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**THE PROPOSED EUROPEAN UNION
CORPORATE SUSTAINABILITY DUE
DILIGENCE DIRECTIVE**

Making or breaking European Human Rights Law?

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The Proposed European Union Corporate Sustainability Due Diligence Directive Making or breaking European Human Rights Law?**Abstract**

The Proposal for a Directive on Corporate Sustainability Due Diligence (EU) 2019/1937, COM/2022/71 final, 23 February 2022, 'CSDDD') if enacted, would extend responsibilities, liability and exposure to administrative penalties to large economic actors for failure to comply with human rights and environmental obligations. The main purpose of this proposal is to establish a binding set of legal norms to increase access to legal enforcement by linking a breach of the due diligence obligation to public sanctions (Article 20) and civil liability. However, as we analyse in this article, the proposal would significantly limit the scope and content of companies' due diligence as compared to the process foreseen by the UN Guiding Principles on Business and Human Rights to which it seeks to give greater effect, while limiting the rights to be protected, and the class of companies obliged to exercise due diligence. At the same time, as we explain, the proposed Directive may jeopardize the integrity of European human rights law as articulated by the judicial and other organs of the Council of Europe, and at the national level.

Keywords: *due diligence; human rights; European Union*

La Propuesta de Directiva de la Unión Europea sobre Debida Diligencia en Sostenibilidad Corporativa ¿Fortaleciendo o debilitando el Derecho Europeo de Derechos Humanos?**Resumen**

La Propuesta de la CE para una Directiva sobre Debida Diligencia en Sostenibilidad Corporativa (UE) 2019/1937, COM/2022/71 final, 23 de febrero de 2022, 'CSDDD'). Si se promulgara, extendería las responsabilidades, la responsabilidad y la exposición a sanciones administrativas a actores económicos más grandes en relación con los derechos humanos y los impactos ambientales. El propósito principal de esta propuesta es establecer un conjunto vinculante de normas legales para aumentar el acceso a la aplicación legal al vincular una infracción de la obligación de diligencia debida con sanciones públicas (Artículo 20) y responsabilidad civil. Sin embargo, como analizamos en este artículo, la propuesta legislativa de la CE limitaría significativamente el alcance y contenido de la diligencia debida de las empresas en comparación con el proceso previsto por los Principios Rectores de la ONU sobre Empresas y Derechos Humanos a los que busca dar mayor efecto, limitando los derechos a proteger y la clase de empresas obligadas a ejercer la diligencia debida. Al mismo tiempo, como explicamos, la Directiva propuesta arriesga la integridad del derecho europeo de derechos humanos tal como lo articulan los órganos judiciales y otros del Consejo de Europa y a nivel nacional.

Palabras clave: *diligencia debida; derechos humanos; Unión Europea.*

SUMMARY¹: 1. INTRODUCTION. 2. HUMAN RIGHTS AND DUTIES. 1 Rights and obligations. 2 Violations and impacts. 3 A hierarchy of rights. 4 Practical or theoretical significance. 5 Summary. 3. DUE DILIGENCE. 1 Due diligence according to the UN's Guiding Principles. 2 Due diligence according to the EC's proposed Directive. 4. CONCLUSION.

I. INTRODUCTION

Human rights instruments are 'state-centric': their conceptual structures are primarily geared to reckon human rights violations by states and to address these via state-based remedial action.² Yet the twentieth century's closing decades have witnessed various attempts to attenuate this restriction to address impairments of human rights by or resulting from the conduct of non-state actors and to bring these within the realm of scrutiny permitted by human rights courts and other actors. This manoeuvre, executed via a range of doctrinal and other devices, can be observed in the gradual extension of the scope of review of business-related abuses across by human rights institutions across the European, Inter-American and African regional systems, which proceeded in decentralised and non-isometric fashion up to the early 2000s.³ In Europe's regional system of human rights protection, for instance, while the court's general jurisprudence affords protections in the market sphere, the incremental evolution of the notion of 'positive obligations', and the identification of a specific state 'duty to regulate' private businesses, for instance, in cases of environmental pollution are relevant in this regard.⁴

¹ This article has been realized on the context of the Jean Monnet Chair on The Transformative Power of European Union Law (TEULP), research funded by the European Commission (Project: 101047458 - TEULP - ERASMUS-JMO-2021-HEI-TCH-RSCH) and led by Juan Jorge Piernas López, Professor at the Faculty of Law of the University of Murcia. Parts of this article draw on Jonas Christoffersen and Claire Methven O'Brien, "Retliggørelsens udfordringer", *Juristen* 5 and 6, 2023, pp.195-201.

