

# **“CLOSING THE LOOPHOLES”: RECOMMENDATIONS FOR AN EU CORPORATE SUSTAINABILITY LAW WHICH WORKS FOR RIGHTSHOLDERS**

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## FOREWORD

The Corporate Sustainability Due Diligence Directive is an important opportunity for victims of corporate harm. I welcome the fact that the European Union is discussing legislation that will establish legally binding duties for businesses to respect people and the planet. This is a great opportunity for the EU to show leadership in requesting companies to act responsibly.

This is an important issue for me personally.

For decades now, my home, the Niger Delta, has been the most valuable oil producing region in Africa, and it is the main source of Nigeria's wealth. European oil companies, including Shell, Eni and Total have pumped billions of Euros-worth of crude oil from this region since the 1960s.

But most people there still live in poverty and the wealth is nowhere to be seen. Every year there are hundreds of oil spills which destroy our farms and the creeks where we used to fish. The sky is lit at night by the burning of gas flares and is filled with soot. Spills are not cleaned up and oil has leached into our drinking water.

In the 1990s, the people of Ogoniland in the Niger Delta raised their voices at these injustices. But the Nigerian army crushed their peaceful protests. They burnt down villages, looted, raped and killed. Hundreds were arrested and tortured.

According to research by Amnesty International, Shell urged the government to deal with the protests, even after it knew that serious abuses were taking place.<sup>1</sup> On 5 November 1995, after an unfair trial, the regime hanged nine innocent men, including my husband, Dr Barinem Kiobel. One of the others killed that day was the activist and writer Ken Saro-Wiwa, who had led the protests.

Since that tragic day I have been fighting to hold to account those responsible for what happened to my husband and the other men.

Victims of human rights abuses are entitled to access justice and governments have an obligation to ensure this access. But victims of corporate human rights abuses face too many legal and practical hurdles in bringing cases against rich and powerful corporations.

For this law to be truly effective, it must live up to international standards and must include fair rules that allow victims, like me and other widows of the "Ogoni Nine", to access justice for the

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<sup>1</sup> Shell denies this allegation. For details of the Amnesty's investigation, as well as Shell's response see: Amnesty International, *A Criminal Enterprise?: Shell's involvement in human rights violations in Nigeria in the 1990's* (Index: AFR 44/7393/2017), 28 November 2017, [amnesty.org/en/documents/AFR44/7393/2017/en](https://www.amnesty.org/en/documents/AFR44/7393/2017/en). In 2022, the court ruled that there was insufficient evidence to prove that Shell had been involved.

harms of European companies regardless of where they operate.

**Esther Kiobel**

# INTRODUCTION

Amnesty International has documented the devastating human rights impacts of corporations for more than 20 years; from disastrous oil pollution in the Niger Delta, and forced labour on palm oil plantations in Indonesia, to the terrifying misuse of spyware to target, harass and intimidate human rights defenders around the world.<sup>2</sup> In the 11 years since the adoption of the UN Guiding Principles on Business and Human Rights it has become clear that voluntary business and human rights measures alone are not sufficient and that states must pass legislation that requires companies to act to address their human rights and environmental impacts.

The Corporate Sustainability Due Diligence Directive (CSDDD) is an opportunity for policymakers in the European Union to enact ground-breaking binding obligations requiring businesses operating in the EU to address their human rights and environmental risks and impacts. If enacted, this directive could create avenues for remedy for victims who have struggled to access justice for the harm they have suffered, it could stop companies from profiting from human rights harm caused by their operations or business relationships and prevent companies from selling products which are then misused in a way that harms people and planet.

As Didier Reynders, the EU Commissioner for Justice and co-initiator of the draft legislation, explained “this proposal is a real game-changer in the way companies operate their business activities throughout their global supply chain. With these rules, we want to stand up for human rights and lead the green transition. We can no longer turn a blind eye on what happens down our value chains. We need a shift in our economic model.”<sup>3</sup>

However, in order for the CSDDD to live up to those expectations and fulfil the European Union’s own commitments, it must be effective. At the time of writing two of the three co-legislators of the EU: the European Commission and the Council of the EU have released their proposals for the Directive. These fail to live up to international standards on human rights in a number of ways. If the law is to be effective, these weaknesses must be addressed.

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<sup>2</sup> See for example: Amnesty International, *Nigeria: Clean it up: Shell's false claims about oil spill response in the Niger Delta* (Index: AFR 44/2746/2015), 3 November 2015, [amnesty.org/en/documents/afr44/2746/2015/en](https://www.amnesty.org/en/documents/afr44/2746/2015/en); *Nigeria: Clean it up: Shell's false claims about oil spill response in the Niger Delta* (Index: AFR 44/2746/2015), 3 November 2015, [amnesty.org/en/documents/afr44/2746/2015/en](https://www.amnesty.org/en/documents/afr44/2746/2015/en); “Massive data leak reveals Israeli NSO Group's spyware used to target activists, journalists, and political leaders globally”, 19 July 2021, [amnesty.org/en/latest/press-release/2021/07/the-pegasus-project/?ref=internetfreedom.in](https://www.amnesty.org/en/latest/press-release/2021/07/the-pegasus-project/?ref=internetfreedom.in)

<sup>3</sup> European Commission, “Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains”, 23 February 2002, [ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1145](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145)

This briefing outlines Amnesty International's key concerns for the CSDDD, detailing where the proposals from the European Commission and the Council fail to live up to international human rights standards and what these gaps could mean for the victims of corporate harm. The briefing also presents Amnesty's key recommendations to address those gaps so that the CSDDD can be fit to provide access to justice for victims of corporate harm. Finally, the briefing summarizes pertinent findings from research conducted by Amnesty over the past 20 years to show what is at risk for victims should the EU not implement these recommendations and develop an effective CSDDD.

## BACKGROUND

### THE LEGISLATIVE PROCESS AND ITS APPLICATION TO THE CSDDD

The CSDDD is currently being negotiated by the European Union under the EU's 'ordinary legislative procedure'.<sup>4</sup> Under this procedure, the directly elected European Parliament, representing the people of the Union, and the Council, representing the governments of Member States adopt legislation jointly, on the basis of a proposal by the European Commission.

The 'European Commission Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' was released in February 2022.<sup>5</sup> The Council adopted a negotiating position ('general approach') on the directive in December 2022, indicating their position on the directive.<sup>6</sup> At the time of writing, although several parliamentary committees had stated their position on the directive,<sup>7</sup> the European Parliament was still negotiating their final position.<sup>8</sup> Following this, the co-legislators (meaning the European Commission, European Parliament and the Council) are expected to enter negotiations ('trilogues') to find a final common text to be adopted by the European Union.

