

# The Role of the European Union in the Future of Business and Human Rights

February 16, 2023

## *The European Union Plans for a Corporate Sustainability Due Diligence Directive and the Possible Consequences for a Business and Human Rights Treaty*

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The European Union (EU) has long strived to establish itself as a leading player in the global arena of human rights protection. The EU Action Plan for Human Rights and Democracy 2020–2024, which guides all policies in this area, opens with the statement that the EU has a vital interest in advancing its leadership on human rights and democracy worldwide. Human rights are not only a fundamental aspect of the EU's political and strategic discourse, but they are also the very foundation of the Union, as its legal framework is built on the shared goal of promoting peace, stability and a world that respects human rights, democracy and the rule of law. As the EU aims to assert itself as a leader in the field of human rights, its stance on legislation defining the responsibility of businesses towards human rights will be crucial for shaping policies in this area.

The goal of diminishing detrimental impacts of business practices on human rights is widely shared, however, the methods to accomplish this vary. The international community has long relied on non-binding instruments, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs), to promote responsible conduct among businesses through recommendations and guidelines. However, it appears that this approach is starting to shift. In recent years, two international binding instruments have emerged that have the potential to fundamentally change the existing paradigm of soft law in the area of business and human rights. These instruments are the legislative proposal by the European Commission for a Corporate Sustainability Due Diligence Directive (CSDDD) and the draft for a Binding Treaty on Business and Human Rights (BHR Treaty) currently being negotiated under the United Nations (UN) system.

Although both of these instruments are still under development and their final content remains uncertain, they hold the promise of transforming the way in which the relationship between business and human rights is addressed. The proposed CSDDD, for example, introduces new obligations for companies to conduct human rights and environmental due

diligence (HREDD), and could have a significant impact on how companies identify, prevent, mitigate, and account for human rights impacts. Similarly, the BHR Treaty, if adopted, would further solidify the existing obligations of states to prevent human rights violations committed by non-state actors, such as corporations, within their territory, jurisdiction or under their control, and to ensure compliance with and enforcement of international human rights law and relevant standards.

The simultaneous preparation of a CSDDD and a BHR Treaty sparks interesting questions about their compatibility and the EU's stance on the treaty process. As the EU is a major global actor in the field of human rights, it is important to consider how these two mechanisms interact and whether they complement or compete with one another. Potentially, a future CSDDD could serve as a model for the treaty, providing a framework for HREDD that could be adopted globally. An EU directive and a treaty may not be mutually exclusive, but instead could coexist and provide different but complementary approaches to addressing business-related human rights abuse, for example, as already argued here, in relation to the right to a healthy environment.

The EU has made it clear that it is dedicated to the cause of the CSDDD, that is, the prevention and mitigation of adverse impacts on human rights and the environment in the business context. The European Commission has consistently emphasised its determination to finalise the text by the end of its mandate in 2024. Likewise, the legislative initiative enjoys widespread support from the European Parliament, as evidenced by the fact that the Parliament already presented a draft of its own in March 2021, which was approved with an overwhelming majority of 504 votes in favor, 79 against, and 112 abstentions. This level of support indicates that a future CSDDD is likely to remain in place, even in the event of major political changes in the composition of the Parliament and the Commission in the upcoming European elections. The commitment of the EU to the CSDDD is evident and it is expected that the directive will be implemented in the near future to achieve the EU's goal of ending 'impunity for companies that cause harm to the planet or people'.

The stance of the EU on a future CSDDD appears to be well-defined and consistent. However, when it comes to the position on a BHR Treaty, the situation is less certain and clear. Despite the fact that negotiations at the United Nations on this topic began nearly a decade ago, the EU has yet established a clear mandate for its participation in these talks. In the October 2022 round of negotiations, the eighth since the process began, the EU was present and engaged in certain discussions, but primarily in the role of an external observer rather than an active participant.

This lack of involvement in the process has been widely criticised. In 2020, a group of 75 Members of the European Parliament (MEPs) signed a letter urging the EU's leading politicians to adopt a negotiation mandate and fully engage in the UN treaty process as soon as possible. It stated that if the EU is to enhance its role as a world leader in HREDD, with many national legislations under development and several sectoral standards already implemented, the BHR Treaty can serve as a means for the EU to further strengthen its efforts and commitment to these causes. The MEPs argued that the increasing alignment of the EU's legislative agenda and the UN treaty process brings us to a critical moment of convergence that should not be missed. Civil society groups have also expressed their disappointment in the EU's lack of engagement in the negotiations, with a social media campaign specifically targeting this issue, named 'Where is the EU?'.

While some may argue that the EU should not participate in the BHR Treaty negotiations and that it should be left to individual Member States to take a stance, the plans to adopt a CSDDD refutes this argument. According to the explanatory memorandum of the document, 'compared to individual action by Member States, EU intervention can ensure a strong European voice in policy developments at the global level'.