² JOSEPH, S., "Taming the Leviathans: Multinational Enterprises and Human Rights", *Netherlands International Law Review* 46, 1999, pp.171–203; MUCHLINSKI, P. T., "Human Rights and Multinationals: Is There a Problem?" *International Affairs (Royal Institute of International Affairs 1944-)*, 77(1), 2001, pp. 31–47, pp.31-32.

³ METHVEN O'BRIEN, C., "Business and human rights and regional systems of human rights protection: applying a governance lens", in MARX, A. WOUTERS, J. and VAN CALSTER, G., (eds.), *Research Handbook on Global Governance and Business and Human Rights*, Cheltenham: Edward Elgar, 2022, pp. 44-74.

⁴ See generally METHVEN O'BRIEN, C., *Business and Human Rights: A Handbook for Legal Practitioners*, Strasbourg: Council of Europe, 2018.

In recent years, regional human rights protection systems, including in Europe, have also embarked on new initiatives dedicated to the field of business and human rights, prompted by the UN Framework and Guiding Principles on Business and Human Rights (UNGPs) respectively of 2008 and 2011.⁵ According to these instruments, international human rights treaties, besides the duties they establish amongst states, entail a ‘corporate responsibility to respect human rights’, that requires businesses to avoid infringing human rights through their own actions or those of their business partners. Businesses should accordingly seek to prevent, mitigate or remediate negative impacts on human rights that they have “caused or contributed to”, as well as those “directly linked” to their operations, products or services through their business relationships, whether contractual or non-contractual.⁶ In terms of subject-matter scope, the corporate responsibility to respect human rights refers to all ‘internationally-recognised’ human rights arising under international instruments, not just those binding via domestic law in any one jurisdiction.⁷

“Human rights due diligence” as described by the UNGPs is a process through which corporations can fulfil their ‘responsibility to respect’ human rights. Its first step is adopting a corporate policy to respect human rights.⁸ Next, due diligence requires four steps comprising a continuous improvement cycle: 1) Assessing actual and potential, direct and indirect impacts of the business’ activities on human rights (“human rights risk and impact assessment”); 2) Integrating appropriate measures to address impacts into company policies and practices; 3) Tracking the effectiveness of measures taken in preventing or mitigating adverse human rights impacts; and 4) Communicating publicly

⁵ UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights’ (2008) UN Doc A/HRC/8/5; UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31, Annex, adopted by the UN Human Rights Council; UN Human Rights Council, ‘Human Rights and Transnational Corporations and Other Business Enterprises’ HRC Res. 17/4 17th session UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011; hereafter ‘UN Human Rights Council 2011’).

⁶ UN Human Rights Council 2011, GP13.

⁷ UN Human Rights Council 2011, GP11.

⁸ UN Human Rights Council 2011, GP15.

about the due diligence process and its results.⁹ Given the right of victims of business-related human rights abuses to access effective remedies, companies should also take steps to remediate adverse impacts of their activities on rights-holders.¹⁰

Though in formal terms non-binding, the UNGPs have had a significant impact worldwide, albeit uneven and still unfolding.¹¹ The UNGPs' and their due diligence concept, specifically, have been widely assimilated into the standards and guidance promoted by other international bodies and institutions. The OECD adopted and in 2023 updated a set of comprehensive guidelines for businesses¹² that integrated due diligence as well as specific Due Diligence Guidance for Responsible Business Conduct,¹³ and sector-specific due diligence guidance documents¹⁴. Significantly, its guidance on Due Diligence for Responsible Business Conduct extended the subject-matter scope of due diligence beyond human rights to environmental and other sustainability and governance issues. The IFC Performance Standards, World Bank Equator Principles, and a range of other individual and sector business policies and tools have likewise been UNGPs-aligned.¹⁵

⁹ UN Human Rights Council 2011, GPs17-20.

¹⁰ UN Human Rights Council 2011, GP22; METHVEN O'BRIEN, C., and HOLLY, G., *Briefing on Civil Liability for Due Diligence Failures*, Copenhagen: Danish Institute for Human Rights, 2021.

¹¹ METHVEN O'BRIEN, C., and BOTTA, G., "The Corporate Responsibility to Respect Human Rights: An updated status review", in DA SILVA ALMEIDA, J. L. (ed.), *Responsabilidade Social Corporativa e Governança Socioambiental: Greenwashing e Direitos Humanos*, Rio de Janeiro: Lumen Iuris, pp. 1-42, 2023, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179257.

¹² ORGANIZATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, "2023 update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct", <https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm>

¹³ ORGANIZATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, *Responsible Business Conduct OECD Guidelines for Multinational Enterprises, Due Diligence* (webpage), <https://mneguidelines.oecd.org/duediligence/>.

¹⁴ ORGANIZATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD Due Diligence Guidance for Responsible Business Conduct*, Paris: OECD, 2018.

