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POTENTIAL OF THE EU DRAFT DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE TO CONTRIBUTE TO A COHERENT FRAMEWORK OF CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS*****

Currently, the field of business and human rights is at a crossroads in terms of normative development, as two major legislative instruments are being negotiated at the regional and international levels. The first instrument is a proposal for a directive aimed at ensuring business responsibility for the respect of human rights and the environment within the European Union, or in other words a proposal for a Directive on Corporate Sustainability Due Diligence. The second one is a proposal of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, commonly referred to as the Third Revised Draft Treaty on Business and Human Rights, which is being developed by the open-ended intergovernmental working group established by the Human Rights Council in 2014. Given such parallel developments, it would seem prudent for the ongoing efforts to be interlinked so as to contribute to creating consistent legal solutions governing corporate accountability for human rights violations at international and supranational fora. This is particularly relevant in the context of rapid globalization, where transnational corporations can exploit legal and regulatory loopholes at the cost of human rights and the

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environment. This paper analyses the two legislative drafts with the aim of determining to what extent those two draft hard law instruments reflect the applicable international soft law standards and contribute to the creation of a complementary and mutually reinforcing regulatory framework. The analysis shows the differences in the scope and approaches utilized in the two instruments and identifies gaps and shortcomings in the proposed solutions from the standpoint of effective protection of the victims' rights. The analysis shows that the two proposed legislative texts are for the most part mutually complementary and it points to the ways in which their norms can be read together so as to enable a coherent and consistent legal framework and ensure legal certainty. The authors also argue that the two legislators should utilize the drafting process to address the identified discrepancies in the existing normative framework in order to achieve the best results.

Keywords: corporate accountability for human rights violations, human rights due diligence, draft CSDDD, draft LBI, transnational corporations.

1. INTRODUCTION

Over the last decades, the field of business and human rights has attracted widespread attention in both academia and practice (Letnar Černič & Michalakea, 2023, p. 3). Currently, the field is at a crossroads in terms of normative development, since two major legislative instruments are being negotiated at the regional and international levels (Bernaz *et al*., 2022, p. 3). The first instrument is a proposal for a directive aimed at ensuring business responsibility for the respect of human rights and the environment within the European Union (hereinafter: the EU) named a proposal for the Directive on Corporate Sustainability Due Diligence (hereinafter: draft CSDDD). More specifically, on 1 June 2023, the European Parliament (hereinafter: EP) adopted its proposed amendments to the text proposed by the European Commission (hereinafter: EC). They constitute the EP's position in the "trilogue" negotiations with the Council of the EU and the EC that were scheduled to start on 8 June 2023.[1] At the time of writing, it is estimated that a final agreement on the CSDDD will not be reached until early 2024, given the number of contentious issues to be resolved (Williams *et al*., 2023).[2] The debate taking place through the trilogue is additionally relevant given that, for the time being, there are no hard law instruments governing corporate accountability for human rights violations on either the United Nations (hereinafter: UN) or EU level that could be used as a model. That being said, it is important not to overlook other relevant provisions of the EU *acquis* that might be applicable to corporate accountability scenarios, which therefore will be elaborated later on in the paper.

[1] Trilogue is one of the tools commonly used today to ensure the effectiveness of the legislative process. It is defined as "informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council, and the Commission". As there is no explicit reference in the treaties, trilogues started on a very informal basis in the early 1990s and evolved over time (Del Monte & Smialowski, 2021, p. 1).

[2] These issues concern primarily the coverage of the CSDDD vis-à-vis human rights due diligence and corporate civil liability for human rights violations.

The second instrument relevant to the ongoing business and human rights debate is a proposal of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, commonly referred to as the Third Revised Draft Treaty on Business and Human Rights (hereinafter: draft LBI). The draft treaty is being developed by the open-ended intergovernmental working group (hereinafter: OEIGWG) established by the Human Rights Council at the UN level in 2014. Recently, intercessional consultations among states were held under the auspices of the UN, which took into account the work of the OEIGWG to date and, in particular, the existing text of the draft LBI and related substantive written inputs of the stakeholders regarding Articles 1-14 (Vinasithamby, 2023, p. 2).

Given such parallel developments, it would seem prudent to link the ongoing efforts to enable their greater contribution to the creation of consistent legal solutions governing corporate accountability for human rights violations in international and supranational fora. The need for convergence is particularly relevant in the light of the fact that, while the two mentioned draft instruments are different in nature, they both take inspiration from the due diligence provisions of the 2011 UN Guiding Principles on Business and Human Rights (hereinafter: UNGPs), a major soft law instrument on corporate accountability for human rights violations existing so far (Ćorić & Knežević Bojović, 2018, p. 26.). Consequently, the two instruments being currently developed should ideally offer a consistent interpretation of the UNGPs norms. In a similar vein, in order to minimize fragmentation and foster convergence, other international soft law instruments governing corporate accountability for human rights violations, such as those developed by the Organization for Economic Cooperation and Development (hereinafter: OECD) and the International Labour Organization (hereinafter: ILO), should be taken into account.

The need for an alignment, specifically of the draft CSDDD, with international standards is further strengthened by the fact that it would enable the draft directive to meet its stated objectives. Namely, some of the draft CSDDD's specific aims underline the importance of avoiding fragmentation of due diligence requirements in the single market, as well as ensuring coherence for companies across existing and proposed EU initiatives on responsible business conduct, while also improving access to remedy for those harmed (Shift's analysis, 2022, p. 3). Furthermore, it is of critical importance that the draft CSDDD be firmly grounded in the key international standards on sustainability due diligence adopted by the UN and the OECD since they complement one another, in order to create a more coherent and secure legal framework capable of effectively preventing corporate abuse and improving access to justice for victims. This is particularly relevant in the context of rapid globalization, where transnational corporations operating in and through complex webs often exploit legal and regulatory loopholes at the cost of human rights and the environment (Bernaz *et al.*, 2022, p. 7).