Although the EU has yet established a mandate for participation in the negotiations, it issued a general statement outlining its views on the process during the last round of talks in October 2022. In that text, the EU recognises the potential of an international legally

binding instrument to enhance global protection against business-related human rights abuses. However, it expressed doubts about the treaty's ability to lead to global standards. The EU representative states that two main aspects are necessary to achieve this:

First, the EU considers that an international instrument can lead to global standards only if it builds on consensual frameworks. In this context, the EU commends the UNGPs as having established a widely accepted foundation for business and human rights initiatives. It considers these to be a working basis that should continue to be taken into account. Furthermore, the EU statement stresses that one of the great potentials of a future CSDDD is that it is built on internationally agreed definitions and standards, in a clear reference to the UNGPs, and underlines the importance of close cooperation with partners.

Is this first critique justified? If we analyse the preamble of the third revised draft of the BHR Treaty, it is true that the wording makes no mention of the UNGPs. Instead, it chooses to reaffirm the principles and purposes of the Charter of the United Nations (Preamble, pt. 1); the nine core International Human Rights Instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labour Organization (pt. 2); and also the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples, relevant ILO Conventions, and recalling further the 2030 Agenda for Sustainable Development, as well as all internationally agreed human rights Declarations.

Almost all of these texts are widely adopted by the community of states, certainly enough to state that a BHR Treaty could be based on internationally agreed definitions and standards. Therefore, the first criticism seems to be somewhat excessive.

Second, the EU believes that any binding instrument related to business and human rights must be both, legally sound and practically feasible, so that it can effectively enhance the protection of victims of business-related human rights abuse and create a level playing field for companies globally. While some of the advances in the content of the treaty are considered positive, such as the promotion of human rights due diligence processes that require companies to integrate a gender perspective at all stages and that are proportional to the size and context of the company's operations, the EU has stated that it continues to have reservations and concerns regarding other aspects of the proposed text. In particular, the EU is concerned about the level of detail and prescriptiveness of the draft instrument in a number of policy areas such as civil and criminal liability, applicable law and jurisdiction, or judicial cooperation, whilst at the same time using vague and open definitions for other key elements in the draft.

The second critique holds significant weight as it highlights the crucial aspect of a BHR Treaty needing to gain broad agreement in order to be approved. Achieving consensus among the different negotiating parties requires flexibility and a willingness to compromise on positions. However, the more ambitious the text, the less likely it is to gain support from a large number of states. This presents a potential challenge for a BHR Treaty, as the pursuit of pleasing as many countries as possible may result in a watered-down document that lacks ambition and ultimately becomes ineffective.

From the way the statement is worded, it seems clear that the EU considers that the current draft treaty does not meet either of the two aforementioned conditions to become an instrument that achieves the objective of creating global standards of behaviour. It believes that by abandoning the guidance and example of the UNGPs, the Treaty would not generate the necessary consensus. It also considers that the current content of the draft is not easily applicable in practice. While affirming that the EU will remain attentive to the process and provide support, where necessary, the statement indicates a preference for the approach underlying the proposed CSDDD. This preference is not inherently negative. However, it would be unfortunate if the EU were to use a future CSDDD as an excuse or justification for not actively participating in the BHR Treaty discussions.

The proposal for a CSDDD at the EU level has generated significant interest and enthusiasm among civil society groups and academic experts in the field. This initiative has the potential to represent a significant legislative achievement in this area, and it could serve as a model and inspiration for similar developments around the world. It may even set in motion a different understanding of states' obligations to protect human rights in relation to rights holders in other countries that are affected by companies based in those states. However, it is important to note that the EU should not assume that a future directive will address and solve all issues related to business-related human rights abuse. The EU and its Member States should also pay close attention to and actively engage with other ongoing legislative developments, particularly the ongoing negotiations for a BHR Treaty. A comprehensive and coordinated approach across different initiatives is crucial for effectively promoting and protecting human rights in the context of business activities.

It could be argued that the EU's stance on a document of such critical importance to the development of international standards for corporate behavior and its impact on human rights as the draft BHR Treaty falls short of what one would expect from an institution that purports to strive for global leadership in human rights. The EU's position on this document, particularly given its significant influence on the international stage, may be perceived as inadequate or insufficient in relation to the aspirations and expectations associated with its role as a leader in human rights. It is important for the EU to actively engage and take a more prominent position in the negotiations for a BHR Treaty and other international standards to ensure that they align with its values and commitments to human rights and sustainable development.

**Suggested citation:** L. E. Aranda, 'The Role of the European Union in the Future of Business and Human Rights: The European Union Plans for a Corporate Sustainability Due Diligence Directive and the Possible Consequences for a Business and Human Rights Treaty', Nova Centre on Business, Human Rights and the Environment Blog, 15th February 2023.