¹⁵ METHVEN O'BRIEN, C., and BOTTA, G., "The Corporate Responsibility to Respect Human Rights: An updated status review", in DA SILVA ALMEIDA, J. L. (ed.), *Responsabilidade Social Corporativa e Governança Socioambiental: Greenwashing e Direitos Humanos*, Rio de Janeiro: Lumen Iuris, pp. 1-42, 2023, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179257.

At European regional level, the Council of Europe has adopted a Recommendation¹⁶ that, mirroring the approach and concerns of the UNGPs, calls for governments to implement the UNGPs and periodically to review their compliance across areas such as company regulation, state-owned enterprises and public procurement, trade agreements, investment promotion and access to justice. Further in this business and human rights guidance it has called for member states to “apply such measures as may be necessary” to encourage or require business enterprises to apply human rights due diligence “throughout their operations”.¹⁷

However, in Europe, it is the European Union (EU) that has played the greater role in articulating expectations on businesses to manage human rights risks and other sustainability issues that are becoming increasingly ‘more detailed, demanding and widespread’.¹⁸

Indeed the EU has enacted new laws establishing mandatory sustainability due diligence requirements encompassing human rights and in some cases broader environmental and governance objectives for certain industry sectors and value chains.¹⁹ Currently, the EU is negotiating the EC Proposal for a Directive on Corporate Sustainability Due Diligence (EU) 2019/1937, COM/2022/71 final, 23 February 2022, ‘CSDDD’). This Directive, if enacted, would extend responsibilities, liability and exposure to administrative penalties to larger economic actors in respect of human rights and environmental impacts, including where suppliers, rather than those companies addressed by the Directive, are immediate perpetrators of harm.

¹⁶ COUNCIL OF EUROPE, Recommendation CM/Rec (2016)3 of the Committee of Ministers to member States on human rights and business, Strasbourg: Council of Europe, 2016.

¹⁷ *Ibid*, Appendix, para 20.

¹⁸ MARTIN-ORTEGA, O. and METHVEN O'BRIEN, C., (eds.), *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer*, Cheltenham: Edward Elgar, 2019.

¹⁹ Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130/1, 19 May 2017; Regulation (EU) 2023/1542 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Art. 85) OJ L 191, 28 July 2023; Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No. 995/2010 (Art. 25) OJ L 150, 9 June 2023.

The main purpose of this proposal, it has been indicated, is to anchor companies' due diligence in a binding set of legal norms with a view to ensuring or increasing access to legal enforcement of the norms by linking a breach of the due diligence obligation both to public sanctions (Article 20) and civil liability in the area of human rights and climate (Article 22).²⁰

Yet the EC's advanced legislative proposal would significantly limit the scope and content of companies' due diligence as compared to the process foreseen by the UNGPs and OECD Guidelines for MNEs.²¹ This is because, under the latter, the focus is on companies' legally-based but non-statutory responsibility to perform due diligence as a process, rather than the articulation of an obligation of result. In other words, due diligence is a responsibility to investigate and deal with risks of adversely affecting human rights, rather than a responsibility to avoid any violation of human rights.²²

However, in the EC's proposed Directive, the price for this legalisation of due diligence, which is supposed to strengthen rights has been, among other things, a limitation partly of the rights to be protected, and partly of the circle of companies that are obliged to exercise due diligence.²³ The Commission's proposal has therefore given rise to

²⁰ METHVEN O'BRIEN, C., and MARTIN-ORTEGA, O., *In-Depth Analysis 30-05-22 Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, Brussels: European Parliament Think Tank, 2022 available at: [https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2022\)702560](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702560).

²¹ EUROPEAN COMMISSION Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final), 23 February 2022.

²² METHVEN O'BRIEN, C. and DHANARAJAN, S., "The corporate responsibility to respect human rights: a status review", *Accounting, Auditing & Accountability Journal*, 29(4), 2016, pp. 542-567; RUGGIE, J.G. AND SHERMAN, J., "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", *European Journal of International Law*, 28 (3), pp. 921-928, (2017). Cf. CASSEL, D., "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence", *Business and Human Rights Journal* 1(2), 2016, pp.179-202.

²³ METHVEN O'BRIEN, C., and MARTIN-ORTEGA, O., *In-Depth Analysis 30-05-22 Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, Brussels: European Parliament Think Tank, 2022 available at: [https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2022\)702560](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702560).

considerable debate,²⁴ and both the Presidency of the EU and the European Parliament have taken steps to amend the proposed Directive.²⁵

This article considers two main aspects of the proposed EU CSDD Directive, namely the delimitation of the rights that are sought to be protected, and the delimitation of the due diligence that is sought to be carried out. We start from the European Commission's draft, as it remains the main focal point of the debate, but we briefly touch on the European Parliament's amendment proposal adopted on 1 June 2023. The aim is to identify the main challenges, not to solve them.