High-quality, mutually reinforcing, and complementary EU and UN rules would be opportune for Southeast European countries (both the EU member states and accession candidates), given that the respective national governments, with the exception of Slovenia, so far have lacked a coherent engagement with the implications of corporate activities

on human rights and the rule of law. This is demonstrated by the absence of National Action Plans on Business and Human Rights, other comprehensive policies, or specific regulations on corporate accountability in Serbia, Montenegro, Croatia, BiH, North Macedonia, Greece, Turkey, and Albania (Letnar Černič & Michalakea, 2023, p. 5).

The paper primarily examines the complementarity of the draft CSDDD with the draft LBI, as well as determines to what extent those two draft hard law instruments reflect the applicable international soft law standards. Complementarity, for the purpose of this paper, is understood as relating to the substance of the given instruments. The authors posit that complementarity cannot be considered a synonym for alignment since complementarity can be achieved even in cases where a certain amount of non-alignment is identified. As long as certain gaps or shortcomings of one hard law instrument can be addressed in the other instrument without creating any confusion for right holders and therefore being partly overcome by them, complementarity will not be endangered.

Before reviewing the corporate civil liability solutions covered by the draft CSDDD from the perspective of their complementarity with the draft LBI and examining, to the extent relevant, their alignment with applicable international soft law standards on corporate accountability for human rights violations, the authors will provide a brief historical background of the development of international instruments applicable to corporate accountability for human rights violations in international law.

2. ESTABLISHING CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL AND EUROPEAN LAW: A HISTORICAL OVERVIEW

The role of transnational corporations and other business enterprises in violations of human rights has been at the heart of international debates for decades (Khoury, 2018, p. 503). More specifically, it was argued that it has been through the "development of human rights law that the role of transnational corporations began to receive additional international attention" (Green, 2016, p. 447). That resulted in efforts to draw up relevant international instruments.

Although during the 1970s attempts were made by the UN by Global South Nations (known as the G-77) to establish internationally-binding mechanisms to address corporate violations of human rights, ultimately those attempts were watered down into "codes of conduct" (Khoury, 2018, p. 509).[3] Namely, from 1977 to 1990, the UN Commission on Transnational Corporations (hereinafter: UNCTAC), as an advisory body of the UN, developed a code of conduct for multinational corporations, but the final draft prepared in 1990 was never adopted (Green, 2016, p. 447).

Several studies investigating cases of human rights violations in the United States of America, England, France, and Australia against multilateral corporations and corporate officers corroborate the need to push for corporate human rights accountability at

[3] For instance, in 1972, the UN Economic and Social Council ordered a study of the impact of transnational corporations on the development process and international relations. See: Nartey, 2021, p. 3.

the international level (Joseph, 2004, p. 16). Consequently, the UN continued to develop standards for businesses and their officers since the initiatives commenced in the late 1970s did not bear fruit. In 2002, the Sub-Commission on Promotion and Protection of Human Rights of the UN Commission on Human Rights drafted a set of principles that directly bound businesses and endorsed corporate officers' responsibility (Nartey, 2021, p. 5). However, these standards were met with strong opposition and were obstructed by the UN Commission (Weissbrodt & Kruger, 2003, p. 922).

When it comes to voluntary mechanisms currently available at the international level, the UNGPs, which were unanimously endorsed by the Human Rights Council in June 2011, seem the most relevant. UNGPs envisage all three relevant dimensions: that potential human rights impacts should be addressed through prevention or mitigation, and that actual impacts should be subject to remediation. In other words, the UNGPs were the first to couple the concept of human rights due diligence with the rule that human rights impacts should be subject to remediation (Andersson, 2020, pp. 13-14). Despite their importance, some authors claim that the UNGPs, along with other soft law mechanisms, arguably have not helped victims gain access to justice and effective remedies (Nartey, 2021, p. 6). According to Vogel, these initiatives have in fact contributed to ongoing human rights violations in the international arena by allowing corporations to choose the methods and processes whereby they only purport to respect human rights and the environment (Vogel, 2010, p. 68). Other authors claim that, while voluntary regulation has resulted in some substantive improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority at both the national and the international level. This is unsurprising, as the relevance of rights under international law and human rights law is questionable if victims had no legal capacity and clear guarantees to enforce their rights before either a national or international court once they claimed to be victims of human rights violations. Although the right to a remedy and reparation is imperative for the effective protection of human rights, the theory of international law and the applicable voluntary regulation do not provide an effective remedy for state failure to address corporate violations of human rights (Nartey, 2021, p. 7).

Similar arguments can be made regarding the effectiveness of soft law instruments developed by the OECD and the ILO. The OECD Guidelines for Multinational Enterprises (hereinafter: OECD Guidelines) are aligned with the UNGPs and, in a similar vein as the draft CSDDD, cover both human rights and environmental topics. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy reinforces these expectations, specifically in relation to due diligence regarding labour rights. Both the draft CSDDD and the draft LBI explicitly make reference to the said ILO instrument. The presented limitations, which are attributable to the soft law character of the existing instruments, shed light on the importance of the current work of the OEIGWG for the elaboration of the LBI. Before getting into the analysis of the quality of the current draft CSDDD, it is valuable to provide a birds-eye view of the key EU provisions relevant to addressing corporate accountability for human rights violations.

In January 2023, the Corporate Sustainability Reporting Directive (hereinafter: CSRD) amending the Non-Financial Reporting Directive (hereinafter: NFRD) entered into force.[4] The NFRD had defined a common standard for non-financial reporting for certain corporations, which has to be transposed into the domestic law of the member states. Member states also have to envisage penalties applicable to infringements of the national provisions adopted under the NFRD (Andersson, 2020, p. 19). However, critics rightly argued that the said directive was framed in a manner that creates overall uncertainty over the effectiveness of reporting as a means to materialize human rights due diligence. Namely, the way the requirements relating to human rights are laid out in the NFRD reduces its potential to generate a practice of effective reporting, especially given its divergence from the UNGPs and other related problems (Martin-Ortega & Hoekstra, 2019, p. 622).

