including by publicly condemning violence and discrimination against women human rights defenders’.

Among the specific protection mechanisms, the figure of the Special Rapporteur on the situation of human rights defenders, created in the Human Rights Council in 2000, stands out.⁶⁰ Similar mandates have been established in regional systems in Africa and the Americas and under the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁶¹

But, to what extent this international and regional framework ensures a safe and enabling environment for HREDs in the context of business activities? Firstly, it should be noted that, with the exception of the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), this framework is predominantly soft law.⁶² The Escazú Agreement is the first legally binding international instrument in the world to include provisions on environmental defenders. Article 9 of the Agreement sets out three main obligations. The first is to ensure a safe and enabling environment in which individuals, groups, and organizations promoting and defending human rights in environmental matters can operate free from threats, restrictions, and insecurity. The second is to take adequate and effective measures to recognize, protect, and promote all the rights of defenders in environmental matters. The third is to take appropriate, effective, and timely measures to prevent, investigate, and punish attacks, threats or intimidations that defenders in environmental matters may suffer while exercising their rights.

In the IAHRs, the IACtHR has welcomed the adoption of the Escazú Agreement. The Court considers it as a positive measure to guarantee the right of access to information, participation and access to justice in environmental matters. In this sense, the IACtHR in the exercise of its jurisdictional function, and in accordance with the evolutionary interpretation of the treaties carried out by the Court,⁶³ has begun to use and take into account the provisions on human rights defenders in environmental matters of the Escazú Agreement. In 2023, in the case of *Baraona Bray vs. Chile*,⁶⁴ the IACtHR determined that the Chilean State incurred in international responsibility for violating the rights to freedom of thought and expression, the principle of legality and judicial protection, to the detriment of a lawyer and environmental defender. To this end, the Court used the provisions of the Escazú Agreement, recognizing that

⁶⁰ See United Nations, *Ms Mary Lawlor Special Rapporteur on the situation of human rights defenders*, n.d., available at: <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/ms-mary-lawlor>.

⁶¹ See *Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa*, available at: <https://www.achpr.org/specialmechanisms/detail?id=4>; IACHR, *Rapporteurship on Human Rights Defenders and Justice Operators*, n.d., available at: <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/DDDH/default.asp>; UNECE, *World's first Special Rapporteur on environmental defenders elected under the Aarhus Convention*, 24 June 2022, available at: <https://unece.org/environment/press/worlds-first-special-rapporteur-environmental-defenders-elected-under-aarhus>.

⁶² See United Nations, *Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean*, 2018, available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.

⁶³ V. R. Hernández-Mendible, ‘El Acuerdo de Escazú y la competencia de la Corte Interamericana de Derechos Humanos para tutelar los derechos relacionados con la materia ambiental’, in F. López Ramón (Coord.), *Observatorio de Políticas Ambientales* (CIEDA-CIEMAT, 2019), pp. 142-168.

⁶⁴ IACtHR, *Baraona bray vs. Chile*, sentencia de 24 de noviembre de 2022 (Excepciones Preliminares, Fondo, Reparaciones y Costas).

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Article 9 establishes the obligation of the States parties to guarantee ‘a safe and favourable environment’ so that human rights defenders in environmental matters ‘can act without threats, restrictions and insecurity’. Likewise, it recognized that, in light of the Escazú Agreement, States must take ‘adequate and effective measures to recognize, protect, and promote’ all their rights; including the rights to life, personal integrity, freedom of opinion and expression. In addition, the Court recalls that international environmental standards highlight the importance of States adopting adequate and effective measures to protect the right to freedom of opinion and expression and access to information in order to guarantee citizen participation in environmental issues which is of vital importance in the materialization and protection of the right to a healthy environment, in accordance with the Escazú Agreement.