II. HUMAN RIGHTS AND DUTIES

1 Rights and obligations

When the purpose is to protect human rights, it is essential to protect all human rights for the sake of the coherence of international human rights law. The concept of human rights has gradually acquired a content that, in many contexts, makes it possible to identify which concrete content a right has, and which concrete behaviour a state must therefore undertake or refrain from.

²⁴ METHVEN O'BRIEN, C. and HARTMANN, J., "The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes", *European Journal of International Law*. <https://www.ejiltalk.org/the-european-commissions-proposal-for-a-directive-on-corporate-sustainability-due-diligence-two-paradoxes/> (19 May 2022); PATZ, C., "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment", *Business and Human Rights Journal*, 7(2), 2022, pp. 291-297.

²⁵ COUNCIL OF THE EUROPEAN UNION, Proposal for a Directive of the European parliament and Of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, 30 November 2022, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>; European Council, Council adopts position on due diligence rules for large companies, 1 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/>; EUROPEAN PARLIAMENT, 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, A9-0184/2023, available at https://www.europarl.europa.eu/doceo/document/A-9-2023-0184_EN.html; and Amendments(1) adopted by the European Parliament on 1 June 2023 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)) https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

In our view, this is not least due to the development of jurisprudence from the European Court of Justice²⁶ and the European Court of Human Rights,²⁷ but also national constitutions and legislation.²⁸ This is also due to international conventions with a more or less well-known and recognised content. But it must still be acknowledged that in many practical contexts a precise answer cannot be given as to which rights a person is entitled to have respected. This is due, among other things, to the fact that the protection of rights is context-dependent, because as part of a proportionality assessment balancing of opposing considerations must be carried out to determine whether a protected interest has impact in the face of opposing considerations.²⁹ And not least, this balancing must be done with respect for the democratic legitimacy of sovereign states and the practical, economic and procedural leeway particularly where considerations of proportionality are involved.³⁰ For these and several other reasons, human rights are characterised by significant complexity, which only increases when the context changes from the national duties of the state to the global duties of companies.

It is in this concretisation of the scope of the states' obligation that the rights of citizens arise with concrete meaning. It is in the movement from the abstract to the concrete that the rights gain practical significance. It is absolutely central to human rights that the states are subject to duty, so that citizens' rights can be enforced against the states and remediated where harms occur. Where one citizen's human rights abut another's, their

²⁶ WOUTERS, J., and OVÁDEK, M., *The European Union and Human Rights: Analysis, Cases, and Materials*, Oxford: Oxford University Press, 2021.

²⁷ CHRISTOFFERSEN, J. and RASK MADSEN, M. (eds.), *The European Court of Human Rights between Law and Politics*, Oxford: Oxford University Press, 2011; HARRIS, D., O'BOYLE, M., BATES, E., and BUCKLEY, C.M., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (5th Edition), Oxford: Oxford University Press, 2023; VAN DIJK, P., VAN HOOFF, F., VAN RIJN, A., AND ZWAAK L., *Theory and Practice of the European Convention on Human Rights* (5th edition), Cambridge: Intersentia, 2018.

²⁸ KELLER, H. AND STONE SWEET, A., "Assessing the Impact of the ECHR on National Legal Systems" in KELLER, H. and STONE SWEET, A. (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford: Oxford University Press, 2008; AUST, H.P. and NOLTE G., (eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, Oxford: Oxford University Press, 2016.

²⁹ YUTAKA, A.-T., "Proportionality", in SHELTON, D. (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, 2013.

³⁰ METHVEN O'BRIEN, C., "The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal," *Business and Human Rights Journal*, 3(1), 2018, pp.47-73.

mediation proceeds via the state's monopoly of power. It is the state that, if necessary, must protect one citizen against the other, for example, by separating protesters or by keeping businesses from indigenous peoples' natural resources.³¹

With the proposed EU directive, however, companies become subjects of a duty, as they must not violate people's human rights. It is a fundamental change that calls for thorough consideration of the extent to which companies can have a concrete and practical duty to protect the rights of every citizen with whom they may come into contact. It does not seem obvious that the proposal for a Directive is based on further consideration of the difference in the subjectivity of the duties of states and companies.

How far it has progressed in thinking can be illustrated by the European Parliament's amendment no. 352 on the right of indigenous peoples to self-determination³². Since the right to self-determination is linked to the formation of a state, companies may have challenges in ensuring enjoyment of this right. Indigenous people's rights to land and inclusion may be central considerations, for instance, in projects concerning natural resources, but directly holding a company responsible for their lack of self-determination is, formally, a significant step to take.