The adopted CSRD was set to amend the NFRD of 2014 by extending the scope of reporting requirements to additional companies, such as all large companies (listed or not) and listed SMEs; by aligning the reporting requirements with the mandatory EU sustainability reporting standards; and by introducing an EU-wide audit assurance of the sustainability information reported (Smith-Roberts, 2022). The scope of the CSRD is even broader than that of the draft CSDDD, given that any "large company" in the EU must report. Moreover, companies not incorporated in the EU but with securities in EU-regulated markets are also covered by the reporting directive. A central critique of the CSRD is that, while the European-based firms will be subject to additional financial sustainability reporting obligations, those in external jurisdictions, for example, those based in Asia or the Americas will not. This means that investors, asset managers, and others will continue to lack crucial sustainability data for a wide range of entities (Smith-Roberts, 2022).

It is worth noting that the CSRD directive will not be subject to isolated transposition but is meant to be applied in tandem with the CSDDD by corporate entities. Both proposals reference the UNGPs and the OECD Guidelines as foundational international due diligence frameworks. Moreover, both directives are stark examples of the movement leading to the "soft law" on business and human rights being translated into hard law, meaning the development of mandatory corporate obligations that are legally enforceable and may result in penalties if violations are found (Smith-Roberts, 2022).

It is expected that all those pieces of EU legislation will significantly impact how companies manage and report on their efforts related to mandatory due diligence obligations regarding human rights, environmental impacts, and associated corporate governance reforms. The two aforementioned EU directives are meant to work through synergy and be applied in parallel by corporate entities: the first (the CSDDD) as a framework for *what* due diligence obligations certain corporations will bear, and the second (the CSRD) as a framework for *how* companies will be required to report on these obligations. Therefore, it is important to coherently apply not only identified European and international legal instruments but also to secure their mutual coherence through an adequate interpretation and application of the different pieces of the EU *acquis*.

[4] The CRSD's rules will start applying between 2024 and 2028.

3. COMPLEMENTARITY OF THE DRAFT CSDDD WITH THE DRAFT LBI AND APPLICABLE SOFT LAW INTERNATIONAL STANDARDS

Within this section, the authors will provide an analysis of complementarity between the identified international and European instruments concerning corporate due diligence obligations, while placing a special focus on the draft CSDDD and the draft LBI. Subsequent to it, the authors will look in-depth into questions of corporate civil liability and other redress-related issues. The analysis assesses the drafts in their current forms.

3.1. The compatibility with regard to corporate due diligence obligations

The analysis of complementarity between the draft CSDDD, draft LBI, and identified international soft law instruments concerning corporate due diligence obligations includes the following aspects: company and material scope of application, due diligence process, and elements of due diligence.

The scope of application of the draft CSDDD and the draft LBI diverges considerably concerning corporate due diligence obligations, given that the draft CSDDD establishes strict size and turnover limits for business enterprises subject to such obligations, while the draft LBI aims to apply to all business enterprises, including business activities of a transnational character (Bernaz *et al.,* 2022, p. 18). This key difference between the two texts is, to an extent, mitigated by the fact that the current Article 3.2 of the draft LBI allows for the possibility for the member states to "differentiate between business enterprises according to their size, sector, operational context, or the severity of impacts on human rights" or rather, allows to the member states to envision different modalities for discharging these obligations for different types of business enterprises. In a similar vein, Article 6.3 of the draft LBI envisages that business enterprises should be required to undertake human rights due diligence, proportionate to their size, risk of human rights abuse, or the nature and context of their business activities and relationships.

The amendments to the draft CSDDD that were recently proposed by the EP also contribute to reducing divergences between the two draft instruments. Namely, the proposed amendments lower some of the size and turnover thresholds and switch the concept of "established business relationship", to the concept of "business relationship" thus ensuring that a uniform terminology is being used in that respect in the draft CSDDD and the draft LBI (amendments proposed by the EP to the CSDDD, 2023). This intervention is not merely a terminological one, and its implications will be elaborated further in the paper. The concept of "business relationship" is also used in the two applicable soft law instruments: UNGPs and OECD guidelines. Furthermore, both the draft LBI and the proposed EP's amendments to the draft CSDDD include definitions of the notion of business relationships, although these do not fully coincide.[5] Nevertheless, the

[5] According to Article 1.5. draft LBI, a business relationship is "any relationship between natural or legal persons including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means". On the other hand, the EP's draft amendments to Article

slight differences in determining the notion of business relationships do not necessarily lead to serious incompatibilities.

Let us recall that the initial draft CSDDD deployed a novel and untested concept of "established business relationships" to reduce the scope of due diligence obligations. The recourse to such a limited scope of companies that were subject to due diligence was based on the need to enable an easier identification of risks by the businesses and was explained by the fact that helping the businesses to identify risks would provide greater leverage in building strategic relationships for protection of human rights. More specifically, the initial version of the draft CSDDD explained that limiting the scope of due diligence to "established business relationships" was necessary to "allow companies to properly identify the adverse impacts in their value chain and to *make it possible for them to exercise appropriate leverage*" (Shift analysis, 2022, p. 4). However, during the development of the UNGPs, Professor Ruggie already argued that the extent of leverage was not an adequate basis for determining the scope of due diligence, and that the concept of prioritization based on severity should instead be applied (Ruggie, 2008).

Following this line of reasoning, the UNGPs intentionally did not limit the scope of due diligence to a particular set of closely related business relationships, such as "established business relationships", as that would have led companies to look for risks and impacts primarily among their strategic suppliers and in other proximate relationships and ignore impacts in more remote parts of the value chain where they are often more severe. The narrow scope, initially introduced by the draft CSSSD, also based the responsibility for due diligence on the concept that is prone to be abused through legal or tactical decisions to manage value chain relationships in ways that avoid them falling within the given scope. This could have created a clear risk whereby, in practice, the focus of due diligence would be defined not by where the most severe risks and impacts occur in a company's value chain but by whether or not a business relationship can be characterized as "established" in line with the various novel tests introduced in the draft (Shift's analysis, 2022, pp. 4-5).