### INTERNATIONAL BUSINESS AND HUMAN RIGHTS STANDARDS

The UN Guiding Principles on Business and Human Rights (UN Guiding Principles) are an internationally endorsed standard of expected conduct, that establish that states have a duty to

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<sup>4</sup> European Parliament, Handbook on the Ordinary Legislative Procedure: A guide to how the European Parliament co-legislates (PE 640.179), September 2020, [https://www.europarl.europa.eu/cmsdata/255709/OLP\\_2020\\_EN.pdf](https://www.europarl.europa.eu/cmsdata/255709/OLP_2020_EN.pdf)

<sup>5</sup> European Commission, Proposal for a Directive on corporate sustainability due diligence and annex, 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>6</sup> 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>

<sup>7</sup> European Parliament, Procedure File: 2022/0051(COD) Corporate Sustainability Due Diligence, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0051\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0051(COD)&l=en)

<sup>8</sup> At the time of writing, the expectation was that this would be finalised at the beginning of June 2023. See 'indicative plenary sitting date': European Parliament, Procedure File: 2022/0051(COD) Corporate Sustainability Due Diligence, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0051\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0051(COD)&l=en)

protect against human rights abuses by businesses.<sup>9</sup> Amongst other things, this requires governments to enact and enforce laws that require businesses to respect human rights, create a regulatory environment that facilitates business respect for human rights, and provide guidance to companies on their responsibilities. International human rights law is clear that this duty to protect human rights extends beyond borders.<sup>10</sup>

Companies also have a responsibility to respect all human rights wherever they operate.<sup>11</sup> This responsibility, and what it means practically, is also laid out in the UN Guiding Principles. The UN Guiding Principles explain that in order to meet their responsibility to respect human rights, companies must take proactive and ongoing steps to identify and respond to their potential or actual adverse human rights impacts. Primarily, businesses must implement a human rights due diligence process to identify, prevent, mitigate and account for the human rights harm that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products or services by their business relationships. Companies should also remediate any human rights abuse to which they have contributed.<sup>12</sup>

The Organisation for Economic Co-operation and Development (OECD) has drawn on the UN Guiding Principles to provide practical guidance for multinational corporations on how to implement their responsibility to respect human rights, including on how they should carry out human rights due diligence. There are a number of OECD guidelines but the primary ones referred to in this briefing are the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance).<sup>13</sup>

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<sup>9</sup> UN Office of High Commissioner on Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (Principles 1, 2 and 3), 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>10</sup> In 2017, the UN Committee on Economic, Social and Cultural Rights confirmed that: "The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective." UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (UN Doc. E/C.12/GC/24), 2017, para. 30., <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/237/17/PDF/G1723717.pdf?OpenElement>

<sup>11</sup> This responsibility was expressly recognised by the UN Human Rights Council on 16 June 2011, when it endorsed the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), and on 25 May 2011 when the 42 governments that had then adhered to the Declaration on International Investment and Multinational Enterprises of the OECD unanimously endorsed a revised version of the OECD Guidelines for Multinational Enterprises. See Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises, Resolution 17/4, UN Doc A/HRC/RES/17/4*, 6 July 2011, [daccess-ods.un.org/tmp/638279.914855957.html](https://daccess-ods.un.org/tmp/638279.914855957.html)

<sup>12</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 15(c), 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

<sup>13</sup> OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (Third Edition)*, 2016, <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>. When outlining what international standards say on each of the key issues discussed in this briefing, both the UN Guiding Principles and OECD Guidelines are used as key sources. Where these documents lack clarity, further interpretations of these documents by UN bodies such as the Office of the United Nations

# CASE STUDY: PETROCHEMICAL POLLUTION IN THE UNITED STATES

*“The frustration of linguistic barriers, ballooning healthcare costs, and fear of deportation are only exhausted by a constant stream of chemical disasters, toxic odours, and a lack of information. Low-wealth communities of colour like ours are... left to shoulder the risk, sickness, and death of petrochemical production.”*

*Yvette Arellano, Founder and Director of Fenceline Watch*

The Houston Ship Channel (Ship Channel) is the largest petrochemical complex in the US, home to over 400 petrochemical plants and two of the country’s largest refineries.<sup>14</sup> These facilities are operated by some of the world’s largest fossil fuel and chemical companies, including subsidiaries of European domiciled companies, and suppliers to the EU. Representing about 40% of US petrochemical manufacturing, the Ship Channel complex produces large volumes of petrochemicals and plastics for domestic and export markets.<sup>15</sup> In 2022, Europe received 78% of US ethylene exports<sup>16</sup> – production of which is highly concentrated along the Gulf Coast – with Belgium, the Netherlands and Germany among the top receiving countries.<sup>17</sup> Ethylene is used to produce polyethylene – one of the most produced plastics in the world, used for food packaging, containers, bottles and bags. The industry producing the building blocks of these plastic goods emits huge volumes of pollution that pose significant risks to human health, the environment and climate.

Frontline communities living adjacent to 52-mile-long Ship Channel endure frequent chemical odours that seep into their neighbourhoods and homes, against the backdrop of plumes of smoke billowing from chemical plants and refinery flares burning day and night. A lack of zoning restrictions in the area means that these communities live and go to school alongside petrochemical

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High Commissioner for Human Rights (OHCHR) and Special Procedures of the Human Rights Council - particularly the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights) – are referenced where necessary.

<sup>14</sup> S. H. Linder, S. Abramson et al. “A Closer Look at Air Pollution in Houston: Identifying Priority Health Risks”, *Report of the Mayor’s Task Force of the Health Effects of Air Pollution*, 2006

<sup>15</sup> Forbes, “After Harvey, Attention Turns To Houston’s Petrochemical Infrastructure”, 30 August 2017, <https://www.forbes.com/sites/uhenergy/2017/08/30/after-harvey-the-issue-turns-to-houstons-aging-petrochemical-infrastructure/?sh=7b8f336222cc>

<sup>16</sup> S&P Global, “Europe receiving majority of US ethylene exports: Navigator”, 19 August 2022 <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/petrochemicals/081922-europe-receiving-majority-of-us-ethylene-exports-navigator>