The last 75 years of work to develop human rights protection in Europe should have fostered a certain scepticism towards the idea of suddenly adopting a directive that elevates social norms into a legal context and that replaces the state with companies as a subject of duty.³³ The most significant challenge in introducing a protection of human

³¹ IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* (30 December 2009) OEA/Ser.L/V/II.Doc.56/09 ; IDEMUDIA, U., TUOKUU, F.X.D. and ESSAH, M., "The extractive industry and human rights in Africa: Lessons from the past and future directions", *Resources Policy* 78, September 2022.

³² Amendments (1) adopted by the European Parliament on 1 June 2023 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)) https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html, supra.

³³ MADSEN, M.R., "From Boom to Backlash? The European Court of Human Rights and the Transformation of Europe," in AUST, H. and ESRA, D., (eds.), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective*, Cheltenham: Edward Elgar, 2021.

rights after the Second World War was the absence of a definition of human rights,³⁴ but that challenge was resolved by establishing institutions that could give content to the rights, namely the Commission and the Court of Justice in Strasbourg.³⁵ A similar solution does not exist for companies, because neither a global nor regional rights institution with relevant jurisdiction has been established³⁶ and cannot be imagined to be established.³⁷

2 Violations and impacts

The European Commission has therefore used the option of establishing a concept of "negative impact on human rights," which is well known from the UN's Guiding Principles. It is this concept that is central to companies' due diligence (Articles 4-9), liability for damages (Article 22) and other governmental enforcement (Articles 17-20).

In Article 3 (c), the Commission defines "negative impact on human rights" as follows:

"...an adverse impact on protected persons as a result of the violation of one of the rights or one of the prohibitions listed in the Annex, Part I, Section 1, as set out in the international conventions listed in the Annex, Part I, section 2."

The European Parliament has not proposed any change on this point. A negative impact thus presupposes a violation of a right "enshrined" in various conventions. It makes good sense after a superficial consideration: if companies are to be held responsible for infringements, there must be infringements. But it challenges the distinction between

³⁴ See also SIMPSON, A. W. B., *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford: Oxford University Press, 2004.

³⁵ See, for example, CHRISTOFFERSEN, J., *Fair balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden: Brill, 2009, s. 7ff.

³⁶ METHVEN O'BRIEN, C., "Business and human rights and regional systems of human rights protection: applying a governance lens", in MARX, A. WOUTERS, J. and VAN CALSTER, G., (eds.), *Research Handbook on Global Governance and Business and Human Rights*, Cheltenham: Edward Elgar, 2022, pp. 44-74; METHVEN O'BRIEN, C., "Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention", *American Journal of International Law Unbound* 114, 2020, 186-191.

³⁷ Cf. BILCHITZ, D., "Corporate Obligations and a Treaty on Business and Human Rights: A Constitutional Law Model?", in DEVA, S. and BILCHITZ, D. (eds.), *Building a Treaty on Business and Human Rights: Context and Contours*, Cambridge: Cambridge University Press 2017, pp. 185-215; NOWAK, M., *A World Court of Human Rights*, in OBERLEITNER, G. (ed.), *International Human Rights Institutions, Tribunals, and Courts*, Springer, 2018.

interference with and violation of rights. According to quite a few provisions, an assessment is first made as to whether a right has been encroached upon, and then it is assessed whether the encroachment constitutes an infringement. The question is therefore whether companies must refrain from any intervention, or whether companies can influence rights in an intrusive way without infringing a right. The point with the breadth of the non-binding norms, according to which companies must avoid any negative impact on rights, is precisely to spread a wide net, but without obligating companies (see for instance paragraph 3 on the due diligence obligation).

The point of the non-binding norms is that companies' (social, non-legal) responsibility goes further than avoiding infringement in a narrow, legal sense. A company should ensure workers' right to strike, even if strictly speaking there is as yet no right to strike in international human rights law. When the company's duty now presupposes a legally recognized right to strike, and when this right does not exist, the companies also have no duty to ensure any employee's right to strike. This does not mean that the employees lose a protected right, because they do not have it, but remedial one means that the companies can reject the employees' right to strike on the grounds that the employees do not have a legally anchored right to strike because they do not have a legally guaranteed right. This can weaken the employees' situation, as they may be forced into an argument as to why they want to invoke a right that is not legally anchored.