The last decade of implementation of international standards demonstrates that the concept of prioritization based on severity (hence, different from the one initially proposed in the draft CSSSD) is the key factor in making due diligence manageable for business, as well as ensuring it tackles the most salient risks to people. Therefore, the proposed amendments of the EP to the draft CSSSD constitute a positive step in the right direction. Moreover, their criterion of "business relationship" can be equated with the criterion envisaged by the UNGPs, the OECD guidelines, and the draft LBI. By doing so, it contributes to aligning the material scopes of these instruments.

Nevertheless, the due diligence requirements set forth in the draft CSSSD are still applicable to a more limited set of companies compared to the respective scopes of application of international standards contained in the UN's and the OECD's instruments. Namely, the proposed EP's amendments retain size and turnover limits, although slightly lowering them (Brown, 2023).

3 paragraph 1 of the draft CSDDD define the business relationship in the following way: "a *direct or indirect* relationship *of a company* with a contractor, subcontractor, or other entities *in its value chain*".

When it comes to the material scope, the draft CSDDD is broader than the draft LBI, as it includes the concept of adverse environmental impact. It is noteworthy that climate is not explicitly included in the due diligence process but rather in a separate and more general provision.[6] However, the material scope of the draft CSSSD is still broader than the LBI's due to its dual focus on human rights and environmental issues. It remains ambiguous how realistic it would be to push for the broadening scope of the draft LBI to include environmental and climate issues, given that the OEIGWG's current mandate is focused on human rights, but is still amenable to change. Such an initiative could significantly contribute to the development of a coherent legal framework governing corporate accountability for human rights violations worldwide.

Then again, Bernaz *et al.* (2022, pp. 12-16) rightly argue that the two texts can be considered complementary, regardless of the identified divergences with regard to company and material scope. If both instruments (the draft LBI and the draft CSDDD) were to be adopted in their current form, they would indeed complement each other, as the CSDDD can be considered an instrument implementing only certain aspects of the draft LBI (Williams *et al.*, 2023).

When it comes to the due diligence process, the draft CSDDD primarily focuses on corporate due diligence, while the draft LBI is more victim-centred and focuses on respect for human rights, and redress, covering areas other than the due diligence process. Hence, the UN instruments, on the one hand, and the draft EU directive, on the other, are based on different approaches. More concretely, the LBI, as a human rights instrument, underlines that the activities of business enterprises, including their obligation to undertake human rights due diligence, have to be regulated by states for the purpose of ensuring that business enterprises "respect internally recognized human rights and prevent and mitigate human rights abuses". The draft CSDDD aims at establishing common rules for corporate due diligence in the EU and is hence more an instrument of corporate law than a human rights instrument. The states' obligations under the draft CSDDD are to adopt legislation to transpose the due diligence rules envisaged by the directive.

When it comes to elements of due diligence, the draft CSDDD in general is more detailed than the draft LBI. Firstly, there is an unambiguous requirement in the draft CSDDD to integrate due diligence into company policy, and there is no similarly clear requirement on this in the draft LBI (Bernaz *et al.*, 2022, p. 13). Both texts are similar with regard to identifying human rights risks but still have important differences. One of them is of mere terminological nature: while the draft CSDDD deals with identifying adverse impacts, the draft LBI governs identifying human rights abuse. That terminological difference carries symbolic value, but it apparently does not have important practical consequences in terms of how the process should be conducted.

The difference with regard to the process of identification was mitigated in the recent amendments to the draft CSSSD that were proposed by the EP. The draft CSSSD initially highlighted that "companies are entitled to make use of appropriate resources,

[6] See Article 15 of the draft CSDDD.

including independent reports and information gathered through the specified complaints procedure" and that "where relevant" they were to "also carry out consultations with potentially affected groups, including workers and other relevant stakeholders, to gather information on actual or potential adverse impacts". By contrast, the draft LBI uses stronger language from the standpoint of rights holders, trying to give affected stakeholders a clearer and stronger role. According to the LBI, the process must include: undertaking impact assessments, integrating a gender perspective, conducting meaningful consultations that will give special attention to marginalized groups, acting in accordance with the principle of free, prior, and informed consent of indigenous peoples, and paying particular attention to conflict areas or areas under occupation.

While the initial EC's proposal of the draft CSDDD underplayed the important role that affected stakeholders should have in informing risk assessment by including the "where relevant" criterion, the EP's proposed amendment, which almost aligns with the draft LBI, contains a more appropriate solution, providing that companies shall also carry out *meaningful engagement* with potentially affected *stakeholders,* including workers and other relevant stakeholders, to gather information in the context of the identification process to gather information on actual or potential adverse impacts. It was argued that the omission of the EC's proposal of the CSSSD can be explained by the fact that the draft does not emphasize the concept of severity as the central criterion in making difficult decisions about what to prioritize (Shift analysis, 2022, p. 8). The EP's proposed amendments constitute a more adequate solution since, without positioning the engagement with affected stakeholders as a central feature of due diligence, the company cannot be certain that it has appropriately assessed the severity of impacts to inform its prioritization of risks, nor can it be sure whether its approaches are having their intended effects in practice.

There are also important differences with regard to avoiding, preventing, and mitigating adverse human rights impacts. Firstly, the draft CSDDD is clearer about when the company is expected to mitigate adverse human rights impacts, whereas the draft LBI fails to explain when mitigation is acceptable. Secondly, pursuant to the draft LBI, the company only needs to worry about the abuses they have identified, whereas, under the draft CSDDD, companies are also required to act regarding impacts they should have identified but did not.