<sup>17</sup> GlobeNewswire, “Ethylene Market Report: Current Industry Trends, Insights, and Forecast to 2030 – IndexBox”, 18 May 2022, <https://www.globenewswire.com/en/news-release/2022/05/18/2446321/0/en/Ethylene-Market-Report-Current-Industry-Trends-Insights-and-Forecast-to-2030-IndexBox.html>

facilities that pose serious risks to their health.<sup>18</sup> Most of these communities face cumulative risks from numerous pollution sources, but the petrochemical industry is a major contributor of harmful emissions.<sup>19</sup> In addition to chronic exposure from routine petrochemical operations, frontline communities are all too often exposed to unauthorised pollution spikes that exceed permitted levels, putting their health at even greater risk.<sup>20</sup> These releases occur during facility start-ups, shutdowns, or malfunctions, caused by industrial accidents to preventative shutting down of facilities due to extreme weather events. Lasting from a few hours to several days or weeks, in some instances a single emissions event can exceed a facility's permitted annual emissions.<sup>21</sup>

*"[The plants] are flaring almost every week. They'll tell us it's normal, it's for safety. But if it's for safety, why is it happening so often? Sometimes we'll see a big old flare with dark black smoke and even then, they tell us we've had a failure and we're preventing an explosion, there's nothing to worry about."* Juan Parras, Founder and Executive Director of Texas Environmental Justice Advocacy Services (T.e.j.a.s.)<sup>22</sup>

Exposure to petrochemical pollutants formed and emitted in the production of ethylene - such as benzene and formaldehyde - has been linked to several health impacts commonly reported by frontline communities, including high cancer rates, asthma and respiratory issues, headaches, reproductive issues, and irritation of the skin, eyes, nose, and throat.<sup>23</sup> Benzene is a well-established cause of cancer in humans, and long-term exposure has also been linked to other adverse health impacts including damage to the immune system, anaemia and reproductive issues.<sup>24</sup> A University of Texas School of Public Health study found elevated rates of all types of childhood leukaemia in census tracts<sup>25</sup> in the greater Houston area with the highest ambient levels of benzene and 1,3-

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<sup>18</sup> R. D. Bullard, "Environmental Racism and Invisible Communities", 96 *West Virginia Law Review*, 1994

<sup>19</sup> Environmental Integrity Project, *Plastics Pollution on the Rise*, 5 September 2019, <https://environmentalintegrity.org/reports/plastics-pollution-on-the-rise/>

<sup>20</sup> Environmental Integrity Project, *Illegal Air Pollution in Texas, 2020*, 14 October 2021, <https://environmentalintegrity.org/wp-content/uploads/2021/10/Illegal-Air-Pollution-in-Texas-2020.pdf>

<sup>21</sup> Sierra Club, *How Startup, Shutdown, and Malfunction Loopholes Give Free Passes to Polluters*, September 2022, [https://www.sierraclub.org/sites/www.sierraclub.org/files/2022-09/SSM\\_FactSheet.pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/2022-09/SSM_FactSheet.pdf)

<sup>22</sup> Meeting with Juan Parras, Founder and Executive Director of T.e.j.a.s., 30 January 2023

<sup>23</sup> American Public Health Association, *Reducing Occupational Exposure to Benzene in Workers and Their Offspring*, 14 December 2005, <https://apha.org/Policies-and-Advocacy/Public-Health-Policy-Statements/Policy-Database/2014/07/09/14/47/Reducing-Occupational-Exposure-to-Benzene-in-Workers-and-Their-Offspring>; One Breath Partnership, *Formaldehyde Air Pollution in Houston*, 1 July 2021, <https://environmentalintegrity.org/news/monitoring-shows-plumes-of-carcinogenic-formaldehyde-in-neighborhoods-along-houstons-ship-channel/>; Center for International Environment Law (CIEL), *Plastics & Health: The Hidden Costs of a Plastic Planet*, February 2019, <https://www.ciel.org/wp-content/uploads/2019/02/Plastic-and-Health-The-Hidden-Costs-of-a-Plastic-Planet-February-2019.pdf> (ciel.org)

<sup>24</sup> International Agency for Research on Cancer Working Group on the Evaluation of Carcinogenic Risks to Humans, *Chemical Agents and Related Occupations*, 2012, <https://publications.iarc.fr/Book-And-Report-Series/larc-Monographs-On-The-Identification-Of-Carcinogenic-Hazards-To-Humans/Chemical-Agents-And-Related-Occupations-2012>

<sup>25</sup> Census tracts are small, relatively permanent statistical subdivisions of a county, averaging about 4,000 inhabitants, according to the US Census Bureau, "Census Tracts Overview", <https://www2.census.gov/geo/pdfs/education/CensusTracts.pdf>

butadiene, compared with census tracts with the lowest levels of these chemicals.<sup>26</sup>

Adverse health outcomes associated with pollution can have knock on impacts. For example, it can limit people's ability to work, attend school and fulfil caregiving responsibilities. Loss of work and healthcare costs can also lead to economic insecurity and anxiety. Reverend James Caldwell, Founder and Director of Houston-based Coalition of Community Organizations told Amnesty International:

*"If you're pregnant, you're breathing contaminated air, you're worried about that going to your child. If you get sick, who's going to take care of your kids? What about your job? This [pollution] impacts the whole community."*<sup>27</sup>

In addition to routine, everyday exposure to pollutants, frontline communities regularly face 'exceedances' and disasters, meaning that chemical and other harmful exposures are higher. For example, from July 2021 to June 2022, at least four refineries in the Ship Channel area released benzene levels along their property boundaries above the Environmental Protection Agency (EPA) action level of nine micrograms per cubic meter from July 2021, according to the environmental non-profit Environmental Integrity Project.<sup>28</sup> Frontline communities face the constant threat of chemical disasters. In 2019 alone, residents along the Ship Channel experienced four major petrochemical disasters, including fires, an explosion, and a leak.<sup>29</sup> Such incidents often lead to local authorities placing residents under shelter-in-place orders and ordering school closures due to elevated levels of hazardous chemicals. School closures can harm children's right to education.

The Center for Effective Government used data from the EPA's risk management program and school location data to determine that at least one in three US schoolchildren attend school within the vulnerability zones of high-risk chemical facilities and therefore could be impacted by a release or explosion.<sup>30</sup> San Jacinto Elementary in Deer Park (in the Ship Channel area) is the school most at risk in the country, within the vulnerable zones of 41 different facilities.<sup>31</sup> Over half (60%) of the

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<sup>26</sup> Kristina W. Whitworth, Elaine Symanski & Ann. L Coker, "Childhood Lymphohematopoietic Cancer Incidence and Hazardous Air Pollutants in Southeast Texas, 1995-2004", *Environmental Health Perspectives*, 2008 116(11) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2592281/>

<sup>27</sup> Meeting with Reverend James Caldwell, founder and director of the Coalition of Community Organizations, 2 February 2023. On file with Amnesty International

<sup>28</sup> Environmental Integrity Project, *Benzene Pollution at Facility Fencelines*, 11 April 2023 <https://storymaps.arcgis.com/stories/9cc8aa37cb34444dbb053a097c22ba07>