Despite its predominant soft law nature, the international and regional instruments for the protection of HREDs contains a series of rights and principles based on legally binding human rights standards and hence constitutes the basis for States to articulate actions and measures aimed at preventing and redressing attacks on HREDs. When implementing these international and regional instruments, States must take into account the serious danger to HREDs in the context of corporate activities, as described in this article. They should therefore envisage preventive measures, and where such measures prove insufficient to prevent non-state actors from infringing defenders’ rights, States should promptly undertake thorough and impartial investigations, prosecute alleged offenders, and grant reparation to victims.

The OSCE Guidelines on the Protection of Human Rights Defenders assert that States have an obligation to protect defenders from abuse by non-state actors, in particular by adopting legislative and other measures to prevent, investigate, punish, and remedy abuses, and that ‘where existing legislation, policies and practices are not sufficient to hold non-state actors to account, States should amend them or adopt new legislation and practices to that end.’⁶⁵ These Guidelines also state that businesses ‘should be encouraged to pay particular attention to the impact of their operations on the situation of human rights defenders. In conducting an impact assessment they should involve human rights defenders and other potentially affected groups and stakeholders through meaningful consultations.’⁶⁶

The Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities condemns all attacks on and violations of the rights of defenders in Council of Europe member States or elsewhere, whether by State or non-state actors, including businesses.⁶⁷ To this end, it calls on member States to create an environment conducive to the work of HR defenders; take effective measures to protect, promote, and respect HR defenders and ensure respect for their activities; strengthen their judicial systems and ensure effective remedies for those whose rights and freedoms are violated; and take effective measures to prevent attacks on or harassment of HR defenders, among other things.

In the European Union, the Guidelines on Human Rights Defenders promote respect for the rights of defenders and protection from attacks and threats by non-state actors, through

⁶⁵ See OSCE *Guidelines on the Protection of Human Rights Defenders*, 2014, available at: <https://www.osce.org/files/f/documents/c/1/119633.pdf>.

⁶⁶ OSCE, *Guidelines on the Protection of Human Rights Defenders*, p. 34.

⁶⁷ See Council of Europe Committee of Ministers, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities*, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3e52.

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relations with third countries and in multilateral fora.⁶⁸ The Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') promotes awareness-raising campaigns focused on promoting open, free, and fair debate and protecting the right to freedom of expression, and should be combined with awareness-raising activities that promote active citizen participation, plurality of opinions, and access to reliable information. The targets of these campaigns include private corporations.⁶⁹

Finally, it should be noted that the international and regional instruments for the protection of HREDs is aimed primarily at States, as they are the main bodies responsible for protecting human rights. However, the UN Declaration on Human Rights Defenders affirms that all persons have a responsibility not to violate the rights of others, which includes non-state actors' responsibility to respect defenders' rights. The preamble of the Declaration thus asserts the duties of individuals, groups, and institutions, including businesses, to promote respect for and knowledge of human rights and fundamental freedoms. Article 11 states that 'everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.' Article 16 states that 'individuals, non-governmental organisations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research'. Finally, Article 19 declares that 'nothing in the present Declaration shall be interpreted as implying for any individual, group or organ of society or any State the right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms referred to in this present Declaration.'

These provisions cover businesses and their activities and connections. Businesses and other non-state actors should therefore desist from taking actions that may prevent HREDs from exercising their rights; in fact, businesses may and must play a preventive role, promoting the Declaration and the rights and activities of HREDs. The General Assembly Resolution on the protection of women human rights defenders likewise invites business leaders to express their public support for the important role of women human rights defenders.⁷⁰

4. HREDs IN THE UN BUSINESS AND HUMAN RIGHTS FRAMEWORK

All the evidence set out above allows us to assert that the international framework for the protection of HREDs is not sufficiently robust to ensure that States will provide strengthened protection of defenders' rights in the context of business activities or to prevent

⁶⁸ See Council of the European Union, *European Union Guidelines on Human Rights Defenders*, available at: <https://data.consilium.europa.eu/doc/document/ST-16332-2008-REV-2/en/pdf>.

⁶⁹ See *Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation')*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022H0758>.