The draft CSDDD is more specific in terms of how to act. The draft LBI envisages "reasonable and appropriate measures", including "integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate". Similar to the draft LBI, the draft CSDDD includes "appropriate measures" to verify compliance with contracts that integrate human rights due diligence requirements. However, the draft CSDDD, in general, provides much more detail about what such measures could be, and therefore it could serve as a basis to strengthen the LBI.

The draft CSDDD is also stronger than the draft LBI with regard to providing a clear requirement to bring adverse impacts to an end, while there is no clear requirement on this in the draft LBI. Finally, the draft CSDDD is also more detailed than the draft LBI on the

point of how to effectively monitor due diligence, as well as the compliance and enforcement of due diligence obligations, while the opposite applies to the obligation to communicate.

In a nutshell, the text of the draft CSDDD and the draft LBI follow different approaches. This does not necessarily make them incompatible but merely reveals their different starting points in terms of due diligence obligations. As elaborated above, many elements of the draft LBI seem generally more in line with the UNGP than is the case with the draft CSDDD. Conversely, the draft CSSSD follows a more detailed approach that is supposed to enable such a kind of legislative instrument to operate in practice. When it comes to the material scope of the draft CSDDD, it is broader than the respective scope of the draft LBI since, like the OECD guidelines, it also covers environmental issues. The identified differences mainly highlight the complementarity between the texts, with the draft CSDDD being more technical and detailed and the draft LBI being focused on setting broader orientations and principles.

3.2. The compatibility with regard to corporate civil liability and redress for victims

Victims of alleged human rights abuses and environmental harm caused by companies encounter a broad variety of difficulties when seeking justice. Some of them are attributable to the transitional nature of business and human rights litigation, the power imbalance between the parties, complex private international rules, and the complexity of corporate groups and value chain activities (Višekruna, 2017, p. 114 and Bernaz *et al*., pp. 4-19). It seems, however, that the main difficulty comes from the absence of coherence in legal liability rules for corporate violations of human rights. Therefore, firstly, the analysis of complementarity between international and European instruments within this section will deal with the inadequacy of the existing and proposed rules on corporate civil liability regimes under the two drafts. Subsequent to that, other relevant challenges will be analyzed and compared in order to better understand the level of complementarity.

3.2.1. Examining the extent of compatibility concerning corporate civil liability

The analysis of complementarity between international and European instruments concerning corporate civil liability includes the following aspects: general principles of corporate civil liability, liability in corporate groups and in the supply chain, and procedural and practical difficulties that undermine victims' redress for damages caused by human rights violations and environmental harm.

The draft LBI and the draft CSDDD approaches to corporate liability differ in numerous respects. A significant difference between the LBI and the CSDDD is that the draft LBI provides for the liability of both legal and natural persons that are conducting business activities (Article 8.6. of the OEIGWG Chairmanship Third Revised Draft LBI, 2021), while the CSDDD only refers to the liability of companies while giving no mention to the liability of natural persons (Article 22(1) of the draft CSDDD). The EC's draft CSDDD makes a reference to the directors' duty of care in Article 25, but still, there is no provision envisaging directors' civil liability when they fail to uphold the duty of care.

This difference between the two draft instruments perhaps may to some extent be mitigated by the fact that recently proposed amendments to the draft CSDDD stipulate that asset managers and institutional investors should also be covered by this duty under certain circumstances. Nevertheless, the said proposal does not envisage their civil liability in the case where the specified measures to avoid adverse impacts were not taken by them (Williams *et al.*). On the other hand, the draft LBI emphasizes that the liability of natural persons, such as decision-makers within a corporation, shall not be a substitute for the liability of the entity itself. It does so by specifying in its Article 8.2 that "State Parties shall ensure that their domestic liability regime provides for liability of legal persons without prejudice to the liability of natural persons […]" (OEIGWG Chairmanship Third Revised Draft LBI, 2021, p. 10).

Another important difference concerns the link between a breach of the company's due diligence obligations and established corporate civil liability under the two drafts. The initial draft of the CSDDD only provides for corporate civil liability in the case when a company breaches a limited number of due diligence obligations, more specifically when it fails to prevent potential adverse impacts or mitigate actual adverse impacts (Article 22 (1)). This means that civil liability cannot be invoked when a company fails to comply with other due diligence obligations, such as the identification of actual or potential adverse impacts, and monitoring the effectiveness of due diligence policies and measures. In that respect, provisions contained in the draft LBI are more advanced. Namely, the draft LBI provides that proper compliance with human rights due diligence obligations shall not automatically absolve a company from liability for the harm caused, thus setting a liability regime that applies beyond due diligence obligations as an effort requirement. The draft LBI also explicitly distinguishes between the fulfilment of due diligence obligations and liability for broader human rights abuses and environmental harm.

The initial CSDDD's approach of not establishing corporate liability for human rights violations, including environmental harm, when there was no identified failure vis-à-vis the compliance with due diligence obligations may be explained by the objective of the CSDDD. Namely, the initial draft CSDDD is primarily directed towards imposing due diligence obligations on specific corporations, while its aim has almost nothing to do with addressing corporate responsibility for committed human rights violations, including environmental harm in general (Bernaz *et al.*, 2022, p. 18).

Some degree of convergence between the draft CSDDD and the draft LBI was attempted by the recent amendments to the draft CSDDD, which created room for holding the company liable for human rights violations, including environmental harm made outside of the due diligence non-compliance scenario. Firstly, the EP proposed in its amendments to the draft CSDDD to delete the provision that indicates an obligation of means stipulating that "for damages occurring at the level of established indirect business relationships […] the company should not be liable for damage if it carried out specific due diligence measures." In a similar vein, the proposed amendment to Article 22 of the draft CSDDD stipulates that specified companies can be held liable for damages even when they support the implementation of specific aspects of their due diligence obligations. It remains to be seen whether the EP's proposals will be incorporated into

the final version of the draft CSDDD. If adopted, both proposed amendments would lead toward breaking the link between a breach of the company's due diligence obligations and the established corporate civil liability, thus creating convergence between the draft CSDDD and the draft LBI in that respect.