<sup>29</sup> 2019 incidents include: Click2Houston, "Investigation underway after fire damages Exxon facility in Baytown" 16 March 2019, <https://www.click2houston.com/news/2019/03/16/investigation-underway-after-fire-damages-exxon-facility-in-baytown/>; CNN, "A huge fire at a Texas chemical plant is out, 4 days after it started", 20 March 2019, <https://edition.cnn.com/2019/03/20/us/deer-park-itc-plant-fire-wednesday/index.html>; Chron, "Houston ship channel remains closed after tanker collision spills gasoline", 11 May 2019, <https://www.chron.com/news/houston-texas/houston/article/Houston-Ship-Channel-remains-closed-after-tanker-13837896.php>; CNN, "66 treated after fire breaks out at ExxonMobil plant in Baytown, Texas", 31 July 2019, <https://edition.cnn.com/2019/07/31/us/exxon-baytown-texas-plant-fire/index.html>

<sup>30</sup> Center for Effective Government, *Kids in Danger Zones*, 30 September 2014, <https://www.foreffectivegov.org/blog/one-three-interactive-map-report-show-kids-danger-chemical-catastrophes>

<sup>31</sup> Center for Effective Government, *Kids in Danger Zones*, 30 September 2014, <https://www.foreffectivegov.org/blog/one-three-interactive-map-report-show-kids-danger-chemical-catastrophes>



children at San Jacinto Elementary are from minoritized racial and ethnic backgrounds and 41% are from low-income backgrounds.<sup>32</sup>

Petrochemical pollution impacts some groups more than others. People living within 3-miles of petrochemical clusters earn 28% less than the average US household and are 67% more likely to be people of colour.<sup>33</sup> Many communities impacted by petrochemical pollution along the Ship Channel are disproportionately people of colour, low-income, and have limited English proficiency.<sup>34</sup> Women and people with internal reproductive organs are also uniquely impacted by petrochemical pollution, which studies have linked to reproductive harms, miscarriages, preterm birth and birth defects.<sup>35</sup> Yvette Arellano, Founder and Director of environmental justice group Fenceline Watch, has spent their entire life in the Ship Channel area. They told Amnesty International:

*“Our future is in the crosshairs as toxic exposure increases mutagenic harm [harm causing genetic mutation] leading to sterility, birth defects, miscarriages, and low-birth weights. As women of colour... we are disenfranchised and disproportionately affected. Many including myself are diagnosed with infertility. Babies are affected in the womb before their first breath leading to developmental, neurological, and immune issues. Our human rights are violated as toxic exposures are carried over generations from parents to children and their children without access to justice or remedy.”<sup>36</sup>*

Despite the severity of the risks faced by frontline communities, information on exposure and risks from local agencies and industry, when provided, is too often delayed, sparse, conflicting, and mostly inaccessible to those with limited English proficiency. One particularly egregious example is the response by the EPA and Texas Commission on Environmental Quality to air pollution in the aftermath of Hurricane Harvey in 2017. The Center for Biological Diversity found that nearly one million pounds of petrochemical pollution – containing chemicals known to cause serious health harms and cancer – had been leaked in the region as a result of flaring and chemical spills connected to Harvey.<sup>37</sup> An audit by the EPA Office of the Inspector General later found that official

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<sup>32</sup> The Texas Tribune, “San Jacinto Elementary School” <https://schools.texastribune.org/districts/deer-park-isd/san-jacinto-elementary-school/#:~:text=San%20Jacinto%20Elementary%20School%20is,and%20English%20language%20learning%20programs>. (accessed on 14 April 2023)

<sup>33</sup> Beyond Plastics, *The New Coal: Plastics and Climate Change*, October 2021 <https://www.beyondplastics.org/plastics-and-climate>

<sup>34</sup> Sustainable Research Systems, *Evaluation of Vulnerability and Stationary Source Pollution in Houston*, 2009 <https://www.nrdc.org/sites/default/files/houston-stationary-source-pollution-202009.pdf>; EPA, *Fact Sheet: Final Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards Overview*, 2010 [https://www.epa.gov/sites/default/files/2016-06/documents/2010-0682\\_factsheet\\_overview.pdf](https://www.epa.gov/sites/default/files/2016-06/documents/2010-0682_factsheet_overview.pdf)

<sup>35</sup> J. Carré, N. Gatimel et al, “Does air pollution play a role in infertility?: a systematic review”, *Environmental Health*, 2017, 16:82 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5534122/>; W. Nicole, “On Wells and Wellness: Oil and Gas Flaring as a Potential Risk Factor for Preterm Birth”, *Environmental Health Perspectives*, 2020, 128(11) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7682589/#:~:text=Overall%2C%20being%20exposed%20to%2010,weight%20or%20fetal%20growth%20restriction>

<sup>36</sup> Yvette Arellano, Founder and Director of Fenceline Watch, by email, 21 April 2023. On file with Amnesty international.

<sup>37</sup> Center for Biological Diversity, “Analysis: Nearly 1 Million Pounds of Seven Deadly Air Pollutants Released by

communication on air quality was limited and some impacted residents were unaware of air quality risks during and immediately after the hurricane.<sup>38</sup>

Inadequate access to clear, understandable information hinders peoples' ability to make informed decisions. Moreover, lack of information, along with language barriers faced by frontline communities<sup>39</sup> and a complex and opaque permitting process,<sup>40</sup> act as a barrier to meaningful participation by community members in decision making, and to their ability to raise concerns about industry.

The US petrochemical industry is undergoing a huge expansion, largely driven by fossil fuel companies investing in plastics production to replace markets lost to the transition to renewable energy.<sup>41</sup> This growth threatens further harm to communities, and also poses a threat to the climate and the country's ability to meet its Paris Agreement climate goals, as the petrochemicals are made from fossil fuels and their production entails significant greenhouse gas emissions.<sup>42</sup> While the industry fuels the climate crisis, in turn, climate change-driven extreme weather events further expose frontline communities to human rights abuse as they can lead to enormous petrochemical releases, trapping frontline communities in a perpetual cycle of harm.