⁷⁰ UN General Assembly, *Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms: protecting women human rights defenders*, A/RES/68/181, 30 January 2014.

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businesses from being directly or indirectly involved in lethal and non-lethal attacks on individuals who promote and protect human rights and the environment in the face of corporate power and bad practices. This situation can be remedied: the international framework for the protection of HREDS can be complemented by the international and national business and human rights instruments. This section primarily explores the added value to the recognition and protection of defenders in the context of business activities of the UNGPs (A/HRC/17/31) and the draft of the international legally binding instrument on business and human rights.

4.1. The role of the HREDS in the UN Guiding Principles on Business and Human Rights

The UNGPs, unanimously adopted in 2011 by the Human Rights Council, represent significant progress in the area of business and human rights, as they constitute the authoritative global framework on States' obligation to protect human rights against business activities (Pillar I); on corporate responsibility to respect human rights (Pillar II); and on the establishment by States and business enterprises, respectively, of judicial, non-judicial and non-state mechanisms for ensuring that those harmed by corporate abuses have access to effective remedy (Pillar III). The UNGPs are the frame of reference in the universe of laws, policies, standards, and soft law initiatives promoting responsible corporate conduct with regard to human rights and the environment.⁷¹

The UNGPs provide guidance and principles based on international human rights law for States and business enterprises not only to protect and respect HREDS' rights, but also to contribute to a safe and enabling environment for their work. With regard to States, Pillar I reaffirms their obligation to protect human rights, including—according to the UN Working Group on Business and Human Rights responsible for the implementation of the UNGPs—protecting the rights of defenders so that they can do the work they do in identifying, reporting, and seeking to prevent, mitigate or remedy adverse impacts of business activity in a safe and enabling environment.⁷²

In the light of Guiding Principle 1, States should therefore enact policies, legislation, and regulations to prevent, investigate, punish, and redress all types of threat to and attack on HREDS in the context of business activities. Furthermore, according to Guiding Principle 2, States should set clear expectations for business enterprises regarding the importance of respecting HREDS' rights. In line with Guiding Principle 3, States should also make the protection of HREDS a priority in their domestic and international policy. They should address risks to HREDS through their trade and economic policies, in line with Guiding Principles 4–6.⁷³ Finally, Guiding Principle 26 points out that States should ensure that obstacles are not placed in the way of HREDS' legitimate and peaceful activities.

National action plans (NAPs) on business and human rights can be an important means of protecting HREDS in the context of business activities and of raising business awareness of their work. These public policy instruments could improve their situation through smart mix of

⁷¹ See D. Iglesias Márquez, *The Institutionalisation of Initiatives to Promote Business Respect for Human Rights*, (Barcelona, 2019).

⁷² UN Human Rights Council, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, A/HRC/47/39/Add.2, 22 June 2022, para. 40.

⁷³ UN Human Rights Council, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, A/HRC/47/39/Add.2, paras 40–52.

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measures which aim to recognize the work of HREDs and prevent businesses from being involved in attacks against them. Governments should use NAPs to set out their expectations of business towards HREDs. Furthermore, HREDs, along with groups that are particularly vulnerable to business-related human rights abuses, need to be placed at the centre of NAPs. Ensuring the effective protection of defenders through NAPs also requires their substantial engagement and to be consulted during the process of the NAP development.⁷⁴