However, it should be kept in mind that the EP's proposed amendments to the draft CSDDD do not get into the set requirement envisaging that a company's liability can be established only if there is a direct causal link between the company's failure to comply with its due diligence obligations and the damage. Due to the lack of specific provisions addressing the burden of proof and the possibility of disclosure mechanisms, victims are likely to struggle to establish such a causal link.[7] Such an approach creates the risk that the CSDDD's liability regime will remain a dead letter, due to the lack of strong procedural safeguards to ensure that victims, who are usually the weaker parties in such disputes, can effectively sue companies. This means that it will be up to the member states to decide on their own whether to address the procedural obstacles that victims face. Admittedly, the EP's proposed amendments to the draft CSDDD provide for limited improvements, among others, in terms of reducing litigation costs through the provision of access to legal aid and developing the ability of civil society organizations and other relevant actors acting in the public interest to bring actions before a court on behalf of a victim or group of victims (Recital 59a (new) of the EP's proposed amendments to the CSDDD). The draft LBI is more advanced in that regard, as it expressly addresses the majority of procedural and practical obstacles that victims face in human rights and environmental harm-related lawsuits against companies. For instance, the draft LBI attempts to reduce the asymmetry of power that typically exists between victims and corporate defendants, and in doing so, it provides victims with legal aid guarantees and allows judges to reverse the burden of proof in specified cases in order to fulfil the victims' right to access to remedy (Bernaz *et al*., 2022, pp. 30-31).

Both draft instruments subject to the present analysis successfully address complex situations where multiple legal entities are involved in causing harm. Those entities include but are not limited to a parent or lead company, along with a subsidiary or business partner. To put it differently, corporate liability in corporate groups or in supply chains for human rights abuses can be established under those draft instruments. Since the draft CSDDD does not include a possibility of holding the subsidiary and the entities with which the company has business relationships liable, the company's liability for damage arising under the draft CSDDD does not preclude its subsidiaries or any of its direct and indirect business partners in the value chain from being held civilly liable under the EU and national law (Article 22, paragraph 2a (new) of the EP's proposed amendments to the CSDDD).

To sum up, it is apparent that, compared to the draft LBI, the draft CSDDD does not contain sufficient rules to address the procedural and practical barriers that have prevented victims of business-related human rights violations and environmental harms

[7] Although the EP's position is not perfect, it is more aligned with the OECD guidelines and UNGPs and, as such, offers a higher likelihood of practical effectiveness (Solidaridad, European Parliament Vote on CSDDD: Significant Improvements for Rights of Smallholder Farmers, 2023).

from seeking justice thus far. Given that the majority of these aspects are within the competence of the member states, it is unlikely that they will be included in the final CSDDD, but will rather be regulated by national law. This, in turn, implies a varying degree of ease of access to justice for the victims, depending on *lex fori*. To mitigate this disparity, the LBI, which contains more provisions on the mentioned procedural aspects, could serve to fill the gaps and play a complementary role for the EU member states by imposing more specific obligations on state parties.

3.2.2. Examining the extent of compatibility concerning redress for victims

Due to cross-border corporate operations and multiple entities within a corporate group or a supply chain, plaintiffs usually encounter a multitude of legal barriers when trying to bring a legal suit in a case of corporate civil liability for violations of human rights.

Issues of private international law pertaining to jurisdictional and applicable law relevant to such cases could be detrimental to the viability of related legal claims and therefore will be briefly examined within this section. So far, the rules of private international law have been criticized and considered inefficient in addressing claims for corporate accountability arising out of cross-border activities due to the cumulative effect, which makes it difficult to bring such complex companies to account (Watt, 2014, p. 45). It was rightly argued that the draft LBI and the draft CSDDD should include private international law provisions to enable victims of business-related human rights abuse to gain access to justice. Furthermore, those provisions should be complementary in order to strengthen the coherence of corporate civil liability issues worldwide and provide legal certainty for the rights holders in the area of cross-border claims for corporate liability and damages.

However, the complementarity between the provisions of two draft instruments pertaining to jurisdictional law has not been achieved. On the one hand, the draft LBI attempts to facilitate joint litigation against parent and subsidiary companies arising out of cross-border harm, which is very important given that victims have limited resources to resort to multiple jurisdictions. The approach taken in the draft LBI further seeks to facilitate access to a forum when the victim is not able to utilize the courts of the home country (so-called forum of domicile) or alternatively, the host country. Such an approach to jurisdiction is unsurprisingly well-tailored given that the primary objective of the LBI is to ensure access to justice and remedy for victims of corporate human rights violations (Bernaz *et al*., 2022, pp. 25-26).

On the other hand, the draft CSDDD contains no provisions governing jurisdiction when a civil claim for damages based on the company's failure to comply with the due diligence obligations raises cross-border elements. That gap should be overcome by the respective applicability of the provisions of the Recast Brussels I Regulation. However, the said regulation, interpreted in conjunction with the draft CSDDD, does not contain sufficient provisions addressing jurisdictional issues that arise in cross-border business and human cases. More specifically, under the general rule of the Recast Brussels I Regulation, victims of human rights abuse and environmental harm resulting from a company's failure to comply with the CSDDD's obligations would be entitled to sue

the company in the member state where it is domiciled. The situation becomes more complicated when a company subject to due diligence obligations in the sense of the draft CSDDD is not domiciled in an EU member state. That hurdle should be addressed through the ongoing efforts to amend the Recast Brussels I Regulation. In that respect, for instance, the recommendations found in the EP's Committee on Legal Affairs report on the due diligence directive in 2020 (Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) proposing amendments to the Recast Brussels I Regulation should be considered. If the given amendments are adopted, the future CSDDD would have full effect and foster a coherent concept of corporate accountability in international and European law. To further this aim, it would be important that the process of amending the Recast Brussels I Regulation takes into account the provisions for determining jurisdiction in cross-border cases in the current draft LBI. By doing so, the LBI could complement the CSDDD on this point and contribute to the development of accountability for human rights violations.