While the proposal might potentially survive such a challenge if it only arose in relation to the right to strike, the problem in our assessment is a general one: what legally binding human rights do people actually have vis-à-vis companies? The answer is roughly none. Human rights, as observed initially, are centered on the duties of states, as individuals' rights are derived from the duties of states. It is (usually) not the other way around. It is (normally) not the case that just because the individual has a specific right, the state has a specific duty. The exception is absolute rights, which do not play the most significant role in scenarios concerning corporate liability. Similarly, if one asks which rights can be derived from the duties of companies, the answer is none. According to international human rights law, people do not have rights vis-à-vis legal or natural persons. People may have positive obligations towards states for protection against abuse by legal or natural

persons.³⁸ It is a consequence of the state's monopoly of power that the state must protect individuals from each other.

3 A hierarchy of rights

In addition, the Commission has delimited the rights by referring in Appendix 1 to 27 vaguely worded rights in various conventions such as (no. 1), "violation of the population's right to dispose of the earth's natural resources and not to be deprived of the means of subsistence in accordance with Article 1 of the International Covenant on Civil and Political Rights," a formulation and a right that is not immediately recognisable in terms of human rights law.

The same applies according to Part 1 as regards "violation of internationally recognized goals and prohibitions in environmental conventions." Even if the Directive aims to promote sustainable development, and thus has a different aim than protecting human rights, the companies' concrete obligation in human rights areas is linked to rights, not to fluid principles of sustainability.³⁹

However, the due diligence obligation does not only apply in relation to the 27 listed rights, but also to a number of conventions listed in Part 2, since it is stated in Annex 1, Part 1, point 21:

"Violation of a prohibition or a right that is not covered by points 1-20 above, but is included in the human rights agreements listed in section 2 of this part, and which directly damages a legal interest protected in these agreements, provided that the undertaking concerned could reasonably have determined the risk of such deterioration and any appropriate measures to be taken to meet the obligations referred to in Article 4 of this

³⁸ METHVEN O'BRIEN, C., "The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal", *Business and Human Rights Journal*, 3(1), pp.47-73; STOYANOVA, V., "Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights", *Leiden Journal of International Law*, 33(3), 2020, pp.601-620; STOYANOVA, V., "Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries", Oxford: Oxford University Press, 2023.

³⁹ METHVEN O'BRIEN, C. and HARTMANN, J., "The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes", *European Journal of International Law*, 2020, available at <https://www.ejiltalk.org/the-european-commissions-proposal-for-a-directive-on-corporate-sustainability-due-diligence-two-paradoxes/>.

Directive, taking into account all relevant circumstances relating to its activities, such as the sector and the operational context.”

In addition to containing a shift from "violation" to "direct damage to a legal interest"/"impairment," which does not correspond to known legal terminology,⁴⁰ the Commission makes a selection of the rights conventions to be protected, which undermines the principles that human rights, as well as being universal, are interdependent and indivisible, hence with equal importance for the individual. Furthermore, the Commission's proposal requires companies to prevent (Article 7) and interrupt (Article 8) negative impacts "resulting from the violation of the rights or prohibitions enumerated" in the annex, which illustrates the concept's central position in the proposal.

The European Parliament has proposed that the provision be shortened so that no reference is made to "violation of" a prohibition or a right, and that the suffix starting with "... and which directly damages a legal interest..." be replaced with, "where there is a foreseeable risk that a prohibition or a right may be affected," which on the one hand will ease the challenge of "infringement" against "influence," but no change to the definition in Article 1 has been adopted.

4 Practical or theoretical significance

The conceptual development of the Commission's proposal does not only concern a question of theoretical importance regarding legal clarity and consistency, as the proposal challenges the cohesion and concrete applicability of human rights laws for Europe's people. Human rights are important for specific people who live in a specific place at a specific time. The individual therefore needs the applicable rights to be given concrete meaning, which in a world of states with a monopoly of power requires state enforcement. Private citizens neither can nor must enforce their own rights, and private companies must not take over the role of the state. Only states can violate treaty-based rights, and if a private company has "violated" a citizen's rights, for example, by discriminating against

⁴⁰ See further, SPIESSHOFER, B. "Supply Chain Due Diligence Law in Germany," Chapter 7 in CATÁ BACKER, L. and METHVEN O'BRIEN, C. (eds.), *Human Rights Due Diligence: Emerging Legal Norms and Standards*, Oxford: Routledge, 2024 (forthcoming).

an employee, it requires a legal suspension to secure the individual's rights vis-à-vis the company.

In a global context, the condition of infringed rights takes on the meaning that a European company can infringe, for instance, the Gambian rights of a Gambian citizen with the effect that a European court in a compensation case must make a legal assessment of whether the European company has violated rights that only the state of The Gambia, in contrast to the individual and the company, is bound to respect.