However, it should be noted that the general assessment of most of the plans adopted is not positive since in the NAPs States take stock of the measures that they already have in place to apply the Guiding Principles, without establishing measures to trigger changes in law or policy. Likewise, it should be added that, currently, only some NAPs make a mere reference to defenders or contain commitments or actions related to their protection, such as Thailand in its 2019-2022 National Action Plan on Business and Human Rights.⁷⁵ Finland's National Action Plan on Business and Human Rights (2014) highlights that human rights defenders play an important role in assessing the impact of business activities on human rights, and underlines the State's cooperation with human rights defenders in exposing corruption.⁷⁶ In Italy, the National Action Plan on Business and Human Rights (2016) made reference to the government's commitment to strengthening mutual cooperation and support provided to human rights defenders.⁷⁷ In the revised edition of the NAP (2018), Italy committed to ensuring a safe and enabling environment for human rights defenders.⁷⁸ In the German NAP, the Federal Government committed to take specific action to step up its wide-ranging commitment to the protection of human rights defenders when applying the UNGPs.⁷⁹ The Swiss NAP also states that as part of its State duty to protect, Switzerland supports the work of HRDs and is committed to ensuring that they are protected against unfair treatment, threats and violence, including abuses committed by private companies.⁸⁰

Pillar II of the UNGPs represents a step forward in the ongoing debate on corporate obligations under international human rights law.⁸¹ It clarifies corporate responsibilities in relation to human rights and states that business enterprises have a duty to respect human rights.

⁷⁴ ISHR and ICAR, *Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights* (London, 2016), p. 1.

⁷⁵ See Ministry of Justice, *First National Action Plan on Business and Human Rights (2019–2022)*, available at: <https://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-en.pdf>.

⁷⁶ See Ministry of Employment and the Economy, *National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights*, available at: <https://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-en.pdf>.

⁷⁷ See *Italian National Action Plan on Business and Human Rights 2016-2021*, available at: <https://globalnaps.org/wp-content/uploads/2017/11/Italy-1st-NAP.pdf>.

⁷⁸ See, *Secondo Piano d'Azione Nazionale su Impresa e Diritti Umani 2021-2026*, available at: https://cidu.esteri.it/comitatodirittiumani/resource/doc/2021/12/secondo_pan_bhr_ita.pdf.

⁷⁹ See, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016 – 2020*, available at: <https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf>.

⁸⁰ See, UN Guiding Principles on Business and Human Rights Swiss National Action Plan 2020–23, available at: https://globalnaps.org/wp-content/uploads/2017/11/beilage-01-principes-directeurs-de-l%E2%80%99onu-relatifs-aux-entreprises-et-aux-droits-de-l%E2%80%99homme-plan-d%E2%80%99action-national-de-la-suisse-2020-2023_en-zu-bra-eda-wbf-1.pdf.

⁸¹ D. Iglesias Márquez, 'La debida diligencia en materia de derechos humanos: Estado de la cuestión y perspectivas', in K. M. Rico Espinoza and E. Guadarrama López (eds.), *Tomo XVI. Derechos humanos y Empresas de la Colección de Estudios en Derechos Humanos*, (Jalisco, 2022), pp. 32–65.

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This means that they must refrain from infringing the human rights of others and address any adverse human rights impacts that may arise. In other words, business enterprises should conduct their activities in such a way that they do not interfere with or adversely impact the enjoyment of human rights by employees, communities, consumers or others who may be directly or indirectly affected by their activities or business relationships. According to the UN Working Group on Business and Human Rights, the corporate responsibility to respect human rights includes supporting the work of defenders and preventing, mitigating, and redressing the risks and attacks they face.⁸² Therefore, if a business enterprise is directly or indirectly causing or contributing to attacks against HREDS, its responsibility is clear: it must stop the attack and address any harm it may have caused.

The responsibility to respect human rights is embodied in human rights due diligence (HRDD), which is an ongoing management process through which a business enterprise identifies, prevents, mitigates, and accounts for human rights risks and adverse impacts in all its operations and products and in all its business relationships (both suppliers and business partners) (Guiding Principle 17). If an effective due diligence process is carried out, impacts can be prevented or mitigated before they become serious damage or be repaired before the damage becomes irreparable.