When it comes to provisions on applicable law in cross-border civil lawsuits, the draft LBI and the draft CSDDD again follow different approaches. The draft LBI includes a choice of law provision in favour of victims, leaving a wide margin for the victims to influence which substantive law should be applied to cross-border business and human rights cases. Conversely, the draft CSDDD does not allow the claimants to choose the applicable law through choice-of-law provisions. Instead, it contains the overriding mandatory provisions requiring the application of corporate civil liability under proposed Article 22 (5).

It seems that the applicable law provisions of the two draft instruments demonstrate an acute lack of complementarity. In the event that two instruments become adopted in their current forms, their provisions on applicable law will give rise to conflicting rules in the context of civil proceedings relating to corporate due diligence obligations and, as such, undermine legal certainty. It would therefore be of critical importance for the respective legislators to attempt their further alignment.

4. CONCLUSION

The International Law Commission (hereinafter: ILC), in its report pertaining to the fragmentation of international law, elaborates on this phenomenon, in particular, in the context of EU law. According to the ILC, the full coherence, realistically speaking, is not achievable within any regional system, including the European system of human rights. However, each legal system has to aim to achieve the highest possible level of coherence as that contributes to predictability, legal security, and legal equality.[8] More concretely, the ILC mentions in its report that a lack of coherence leads to the emergence of conflicting jurisprudence, forum shopping, conflicting rules, and overlapping legal regimes. All these result in the loss of legal security.[9] For all these reasons, the elimination of the existing or

[8] For more on the work of the ILC Study Group on the fragmentation of international law see: Zdravković (2019, p. 158).

[9] International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law

anticipated incoherence is highly recommendable and mutually beneficial (Ćorić, 2019, p. 251). This is particularly relevant in the context of rapid globalization, where transnational corporations operating through complex webs are often able to take advantage of legal loopholes at the cost of human rights and the environment (Bernaz *et al.*, 2022, p. 7).

On the path to establishing a coherent framework governing corporate accountability for human rights violations in European and international fora, it is critical that the ongoing drafting of two major legislative instruments in this field does not take place in a vacuum but rather that these instruments complement each other at regional and international level. The explicit reference made in the draft instruments to the UNGPs and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy constitutes a step in the right direction. Unlike the draft LBI, the draft CSDDD also invokes the OECD Guidelines. More importantly, only the draft CSDDD clearly covers corporate liability arising out of environmental harm.

The negotiation processes for the adoption of both hard law instruments are interlinked given the fact that the draft LBI will have to be concluded as a so-called "mixed agreement" (Bernaz *et al*. 2022, p. 9). That means that the LBI will have to be negotiated, signed, and ratified by the EU and all of its member states, or alternatively the EU member states could also mandate the EC to negotiate on their behalf in addition to negotiating on behalf of the EU. Such an institutional connection between negotiation and the legislative process will apparently strengthen points of convergence between the two draft instruments.

The conducted analysis shows that while the texts of the current drafts of the CSDDD and the LBI reveal a considerably high level of complementarity, full alignment is not achieved. On a positive note, most of the identified shortcomings of one instrument are addressed at the same time in the other instrument, which partly mitigates such gaps.

When it comes to the compatibility of corporate due diligence obligations in the draft CSDDD and draft LBI, the two texts can be considered complementary, regardless of the identified divergences with regard to company and material scope and different approaches in terms of due diligence obligations. If both instruments were to be adopted in their current form, they would indeed complement each other, as the CSDDD can be considered an instrument implementing only certain aspects of the draft LBI.

With regard to the corporate civil liability regime, it may be concluded that the draft CSDDD does not contain sufficient rules to address the procedural and practical barriers that have prevented victims of business-related human rights violations and environmental harms from seeking justice thus far. Given that the majority of these aspects are within the competence of the EU member states, it seems unlikely that they will be included in the final CSDDD. To mitigate this disparity between the two draft instruments, the LBI, which contains more provisions on these procedural aspects, could serve to fill the gaps and play a complementary role for the EU member states by imposing specific obligations on state parties.

When it comes to the issues of redress for victims, it is important to understand that jurisdictional and applicable law relevant to such cases could be detrimental to the viability of related legal claims and therefore should be carefully tailored. Due to that, it is

Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, paras. 9, 15, 140, 186, 191.

particularly important that the draft LBI and the draft CSDDD include private international law provisions to enable alleged victims of business-related human rights abuse to gain access to justice.

The complementarity between the provisions of two draft instruments pertaining to jurisdictional and applicable law has not been achieved. In order to achieve complementarity with regard to jurisdictional law, it would be important for the process of amending the Recast Brussels I Regulation to take into account the provisions for determining jurisdiction in cross-border cases of the current draft LBI. By doing so, the LBI could complement the CSDDD on this point and contribute to the development of accountability for human rights violations. It appears from the analysis that the applicable law provisions of the two draft instruments also demonstrate an acute lack of complementarity. Therefore, if two instruments were adopted in their current forms, their provisions on applicable law would give rise to a conflict of laws in the context of civil proceedings relating to corporate due diligence obligations and, as such, would undermine legal certainty. It would therefore be of critical importance for the respective legislators to attempt their further alignment, taking advantage of the interlinkage of the two normative developments. Through the complementarity of two draft instruments, the coherence of the corporate civil liability regime along with due diligence obligations could be achieved worldwide, providing legal certainty for the rights holders with regard to cross-border claims for corporate liability and damages.

LIST OF REFERENCES

Andersson, C. 2022. *The Road to Corporate Sustainability Transparency, Prevention and Accountability for Global Human Rights Harms*. Master's Thesis in International Law, Gothenburg: Department of Law of the University of Gothenburg.