For decades petrochemical facilities have been polluting the environment in which frontline communities live, work, and breathe, yet the authorities have failed to take adequate action to regulate the industry. The Texas Commission on Environmental Quality rarely enforces fines for companies that release pollutants in violation of their permit limits. In June 2022, a spokesperson for the commission told the investigative news organisation Public Health Watch that "*the current enforcement rate for reported emission events is over 10%.*"<sup>43</sup> But analysis of state records has shown previous enforcement rates to be as low as 3%.<sup>44</sup> Even when fines are enforced, they are often well below the maximum allowed by federal law; advocates believe that this low rate of

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Texas Refineries During Harvey Floods", 1 September 2017,

[https://www.biologicaldiversity.org/news/press\\_releases/2017/air-pollution-09-01-2017.php](https://www.biologicaldiversity.org/news/press_releases/2017/air-pollution-09-01-2017.php)

<sup>38</sup> EPA Office of Inspector General, *EPA Needs to Improve Its Emergency Planning to Better Address Air Quality Concerns During Future Disasters*, 16 December 2019, [https://www.epa.gov/sites/default/files/2019-12/documents/epaog\\_20191216-20-p-0062.pdf](https://www.epa.gov/sites/default/files/2019-12/documents/epaog_20191216-20-p-0062.pdf)

<sup>39</sup> Texas Tribune, "Texas environment agency's plan to remedy language discrimination allegations leaves advocates frustrated", 14 March 2022, <https://www.texastribune.org/2022/03/14/tceq-spanish-language-access-texas/>

<sup>40</sup> Center for International Environmental Law, T.e.j.a.s et al, *Plastics & Health: The Hidden Costs of a Plastic Planet*, February 2019; Texas Tribune, "Website aims to make pollution permit information more accessible in Houston", 15 September 2022, <https://www.texastribune.org/2022/09/15/texas-pollution-tceq-air-alliance-website/>

<sup>41</sup> Yale Environment 360, "The Plastics Pipeline: A Surge of New Production Is on the Way", 19 December 2019, <https://e360.yale.edu/features/the-plastics-pipeline-a-surge-of-new-production-is-on-the-way>

<sup>42</sup> Rocky Mountain Institute, *Emissions Out the Gate: State of the Refining and Petrochemical Industries*, 2022, <https://rmi.org/insight/emissions-out-the-gate/>

<sup>43</sup> Public Health Watch, "Houston-Area Residents Take Pollution Monitoring Into Their Own Hands. The Results are Worse Than Feared.", 15 December 2022, <https://publichealthwatch.org/2022/12/15/houston-texas-air-pollution-chemicals-monitors/>

<sup>44</sup> Environmental Integrity Project, *Texas Fails to Penalize 97 Percent of Illegal Air Pollution Releases*, 7 July 2017 <https://environmentalintegrity.org/news/texas-fails-to-penalize-97-percent-of-illegal-air-pollution-releases/>

sanctions is insufficient to incentivise compliance.<sup>45</sup>

### **The implications for the CSDDD**

This case study demonstrates a number of key issues which policymakers in the EU should keep in mind as they finalise the CSDDD.

The first is the broad range of harm communities experience due to corporate actions. Under the CSDDD it is crucial that companies be required to conduct their human rights and environmental due diligence with respect to all human rights risks and impacts. It is also critically important that companies be required to assess human rights impacts using an intersectional lens that considers gender, and racial justice among other hierarchies so that the disparate impacts faced by these groups so they can be effectively addressed during human rights and environmental due diligence.

The second issue that this case demonstrates is the linkage between the impact of companies on climate change, the environment, and human rights, which communities living near these petrochemical facilities feel acutely. The CSDDD must ensure it includes sufficient provisions related to the direct environmental and human rights impacts, as well as the climate impacts of companies.

Finally, this case demonstrates the importance of ensuring access to justice for victims of corporate harm, as the communities face several barriers to raise their concerns, including lack of access to information. The CSDDD is an opportunity to provide victims of corporate harm, such as those living along the Houston Ship Channel, alternative avenues for accessing information and accessing justice.

## **KEY ISSUES**

### **1. HUMAN RIGHTS SCOPE**

Under the CSDDD, companies will be required to assess and address the human rights risks and impacts linked to their operations and value chains. The scope of human rights that businesses will have to assess under the directive is under discussion.<sup>46</sup> Amnesty International advocates that companies be required to assess all human rights risks and impacts using a risk-based approach. This section explains how such an approach aligns with international standards on business and human rights, how the proposals put forward by the European Commission and the Council do not meet this standard, and why victims of corporate-related human rights abuses might suffer should the CSDDD not require companies to assess their risks and impacts in relation to all human rights.

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<sup>45</sup> One Breath Partnership, "Why doesn't TCEQ fine polluters more?", 20 August 2020, <https://onebreathou.org/newsroom/2020/08/texas-air-pollution-fines-enforcement/>

<sup>46</sup> See: European Council, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach*, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

### **International standards on human right scope**

International standards require companies to look at all human rights as part of their human rights due diligence. This is because, as stated in both the UN Guiding Principles and OECD Guidelines, “business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights”.<sup>47</sup> As expressed in the Office of the High Commissioner for Human Rights’ interpretative guidance to the UN Guiding Principles, it is “not possible to limit the application of the responsibility to respect human rights to a particular subset of rights for particular sectors”.<sup>48</sup>

In practice, human rights risks vary by industries and contexts. Therefore, international standards outline that instead of limiting the human rights they assess, companies should use a risk-based approach to human rights due diligence. This means that companies should carry out a broad initial scoping exercise to identify all potential human rights risks and impacts across their operations and value chains. They can then prioritise the most significant risk areas (based on severity and likelihood) for ongoing assessment.<sup>49</sup>

With respect to which international human rights instruments companies should reference when conducting human rights due diligence, the OECD guidelines state that reference should be made to the International Bill of Human Rights (that is, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), to the core International Labour Organisation (ILO) instruments as well as to UN instruments which have elaborated on the rights of specific groups or populations such as women, children, Indigenous peoples, and migrant workers.<sup>50</sup> The OECD guidelines also specify that in situations of armed conflict, enterprises should respect the standards of international humanitarian law.<sup>51</sup>

### **European Commission and Council of the EU positions on human rights scope**

Instead of requiring companies to look at all human rights risks and impacts, the European Commission’s proposal defines the human rights impacts companies will have to assess by reference to a limited list of human rights violations in an annex, and then a ‘catch-all clause’ capturing all other violations, if they are also covered by a separate incomplete list of UN treaties and ILO instruments. The limited list of human rights violations does not include for example the right to a clean, healthy and sustainable environment or the right to freedom of movement. The list of international conventions excludes instruments such as the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, ILO standards on occupational safety

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<sup>47</sup> OECD, *OECD Guidelines for Multinational Enterprises*, 2011, p32, <http://mneguidelines.oecd.org/guidelines/>; and UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 1 January 2012, p13, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>48</sup> UN OHCHR, *The Corporate Responsibility to respect Human Rights: An Interpretive Guide*, 2012, p13, <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/RtRInterpretativeGuide.pdf>