It even follows from the proposed Directive's article 22, paragraph 5, that the responsibility according to the Directive must "find overall prescriptive application" vis-à-vis the legislation of a non-member state. While this may seem to resemble any other case of the application of foreign law that private international law allows for in different contexts, the subjectivity of duty makes the difference, just as it will be inherently more sensitive to interpret the applicability of human rights in a foreign context.⁴¹ It will also be more complex to interpret in a foreign context, as human rights apply with variations over time and place. This is the core of the principle of subsidiarity, which is deeply rooted in human rights.⁴²

5 Summary

The Commission's proposal implies an destabilizing, and even perhaps undermining, of the human rights law that Europe has spent 75 years building with the goal to ensure an internal coherence that respects the particular circumstances of individual countries and democratic decision-making processes and priorities. One must be careful in challenging that effort, not least in a context where private actors are made primarily responsible for

⁴¹ LICHUMA, C., "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South," *Völkerrechtsblog*, 16 January 2023; LICHUMA, C., "(Laws) Made in the 'First World': A TWAAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," *ZaöRV: Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 81 (2), 2021, pp.497-532.

⁴² NEUMAN, G. L., "Subsidiarity", in SHELTON, D. (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, 2013; CAROZZA, P., "Subsidiarity as a Structural Principle of International Human Rights Law", *American Journal of International Law*, 97(1), 2003, pp.38-79.; BARBER, N. W. and EKINS, R., "Situating Subsidiarity", *The American Journal of Jurisprudence*, 61(1), 2016, pp.5-12; BESSON, S., "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?" *The American Journal of Jurisprudence*, 61(1), 2016, pp.69-107.

the protection of rights on the basis of an unclear concept that aims to create clarity in order to increase law enforcement, but which in practice must be expected to reduce companies' incentive to respect individuals' interests and rights. The directive as outlined therefore risks missing the mark.

III. DUE DILIGENCE

1 Due diligence according to the UN's Guiding Principles

The concept of due diligence is the central focal point for companies' non-binding responsibility not to affect human rights negatively. Human rights due diligence is a process by which companies operationalise their work to promote and respect human rights. It is not a performance obligation, as companies can have a negative impact on human rights, even if the due diligence obligation is complied with.

This is due, amongst other things, to the fact that companies are entitled to prioritize their efforts to avoid negative impacts (UNGP 24). This is based on a recognition that a company cannot be perfect and that it is better that companies are encouraged to do something than meet them with unrealistic demands for perfection. In other words, the great must not be the enemy of the good.⁴³

The UN Guiding Principles make non-binding requirements that companies must implement a process containing various steps to promote and respect human rights: businesses should adopt a policy to respect human rights (GP 15); businesses should assess the risk of current and potential impacts on human rights; businesses should take steps to address the identified impacts; businesses should assess the impact of efforts to avoid and minimize impacts; businesses should be open and communicate their process and its effect (GP 17-20); finally, businesses should provide victims with access to effective remedies and remedy violations (GP 22).

The obligation to exercise due diligence is broad and includes any negative impact on human rights that a company may cause or contribute to causing through its own activities

⁴³ RUGGIE, J.G. and SHERMAN, J.F., "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: Reply to Professors Bonnitcha and McCorquodale", *European Journal of International Law*, 28(3), pp. 921–928, 2017.

or through activities that are connected to the company's own activities or that can be directly linked to the activities of business associates, products or services (GP 17). The purpose of the very broad focus is to encourage companies to seek to influence the behaviour of their business associates, and due diligence is therefore not limited to companies' supply chains.⁴⁴

However, the broad obligation must not impose disproportionate burdens on companies. Companies can therefore adapt the extent of due diligence to the nature and context of the company in light of conditions such as the company's size, industry and character as well as the nature and seriousness of the negative impacts (GP 14). As mentioned, companies can prioritize efforts and focus on the most serious situations first (GP 24). It is essential that this is not a one-off exercise, but a continuous effort that should include dialogue with stakeholders.

The crucial thing is to consider the UNGP as a practical tool to increase companies' efforts to promote and respect human rights without imposing concrete obligations on companies to achieve certain results. Even though they are distinct concepts this aligns with the approach taken to due diligence duties for states under the ECHR, where resource considerations are weighed in the balance in assessing the content of states' positive obligations.⁴⁵

2 Due diligence according to the EC's proposed Directive

When it is considered that the UNGPs as a practical tool should not lead to specific results, it can be foreseen that, as a process obligation, this could be legalised without major challenges, so that all companies were obliged to carry out reasonable due diligence. However, the EC's proposal treads new paths. The Commission wants to introduce performance obligations, so that companies can be held legally responsible if, despite

⁴⁴ See Swedwatch, SOMO, ECCHR, OECD Watch and ECCJ, A little downstream goes a long way: How downstream due diligence can prevent and mitigate harm, 11 April 2023, <https://corporatejustice.org/publications/a-little-downstream-goes-a-long-way-how-downstream-due-diligence-can-prevent-and-mitigate-harm/>

⁴⁵ STOYANOVA, V., "Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights", *Leiden Journal of International Law* 33, 2020, pp. 601–620.

completed but insufficient investigations and processes, they end up infringing the rights of individuals (to the extent that this makes sense conceptually, cf. above). The European Parliament has adopted proposals for a tightening, so that it is made clear that companies must take appropriate measures to prevent (or if prevention is not possible or has failed) to counter negative impacts.