Ćorić, V. 2019. The Court of Justice of the European Union and the European Court of Human Rights Procedures: On the Quest for a More Coherent Approach in Human Rights Protection. In: Novaković, M. (ed). *Common Law and Civil Law Today – Convergence and Divergence*. Vernon Series in Law. Delaware/Malga: Vernon Press, pp. 247-263.

Ćorić, V. & Knežević Bojović, A. 2018. Indirect Approach to Accountability of Corporate Entities through the Lens of the Case-Law of the European Court of Human Rights. *Strani pravni život,* 62(4), pp. 25-38. https://doi.org/10.5937/spz0-20339

Green, J. M. 2016. Corporate Torts: International Human Rights and Superior Officers. *Chicago Journal of International Law,* 17(2), pp. 447-520.

Joseph, S. 2004. *Corporations and Transnational Human Rights Litigation. Human Rights Law in Perspective.* Oxford: Hart Publishing.

Khoury, S. 2018. Corporate (Non-)Accountability and Human Rights: Approaches from the Regional Human Rights Systems and Prospects for the ASEAN. *Asian Journal of Social Science* 46(4-5), pp. 503-523. https://doi.org/10.1163/15685314-04604007

Martin-Ortega, O. & Hoekstra, J. 2019. Reporting as a Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive. *European Law Review,* 44(5), pp. 622-645.

Nartey, E. K. 2021. *Accountability and Corporate Human Rights Violations in Tort and International Law.* 1st ed. *Newcastle upon Tyne:* Cambridge Scholars Publisher.

Višekruna, A. 2017. Protection of Rights of Companies before the European Court of Human Rights. *EU and comparative law issues and challenges series (ECLIC),* 1(1), pp. 111-126. https://doi.org/10.25234/eclic/6524

Vogel, D. 2010. The Private Regulation of Global Corporate Conduct: Achievements and Limitations. *Business and Society,* 49(1), pp. 68-87. https://doi.org/10.1177/0007650309343407

Watt, M. H. 2014. The Relevance of Private International Law to the Global Governance Debate. In: Watt, H. M, Arroyo, D. P. F. (eds.), *Private International Law and Global Governance*. Oxford University Press: Oxford, pp. 2-19. https://doi.org/10.1093/acprof:oso/9780198727620.003.0001

Weissbrodt, D. & Kruger, M. 2003. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. *American Journal of International Law,* 97(4), pp. 901-922. https://doi.org/10.2307/3133689

Zdravković, A. 2019. Finding the Core of International Law – Jus Cogens in the Work of International Law Commission. *South Eastern Europe and the European Union - Legal Issues*, 5(1), Verlag Alma Mater, pp. 141-158. https://doi.org/10.2139/ssrn.3776309

Internet sources

Bernaz, N. *et al.* 2022. *The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive: Competences, Comparison and Complementarity*. Available at: https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf (18. 6. 2023).

Brown, M. 2023. *Human Rights and the Environment - European Parliament adopts amendments to draft Corporate Sustainability Due Diligence Directive*. Available at: https://www.lexology.com/library/detail.aspx?g=4d78eded-f72d-4d3c-bff1-6bc4a9dbab82 (24. 5. 2023).

Del Monte, M. & Smialowski, S. B. 2021. *Understanding trilogue Informal tripartite meetings to reach provisional agreement on legislative files*. Briefing. European Parliamentary Research Service (EPRS) Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690614/EPRS_BRI(2021)690614_EN.pdf (25. 5. 2023).

EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive 2022. SHIFT'S Analysis. Available at: https://shiftproject.org/wpcontent/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf (19. 5. 2023).

European Parliament Vote on CSDDD: Significant Improvements for Rights of Smallholder Farmers 2023. Available at: https://www.solidaridadnetwork.org/news/european-parliament-vote-on-csddd-significant-improvements-for-rights-of-smallholder-farmers/ (18. 5. 2023).

Koskenniemi, M. 2006. *International Law Commission Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.* Report of the Study Group of the International Law Commission. A/CN.4/L.682, 13 April 2006. Available at: https://digitallibrary.un.org/record/574810 (18. 5. 2023).

Letnar Černič, J. & Michalakea, T. 2023. Introduction. In: Letnar Černič, J. & Michalakea, T. (eds.), *Business and Human Rights in South East Europe*. re: constitution Working Paper. Forum Transregionale Studien 10/2023, pp. 5-6. Available at: https://reconstitution.eu/ working-papers.html. (11. 6. 2023).

Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) 2021. Committee on Legal Affairs, European Parliament. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html (25. 5. 2023).

Ruggie, J. 2008. *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.* United Nations Digital Library. Available at: https://digitallibrary.un.org/record/625292 (11. 6. 2023).

Smith-Roberts, A. 2022. *Everything you need to know about the EU CSDD & EU CSRD*. Available at: https://www.levinsources.com/knowledge-centre/insights/eu-csdd-eu-csrd-mining (24. 5. 2023).

Vinasithamby, A. 2023. *HRC52: Next steps toward a binding treaty on business and human rights*. International Service for Human Rights. Available at: https://ishr.ch/latest-updates/hrc52-next-steps-toward-a-binding-treaty-on-business-and-human-rights/ (11. 6. 2023).

Williams, O. *et al.* 2023. *Human Rights and the Environment - European Parliament adopts amendments to draft Corporate Sustainability Due Diligence Directive* blog. Available at: https://www.eyeonesg.com/2023/06/human-rights-and-the-environment-european-parliament-adopts-amendments-to-draft-corporate-sustainability-due-diligence-directive/ (24. 5. 2023).

Legal sources

Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. OEIGWG Chairmanship Third Revised Draft. 17.08.2021. Available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf (24. 5. 2023).

Amendments 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). European Parliament. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html (11. 6. 2023).