<sup>49</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p23, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>50</sup> OECD, *OECD Guidelines for Multinational Enterprises*, 2011, p32, <http://mneguidelines.oecd.org/guidelines/>

<sup>51</sup> OECD, *OECD Guidelines for Multinational Enterprises*, 2011, p32, <http://mneguidelines.oecd.org/guidelines/>

and health as well as conventions related to International Humanitarian Law.<sup>52</sup>

The Council proposes an even more limited approach by firstly reducing the initial list of human rights violations referenced in the annex, removing for example, several rights of children such as the right to education. Secondly, referring to an even more limited list of international human rights instruments, excluding treaties such as the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of the Child (both ratified by all EU member states). And finally, removing the catch all clause included in the European Commission's proposal and introducing a complex set of conditions which in practice means that companies would only have to assess human rights enshrined in the listed treaties (as opposed to the limited list of human rights) in relation to their *own* operations, and not in relation to the activities of their business partners, and only if deemed reasonably foreseeable.

Because of these omissions, neither the European Commission's CSDDD proposal nor the Council's General Approach on the CSDDD fully align with international standards.

### **The impact on rightsholders**

Amnesty International has documented many cases of human rights abuses - committed directly by corporate actors or through their business relationships - which would be at risk of not being included in the scope of the CSDDD under the Council's General Approach or the European Commission's position.

For example, Amnesty International exposed a range of labour rights abuses linked to construction in Qatar in the lead up to the 2022 World Cup.<sup>53</sup> This huge project involved numerous international, and European, companies as well as Qatari subcontractor firms.<sup>54</sup> Amnesty International exposed conditions which amounted to forced labour and, up until recently migrant workers faced significant restrictions on the freedom of movement including through the illegal confiscation of their passports.<sup>55</sup> For example, one Nepalese worker told Amnesty International:

*"I hope that my fellow countrymen from Nepal don't get trapped in such a company the way we did... There is an illness in my family, my father is in hospital. I have been trying to go back for*

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<sup>52</sup> To read more about the civil society concerns regarding the material scope in the European Commission's proposal and other issues please see: European Coalition for Corporate Justice (ECCJ), *European Commission's proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis*, 5 April 2022, <https://corporatejustice.org/publications/analysis-of-eu-draft-directive-on-due-diligence/>

<sup>53</sup> Amnesty International, "Qatar World Cup of shame", <https://www.amnesty.org/en/latest/campaigns/2016/03/qatar-world-cup-of-shame/>, accessed on 2 May 2023.

<sup>54</sup> Amnesty International, *The Dark Side of Migration: Spotlight on Qatar's construction sector ahead of the world cup*, (Index: MDE 22/010/2013), <https://www.amnesty.org/en/documents/MDE22/010/2013/en/>

<sup>55</sup> Since publishing this research, the law in Qatar has changed allowing migrant workers more freedom of movement. However, despite recent changes Amnesty International research shows that freedom of movement for migrant workers is far from guaranteed. Amnesty International, *Unfinished business: what Qatar must do to fulfil promises on migrant workers' rights* (Index: MDE 22/6106/2022), 20 October 2022, <https://www.amnesty.org/en/documents/mde22/6106/2022/en/>

*his treatment.”*<sup>56</sup>

International business and human rights standards establish that European companies involved in, or subcontracting, construction projects in Qatar should have conducted human rights due diligence to ensure that they are not causing, contributing to, or are linked to such human rights harms. Yet neither the Council’s General Approach nor the European Commission’s CSDDD proposal explicitly includes the right to freedom of movement in the proposed list of human rights impacts companies will have to assess in relation to their business relationships. This means that the companies linked to this type of harm would not need to take this into account – and could essentially be allowed to turn a blind eye to an egregious abuse.

Similarly, the Council’s General Approach does not include any reference to the rights of Indigenous Peoples, nor include the UN Declaration on the Rights of Indigenous Peoples in the list of relevant international human rights instruments. But it has been well documented how businesses harm the rights of Indigenous Peoples around the world. For example, in its 2020 report, [‘From Forest to Farmland’](#) Amnesty International uncovered how beef from cattle grazed illegally in protected areas in the Brazilian Amazon was entering the supply chain of the world’s largest beef producer, JBS, a major exporter to the EU.<sup>57</sup> Amnesty International’s report exposed how Indigenous peoples had had their land illegally seized and many faced significant threats, intimidation, and violence during the process. Endi, an indigenous Uru-Eu-Wau-Wau man, said:

*“It is like becoming homeless. For us [the forest] means everything necessary for our survival. Without the forest we are nothing, we have nowhere to go.”*<sup>58</sup>

JBS later said that it was putting in place steps to better monitor its suppliers.<sup>59</sup>

## Conclusion

International standards establish that companies should assess human rights risks and impacts in relation to all human rights using a risk-based approach. They also establish that when conducting due diligence, companies should reference the full body of UN human rights treaties and ILO instruments, as well as international humanitarian law.

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<sup>56</sup> Amnesty International, *The Dark Side of Migration: Spotlight on Qatar’s construction sector ahead of the world cup*, (Index: MDE 22/010/2013), <https://www.amnesty.org/en/documents/MDE22/010/2013/en>

<sup>57</sup> To see the full details of Amnesty International’s research as well as the company responses, please see: Amnesty International, *From forest to farmland: Cattle illegally grazed in Brazil’s Amazon found in JBS’s supply chain* (Index: AMR 19/2657/2020), 15 July 2020, <https://www.amnesty.org/en/documents/amr19/2657/2020/en>

<sup>58</sup> Amnesty International, *From forest to farmland: Cattle illegally grazed in Brazil’s Amazon found in JBS’s supply chain* (Index: AMR 19/2657/2020), p27-28, 15 July 2020, <https://www.amnesty.org/en/documents/amr19/2657/2020/en>

<sup>59</sup> On 23 September 2020, JBS announced it would introduce a new system to monitor its cattle suppliers, including its indirect suppliers, by 2025. See: Amnesty International, “Brazil: Cattle illegally grazed in the Amazon found in supply chain of leading meat-packer JBS”, 15 July 2020, [amnesty.org/en/latest/press-release/2020/07/brazil-cattle-illegally-grazed-in-the-amazon-found-in-supply-chain-of-leading-meat-packer-jbs](https://www.amnesty.org/en/latest/press-release/2020/07/brazil-cattle-illegally-grazed-in-the-amazon-found-in-supply-chain-of-leading-meat-packer-jbs)

Both the Council and the European Commission's proposals fall short of international standards. The approaches they have adopted instead are overcomplicated and lack clarity for businesses.<sup>60</sup>

Including a restricted list of human rights that companies must assess under the CSDDD is at odds with the principles of indivisibility and interdependence of human rights. And as the case studies outlined in this briefing demonstrate, there is a risk that if the CSDDD does not include an open-ended definition of human rights impacts, cases of human rights abuse will fall outside the scope of the Directive.