Business enterprises that operate or have business relationships in contexts where there may be attacks on or danger to HREDS should take these risks and impacts into consideration in their due diligence processes. In other words, in line with Guiding Principle 18, business enterprises operating in such contexts should identify and assess any actual or potential risks to defenders caused by or directly related to their activities or business relationships. Once the risks have been identified and assessed, in accordance with Guiding Principle 19, business enterprises should integrate the findings from their impact assessments across relevant functions and processes, and take appropriate measures to seek to prevent or mitigate risks to defenders that are directly linked to their operations, products or services by their business connections with other entities, even if they have not contributed to those impacts. These measures may include implementing an early-warning detection system for risks to defenders; consulting relevant local, national, and international organizations to determine how best to protect defenders; or training staff to better engage with defenders. Once the appropriate measures have been taken, business enterprises should track their effectiveness to find out whether they are working (Guiding Principle 20). Finally, business enterprises should communicate externally regarding the measures they have taken to address the risks and dangers faced by defenders (Guiding Principle 21).

HRDD processes should also be complemented by appropriate policies based on a strong corporate commitment to respecting human rights. These policies should contain an explicit commitment to preventing and addressing their adverse impacts on HREDS. Business enterprises such as Unilever, McDonald's, and Tesco, among others,⁸³ have adopted specific or general policies on HREDS. For example, Meta, formerly Facebook, has been associated with

⁸² UN Human Rights Council, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, A/HRC/47/39/Add.2, 22 June 2022, para. 9.

⁸³ See Business & Human Rights Centre, *Business Policies & statements that mention Human Rights Defenders & civic freedoms*, available at: <https://www.business-humanrights.org/en/big-issues/human-rights-defenders-civic-freedoms/how-companies-investors-can-support-hrds/>.

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cyber-attacks on HR defenders, such as harassment through Facebook.⁸⁴ Meta's human rights policy recognizes that social media can cause risks to and attacks on defenders and it is committed to protecting them in accordance with the UN Declaration on Human Rights Defenders.⁸⁵

In addition to preventing and mitigating risks to and attacks on HREDs, HRDD processes should be informed by their work in promoting and defending human rights. The commentary on Guiding Principle 18 notes that in order to assess the human rights impact of their activities accurately, business enterprises should seek to understand the concerns of potentially affected stakeholders and should therefore consider consulting with defenders and other civil society actors. In this regard, the UN Working Group on Business and Human Rights considers that 'a fundamental component for realising this in practice is to treat human rights defenders as valued partners by engaging with them early, consulting them regularly to understand a business enterprise's impacts on the ground, and pursuing genuine attempts to remediate harm where efforts to prevent abuses against human rights defenders have failed'.⁸⁶ To date, however, few business enterprises carry out these processes. The 2022 Corporate Human Rights Benchmark, which assesses the human rights performance of 127 global business enterprises in sectors identified as having a high risk of adverse impacts on human rights, highlights a significant gap in the implementation of due diligence processes: in 2022, 46 of the 127 business enterprises assessed scored zero on this issue. Furthermore, business enterprises that carry out due diligence processes rarely take the situation of defenders into consideration.⁸⁷

In response to the failure of businesses in the implementation of due diligence processes, the call for mandatory HRDD has intensified over the years since the adoption of the UNGPs and began to bear fruit more recently with the emergence of legal initiatives and the adoption of some laws. Today, there appears to be particular momentum around mandatory HRDD legislations and legislative proposals in Europe.⁸⁸ Mandatory HRDD legislations have been enacted at national level in countries like France, Germany, the Netherlands and Norway.⁸⁹ None of these laws makes express reference to HREDs or their situation of danger. However, they contemplate the stakeholder engagement in their provisions. The primary objective of stakeholder engagement in the context of HRDD is to ensure that the measures

⁸⁴ See D. Sebastienne Daiz, *Rights Defenders: Government Weaponizes Facebook to Attack Critics*, 11 November 2021, available at: <https://phkule.org/article/404/rights-defenders-government-weaponizes-facebook-to-attack-critics>; Altonivel, *Facebook Protect llega a México para evitar hackeos, ¿cómo activar este programa de seguridad?*, 2 December 2021, available at: <https://www.altonivel.com.mx/tecnologia/facebook-protect-llega-a-mexico-para-evitar-hackeos-como-activar-este-programa-de-seguridad/>.