A legalisation of the non-binding due diligence obligation does not necessarily have to take place without changes, but it is, on the other hand, essential to ensure the adoption of a legal obligation that can be appropriately implemented by companies and thereby ensure increased respect for human rights. However, the Commission's proposed directive goes both too far and not far enough, and in a way that can be expected to be counterproductive in relation to the goal of increased rights protection: the EC's proposal is too narrow in terms of the companies and rights it applies to, but too broad in its requirement for due diligence results.⁴⁶

The UNGPs presuppose a highly varied due diligence process, whereas the EC, like the German Supply Chain Act,⁴⁷ sets out a series of concrete duties, the practical effect of which must be considered questionable. According to Article 8, the duties include:

- (a) neutralising the negative impacts or minimizing their extent, including by paying compensation
- (b) development and implementation of a corrective action plan with deadlines and quantitative indicators for measuring improvements
- (c) obtaining contractual guarantees from a direct partner in an established business relationship
- (d) making investments

⁴⁶ SAVOUREY, E., and BRABANT, S., "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption," *Business and Human Rights Journal* 6(1), 2021, pp.141-152.

⁴⁷ DEUTSCHER BUNDESTAG, [Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten](#) (German Supply Chain Due Diligence Act), 2021.

(e) provision of aid to an SME with which there is an established business relationship if the viability of the SME is at risk

(f) increasing the company's ability to bring the negative impacts to an end, particularly if no other measures are appropriate or effective.

The vague and indefinite nature of the obligation illustrates why it is difficult to achieve such clarity that a legal liability can be attached to the failure to comply with the duties. The Commission has thus attached qualifying reservations to the various duties (such as “appropriate”, “reasonable”, “relevant”, “if necessary”) which underlines the undefined nature of the legal duties and the long road to the goal of achieving clarity for the purposes of legal sanctions.⁴⁸

The unclear nature of the duties may be among the reasons why the Commission's proposal does not cover all companies but is limited to certain companies based on size and presumed risk of serious, negative impacts,⁴⁹ just as the lack of clarity may lie behind the desire to give companies access to limit their liability by contract (see Article 8(3)(c).

On the one hand, the Commission's proposal tightens companies' duties (compared to the UNGPs) by specifying legal duties, but on the other hand these legal duties are, compared to the UNGPs, weakened by various restrictions. In a world where companies and many lawyers are fundamentally sceptical of assuming legal responsibility for breach of unclear duties, it can be questioned how likely it is the Commission's proposal will lead to the desired strengthening of human rights protection.

⁴⁸ METHVEN O'BRIEN, C., and MARTIN-ORTEGA, O., *In-Depth Analysis 30-05-22 Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, Brussels: European Parliament Think Tank, 2022 available at: [https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2022\)702560](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702560).

⁴⁹ This is problematic given the human rights impacts, for instance, of the financial sector: UNITED NATIONS WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, Financial Sector and the European Union Corporate Sustainability Due Diligence Directive Statement by the United Nations Working Group on Business and Human Rights 12 July 2023, <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Statement-Financial-Sector-WG-business-12July2023.pdf>.

IV. CONCLUSION

In our view, it almost goes without saying that it is not possible simply to adopt clear rules about how companies must fulfil their 'responsibility' in the area of human rights or the climate. The numerous and detailed rules that apply at the national level in EU Member States only on the protection of people against discrimination on the labour market can illustrate how far there is a categorical consensus about a sensible legal anchoring for human rights protection.

The Achilles heel of the EC's proposed Directive appears to be its desire for an unattainable clarity. The strength of the UNGPs' non-binding norms is their ambiguity, as the concept of "negative impact" is soft and fluid, thus leaving it to companies and other stakeholders to contest the determination of such impacts, even knowing that zero impact may not be achievable. Sanctions in the form of criticism and pressure from consumers, social, political and financial entities and other companies have at least in some situations proven to be an effective means of pressuring companies. In this connection, the lack of clarity has the function of forming a basis for a broad criticism – even without a legal one. On the other hand, the Directive may jeopardise the normative coherence of European human rights law and likely presents challenges for European and national human rights courts, as well as companies, lawyers and other actors, that are yet to be countenanced.

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