To align with international standards, and to ensure that all corporate-related human rights abuses are captured by the CSDDD, the co-legislators could replicate the approach of the EU Digital Services Act. The Digital Services Act requires online platforms to conduct risk assessments which assess "any actual or foreseeable negative effects for the exercise of fundamental rights" (emphasis added)<sup>61</sup> and then outlines a list of particularly relevant human rights impacts online platforms may impact, but this list is non-exhaustive.

### **Recommendations**

- Under the CSDDD companies should be required to conduct human rights and environmental due diligence with respect to all human rights risks and impacts using a risk-based approach.
- A comprehensive, but non-exhaustive, list of international human rights instruments should be included in the annex of the CSDDD but for reference only.

### **CLIMATE AND ENVIRONMENT – POP OUT BOX**

Climate change and environmental harm are human rights issues.

The climate emergency is a human rights crisis of unprecedented proportions. Climate change threatens the enjoyment of civil, political, economic, social and cultural rights of present and future generations and, ultimately, the future of humanity. When climate change-related impacts hit a country or a community, the knock-on effects can seriously undermine the enjoyment of the right to life lived in dignity, endanger a range of freedoms, and in many cases even put at risk the cultural survival of entire peoples. Similarly, the loss of biodiversity and the pollution crisis pose a serious challenge to human rights, impacting health, food security and access to safe water, among other effects.

International standards are clear that companies must assess and address risks and impacts related to all human rights as part of their human rights due diligence. This includes the human right to a

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<sup>60</sup> Arguably, a risk-based approach in which businesses are required to identify all potential human rights risks and impacts, and then prioritise the most salient risks for further action would be more effective. After the identification phase each company will be left with only a limited number of risks and impacts to address, and this list will be tailored to the company's sector, operations, and business relationships making it a much more practical approach for the CSDDD than the proposed alternatives.

<sup>61</sup> European Union (EU), *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)*, <http://data.europa.eu/eli/reg/2022/2065/oj>

clean, healthy and sustainable environment. This right is enshrined in a variety of human rights instruments and over 110 national constitutions. It was also officially recognized by UN member states at the Human Rights Council and the General Assembly, respectively in October 2021 and July 2022.<sup>62</sup> The UN General Assembly also noted that “the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, and the resulting loss in biodiversity interfere with the enjoyment of this right - and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights.” Despite this, the proposals from the European Commission and the Council fail to sufficiently address environmental harm and corporate impacts on climate change.

Under their proposals, environmental impacts are defined as an adverse impact on the environment resulting from the violation of obligations listed in international conventions which are subsequently listed in an annex. However, the list of international conventions in both annexes are far from comprehensive, failing to include key environmental conventions such as the Paris Agreement and Aarhus Convention.<sup>63</sup> Beyond this, the fragmented nature of international conventions related to the environment and climate means it is not logical to define environmental impacts in this manner. Instead, a broader definition on environmental impacts should be established.<sup>64</sup>

Both co-legislator proposals would oblige companies to develop a plan to “ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C”<sup>65</sup> However, their proposals are not strong enough: this

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<sup>62</sup> UN, “UN General Assembly declares access to clean and healthy environment a universal human right”, 28 July 2022, <https://news.un.org/en/story/2022/07/1123482>

<sup>63</sup> The Paris Agreement is a legally binding international treaty which entered into force on 4 November 2016. The Agreement includes commitments from all countries to reduce their emissions and work together to adapt to the impacts of climate change. Over 190 States and the European Union have joined the agreement. Paris Agreement (UN), 12 December 2015, <https://www.un.org/en/climatechange/paris-agreement>

The UN Economic Commission Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) guarantees access to information, public participation and access to justice in relation to environmental rights. The EU and its 27 Member States are all Parties to the Aarhus Convention. See: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998, <https://unece.org/environment-policy/public-participation/aarhus-convention/text>;

European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, 23 February 2022, annex 1 part 2, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en); European Council, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach*, Annex 1 part 2, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

<sup>64</sup> The Corporate Sustainability Reporting Directive, EU Taxonomy, and EU Batteries Regulation use ‘impact categories’ to define environmental impact. The use of impact categories would promote alignment across EU legislation and allow for a broader definition of environmental impacts.

<sup>65</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, article



obligation would only apply to very large companies (over 500 employees and with a net turnover of more than EUR 150 million); these companies would only be required to include emission reduction objectives if the company itself identifies, or should have identified, climate change as a principal risk;<sup>66</sup> the proposals provide no explicit criteria for the quality of the plan or an obligation to implement the plan; and unlike other requirements under the directive, companies would not be held liable for the failure to comply with this aspect of the proposal.<sup>67</sup>

For the CSDDD to be fit to tackle corporate-related environmental harm and to help deliver climate justice it must require a number of things.<sup>68</sup> Firstly, in relation to climate change, all companies should be required to include the harmful impacts from their greenhouse gas emissions throughout their global operations in their human rights and environmental due diligence. Secondly, provisions to hold companies liable for their climate related impacts should they fail to conduct effective human rights and environmental due diligence – in line with human rights and environmental impacts - should also be included. Thirdly, in relation to environmental harm, the definition of environmental impacts should be replaced with a broad, open-ended provision including all actual and potential impacts to the environment, including climate and biodiversity.

## 2. VALUE CHAIN SCOPE

The CSDDD will require companies to conduct human rights and environmental due diligence in

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15 (1), 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en); European Council, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach*, Article 15 (1), <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

<sup>66</sup> Article 17 of the European Commission proposals and council of the EU General approach outlines that “Each Member State shall designate one or more supervisory authorities to supervise compliance with the obligations laid down in.... article 15 (on combatting climate change).” The supervisory authority will have the power to investigate, and request information, related to compliance with obligations set out in the CSDDD including the climate transition plan requirement in article 15. However, under the Council general approach these authorities will only have supervise companies that have already adopted a climate transition plan.