⁸⁵ See Meta, *Corporate Human Rights Policy*, n.d., available at <https://about.fb.com/wp-content/uploads/2021/04/Facebooks-Corporate-Human-Rights-Policy.pdf>.

⁸⁶ UN Human Rights Council, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, A/HRC/47/39/Add.2, 22 June 2021, par. 54.

⁸⁷ See World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022 Insights Report*, November 2022, available at: <https://www.worldbenchmarkingalliance.org/research/2022-corporate-human-rights-benchmark-insights-report/>.

⁸⁸ G. Quijano and C. Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?', *Business and Human Rights Journal*, vol. 6, n. 2, 2021, pp. 241-254.

⁸⁹ See, S. Deva, 'Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?', *Leiden Journal of International Law*, vol. 36, n. 2, 2023, pp. 389-414.

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taken by businesses match the actual risks and needs of individuals or groups whose rights are negatively impacted by their activities.

Stakeholders are persons or groups of persons who have interests that are or could be impacted by an enterprise's activities. Therefore, HREDs are included within the definition of stakeholder and, therefore, they must be considered and consulted as affected and legitimate stakeholders in the HRDD processes. In this regard, the French Duty of Vigilance stipulates that the plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. The Section 4 of the Norwegian Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions establishes that the enterprises shall carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises. For the purposes of this Act, due diligence means to communicate with affected stakeholders and rights-holders regarding how adverse impacts are addressed. The German Act on Corporate Due Diligence Obligations in Supply Chains, Section 4(4) states that in establishing and implementing its risk management system, the enterprise must give due consideration to the interests of its employees, employees within its supply chains and those who may otherwise be directly affected in a protected legal position by the economic activities of the enterprise or in its supply chains.

In February 2022, the European Commission published the proposed directive on corporate sustainability due diligence and amending Directive (EU) 2019/1937, with the aim of guaranteeing that companies that operate in the EU market contribute to sustainable development and to the transition towards sustainable economies and societies by identifying, preventing, mitigating and minimizing the potential or actual adverse human rights and environmental impacts connected with businesses' own operations, subsidiaries and value chains. In line with the UNGPs, the Directive Proposal empowers businesses to use independent studies in order to identify adverse impacts. However, it departs from the UNGPs in its provision that establishes that, where appropriate, businesses will consult with potentially affected groups, such as workers and other stakeholders, for the purpose of gathering information on the potential or actual adverse impacts. This provision grants some discretion to businesses in carrying out such consultations. In the UNGPs, substantive consultations with potentially affected groups and other stakeholders play a key role in the identification and assessment of the actual or potential negative consequences on human rights and UNGPs, in order to evaluate the impact of their activities on human rights, businesses should try to understand the concerns of stakeholders who might be affected, consulting with them directly and bearing in mind questions of language and other factors that might impair effective communication. In fact, the UNGPs indicate that it is not possible to hold such consultations, businesses must consider reasonable alternatives, such as consulting sound and independent experts, including defenders of human rights and other actors in civil society.

In November 2022, Lara Wolters, member of the European Parliament's Committee of Legal Affairs, released their report setting out proposed amendments to the Commission's Draft Directive.⁹⁰ The European Parliament thanked all human rights defenders for their courageous

⁹⁰ See, Committee on Legal Affairs, Draft Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.pdf.

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and crucial work in defence of human rights and the planet. It also acknowledged that they have to do their work under increasingly challenging and evolving circumstances and often at a heavy personal cost for them, their families and their communities. It also calls on the European External Action Service, the Commission and the Member States to address the threats against and attacks on HRDs by governmental and non-governmental actors, including businesses or groups acting on behalf of them. The European Parliament underlines that it is the state's responsibility to ensure the safety of HRDs and their ability to work in an enabling environment, including when the threats and reprisals come from non-state actors.⁹¹ In this line, one of the amendments proposed by the European Parliament to the Commission's Draft Directive is the inclusion of Article 14 – paragraph 3 b that establishes that Member States and the Commission shall provide support and protection for workers' rights defenders, human rights and environmental defenders in relation to potential or actual adverse impacts related to business operations. It also attempts to enhance the stakeholder engagement provisions by adding a new Article 9 a that states that Member States shall ensure that undertakings effectively and meaningfully engage stakeholders, including human rights and environmental human rights defenders, in fulfilling their due diligence obligations. In this regard, undertakings shall be required to ensure effective and appropriate frameworks, measures and tools of engagement are put in place.

In sum, the UNGPs, therefore, do not break the paradigm of confrontation between HREDs and business enterprises in order to move towards an environment of cooperation. The schedule for implementing the UNGPs nevertheless envisages strengthening the protection of HREDs as a key priority for the global business and human rights agenda in the UNGPs' second decade of existence.⁹²

4.2. The inclusion of HREDs in the UN Treaty on Business and Human Rights

In parallel to the implementation of the UNGPs, in June 2014, the Human Rights Council adopted Resolution 26/9 on the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, a task for which an open-ended intergovernmental working group (OEIGWG) would take responsibility. This resolution triggered the momentous process of developing a hard law instrument in the field of business and human rights.⁹³ In October 2022, the eighth session of the OEIGWG took place, at which the third revised draft of the proposed legally binding international instrument was discussed.⁹⁴

⁹¹ See, European Parliament, Resolution of 16 March 2023 on the EU Guidelines on Human Rights Defenders (2021/2204(INI)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2023-0086_EN.html.

⁹² UN Human Rights Council, *Guiding Principles on Business and Human Rights at 10: taking stock of the first decade*, A/HRC/47/39, 22 April 2021, para. 66.

⁹³ D. Iglesias Márquez, 'Hacia la adopción de un tratado sobre empresas y derechos humanos: viejos debates, nuevas oportunidades', *Deusto Journal of Human Rights*, No. 4, 2019, pp.145-176.

⁹⁴ See UN Human Rights Council, *Eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, n.d., available at: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8>.

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HREDs and civil society have been instrumental in driving and sustaining the treaty process.⁹⁵ During the treaty process, HREDs have been in charge in bringing attention to a range of issues that often escape attention of States, such as climate change and environmental issues, labour issues, business practices in fragile settings, and corruption. The proposed international legally binding instrument is an opportunity to strengthen the international framework for protecting HREDs through binding provisions on States providing for fostering a safe and enabling environment for the promotion and defence of rights and the environment in the face of corporate activities. This is similar to the Escazú Agreement in Latin America. In this sense, in 2017, the Chairperson-Rapporteur of the OEIGWG published a document setting out the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereinafter, ‘the elements document’). The elements document proposed that this international legally binding instrument should include provisions that assure that State Parties ‘adopt adequate measures to guarantee the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers, as well as proper assistance, including inter alia, legal, material and medical assistance, in the context of human rights violations or abuses resulting from the activities of TNCs and OBEs throughout their activities.’⁹⁶ However, in the third revised draft of 2021, the provisions referring to HREDs are very limited.⁹⁷

On the one hand, the preamble to the third revised draft text of the legally binding instrument contains a reference to the UN Declaration on Human Rights Defenders and recognizes that ‘civil society actors including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for business-related human rights abuses.’ While these references are welcome, they could be complemented with references to the General Assembly Resolution on the protection of women human rights defenders. The differing risks and attacks faced by different groups within the category of defenders must also be recognized. On the other hand, it should be taken into account that preambular provisions are often predominantly aspirational and provide guidance when interpreting the treaty, but do not constitute any kind of binding obligation on States.

With regard to the substantive provisions of the third revised draft text of the legally binding instrument, Article 5.2 requires States to ‘take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity.’ This provision has significant

⁹⁵ D. B. Garrido Alves, ‘Sociedade civil organizada e o tratado em empresa e direitos humanos: caminhos para viabilidade política’, in D. Iglesias Márquez. and A. L. Walter de Santana (eds), *Derechos Humanos y Empresas: retos y debates multidisciplinares en Latinoamérica* (Valencia: Tirant lo Blanch, 2022), pp. 161-174.

⁹⁶ See, *Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights*. Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf.

⁹⁷ See OEIGWG Chairmanship, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, 17 August 2021, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>.

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potential to improve the situation of HREDs in the context of business activities. However, ‘human rights and environmental defenders’ should be added expressly. Moreover, the legally binding instrument should be complemented by others provisions ensuring that States impose obligations on business enterprises to prevent or mitigate any kind of attack on HREDs. In this regard, in the eighth session of the OEIGWG, Uruguay, Panama, Palestine, Mexico and Brazil proposed a new provision in the Article 6. Prevention regarding the protection of HREDs. In this sense, the proposed 6.8 quarter establishes that State parties shall enact norms to ensure that business enterprises respect the rights of human rights defenders.

The third revised draft text of the legally binding instrument also contains provisions related to stakeholder engagement. Article 6.4 provides that ‘States Parties shall ensure that HRDD measures undertaken by business enterprises shall include: conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas.’ This provision is relevant to address the situation of HREDs. However, HREDs should be expressly added in the list of stakeholders to be consulted in the due diligence processes.

5. CONCLUSIONS

Globally, there is a worrying lack of monitoring of and accountability for the harmful consequences of corporate activities. This has spurred the laudable work of individuals who promote and defend human rights and the environment in the face of corporate power and bad practices. Often forced or compelled to intervene, these HREDs resist and report business enterprises’ human rights abuses and environmental impacts, despite growing danger to themselves and their families.

Corporate activities are one of the root causes of lethal and non-lethal attacks on HREDs around the world. Business enterprises are therefore clearly involved in the attacks both directly and indirectly, whether through legal proceedings to silence and obstruct d HREDs’ work or through inaction in an environment of violence against HREDs. The generally dangerous situation faced by HREDs has given rise to international and regional instruments for recognizing and protecting their work. However, its predominantly soft law nature and general provisions do not go far enough to ensure that States construct the framework required to prevent business enterprises from being directly and indirectly involved in attacks on HREDs. Nor does it contain direct guidance for business enterprises to prevent or mitigate any kind of attack. As a result, the international and regional instruments for protecting HREDs fails to reverse this dynamic of attacks, which has been generated by an economic model that fails to take negative externalities on people and the environment into account.

The creation of business and human rights instruments at different levels of government provides opportunities to complement the international and regional instruments for protecting HREDs. These instruments should be articulated and implemented taking into account the situation faced by HREDs in the context of business activities. The UNGPs and the proposed UN treaty on business and human rights are particularly relevant to addressing the dangers

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faced by HREDS. The implementation of the UNGPs —through public policy instruments or legislation, and even at the corporate operational level—must take into account that the protection and respect of HREDS is not an option but an obligation and a responsibility for States and business enterprises, respectively. In view of this, both national action plans on business and human rights and the due diligence laws currently on the rise, especially at the European level, should shape appropriate measures for ensuring that business enterprises prevent and mitigate attacks on HREDS, especially women and indigenous peoples.

The proposed UN instrument on business and human rights should focus on victims and those affected by business activities. It should include specific provisions to protect HREDS in the context of business activities and to ensure a safe and enabling environment for their work, in line with the Escazú Agreement. The provisions included in the third revised draft remain very limited.

Finally, it should be stressed that business and human rights instruments should promote partnership between States and business to move towards responsible corporate conduct with regard to human rights and the environment. HREDS are key not only to detecting the impacts of corporate activities at an early stage, but also to coordinating prevention, mitigation, and remediation measures. In the domain of business and human rights, HREDS are not enemies but essential allies.