<sup>67</sup> For more details please see Article 15 ‘combatting climate change’ in the European Commission and European Council CSDDD proposals. European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, article 15, 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en); and European Council, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach*, Article 15, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

<sup>68</sup> Climate justice is a term used by civil society organizations and social movements to highlight the justice implications of the climate crisis and the need to design just policy responses to climate change. Climate justice approaches focus on the root causes of the climate crisis and how climate change builds on and magnifies inequalities among countries and within countries. Climate justice demands are based on the imperative of addressing such imbalances and injustices, starting from centring climate action in the perspectives, knowledge and demands of groups and communities most affected by the climate crisis. Gender, racial, class, ethnic, disability and inter-generational justice are essential to achieve climate justice. Amnesty International, *Stop burning our rights: What governments and corporations must do to protect humanity from the climate crisis* (Index: POL 30/3476/2021), 7 June 2021, <https://www.amnesty.org/en/documents/pol30/3476/2021/en/>

relation to their own operations and to their value chain – meaning the activities and business relationships involved in the development, distribution and use of a product or service. However, there have been varied attempts to limit how much of the value chain companies will be required to consider. This section outlines what is at risk if companies are not required to look at their entire value chain, how the European Commission and the Council are proposing to limit the value chain, and how any such limitation would not meet international standards.

### **International standards on value chain scope**

International standards outline that when conducting human rights due diligence, businesses should look at their entire value chain.<sup>69</sup> A company's value chain refers to the full range of activities utilised to create a product or service. This includes both *upstream* activities, that are related to the supply of materials and services utilised by the company including the extraction and transportation of raw materials. It also includes *downstream* activities. These relate to what occurs after the product or service has been supplied to the next user in the chain. For example, *downstream* activities include the transport or the use of a product or service created by the company.

Human rights and environmental due diligence is the process by which companies identify human rights and environmental risks and impacts that they may cause, contribute to, or be directly linked to. Given that companies may cause, contribute to, or be directly linked to human rights and environmental abuse at any point in their value chain it is important that they include the entire chain in their assessments.

Because of this, international standards outline that companies should take a risk-based approach to human rights due diligence. This means that once the full value chain has been assessed for risks and impacts, the company can then prioritise the most salient - where saliency is defined based on severity of potential harm as well as likelihood.<sup>70</sup>

### **[Box] Why does the OECD use the term supply chain not value chain?**

The OECD uses the term 'supply chain' instead of value chain in the OECD Guidelines. Some have interpreted this to mean that companies should only assess the upstream part of the value chain. However, the OECD have clarified that their use of the term supply chain is intended to mean the full upstream and downstream parts of the chain and thus has the same intended meaning as the term value chain.<sup>71</sup>

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<sup>69</sup> UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 1 January 2012, p15, [ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights](https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights)

<sup>70</sup> UNGP Reporting, "Salient Human Rights Issues", <https://www.ungpreporting.org/resources/salient-human-rights-issues>, Accessed on 2 May 2023

<sup>71</sup> OECD Watch, Swedwatch, European Coalition for Corporate Justice, European Centre for Constitutional and Human Rights and SOMO, "Downstream due diligence: Setting the record straight" 16 December 2022, <https://corporatejustice.org/publications/setting-the-record-straight-downstream-due-diligence>

## **European Commission and Council of the EU positions on value chain scope**

The European Commission's CSDDD proposal requires companies to conduct human rights and environmental due diligence in relation to their own operations, that of their subsidiaries and their value chain. It defines value chain as, "activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company."<sup>72</sup> However, the due diligence obligation is limited to 'established business relationships' only, where "established business relationships means a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain".<sup>73</sup> Therefore, although the value chain definition under the Commission proposal is broad, the requirement to only look at 'established business relationships' would limit how much of the value chain companies would have to include in their human rights and environmental due diligence.

In its proposal, the Council removed reference to 'established business relationships' and narrowed the definition of value chain. The term value chain was replaced with 'chain of activities' defined as activities of the company's upstream related to the production of goods or provision of services (design, extraction, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service) and activities of the downstream related to the distribution, transport, storage and disposal of the product.<sup>74</sup> The definition of chain of activities excludes the use of products and provision of services, and introduced an exemption for products subject to export control (see 'company & sector scope' section for more details on this aspect).

In both proposals, the extent of the value chain that companies will have to assess as part of their due diligence is curtailed, and thus neither lives up to international standards.

### **The impact on rightsholders**

#### ***Downstream operations***

Limiting the scope of the value chain which companies are required to assess as part of their human rights and environmental due diligence could result in companies missing, and therefore not addressing, significant human rights impacts. Amnesty International has documented cases of human rights and environmental impacts which risk not be in scope of the CSDDD under one or

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<sup>72</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, article 3 (g), 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>73</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, p51, 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>74</sup> With regard to the extent of the inclusion of the financial sector in the value chain scope, see the company scope section.

more of the proposals by EU co-legislators.

These proposals either remove the *entire* downstream part of the value chain e.g. the distribution, transport, storage, disposal and use of a product.

For example, in the 2022 Amnesty International report, “Deadly Cargo: Exposing the supply chain that fuels war crimes in Myanmar”, researchers detailed how two Myanmar affiliates of the Singapore and Switzerland-based Puma Energy contributed to human rights harm by supplying aviation fuel to the Myanmar military, which undertook unlawful air strikes.<sup>75</sup> These attacks resulted in the death and injury of civilians and the displacement of entire communities. Puma Energy stated that its Myanmar affiliates limited their operations to the provision of aviation fuel for civilian purposes, but in reality, research showed that the aviation fuel managed by Puma Energy’s affiliates at the port of entry was either directly provided to the Myanmar military or could be misappropriated by it.

The report, “My Eye Exploded”, exposed the widespread, global misuse of kinetic impact projectiles such as plastic and rubber bullets in the policing of public assembly.<sup>76</sup> The research identified Lebanese security forces repeatedly employing a variety of French manufactured rubber projectiles, tear gas launchers and projectiles against peaceful protestors in 2019 and 2020. Faten (not her real name) was hit by a tear gas grenade in her right shoulder. She told Amnesty International:

*“The riot police were only 10 meters away. I felt I was hit by something on my shoulder. I couldn’t feel my arm anymore. I thought I lost it, and then I collapsed. They were shooting tear gas at chest level directly at the people.”<sup>77</sup>*

Amnesty International and others have also widely documented the widespread misuse of digital surveillance technologies such as NSO Group’s Pegasus spyware which has been found to have been used to target journalists, lawyers, politicians and human rights defenders around the world.<sup>78</sup> Pegasus allows operators to access a target’s phone – to read messages, see photos, and even turn on its microphone.<sup>79</sup> While this tool may be marketed for legitimate purposes – to “collect data from

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<sup>75</sup> To see the full details of Amnesty International’s research as well as the company responses, please see: Amnesty International, *Deadly Cargo: The supply chain that fuels war crimes in Myanmar* (Index: ASA 16/6147/2022), 3 December 2022, [amnesty.org/en/documents/asa16/6147/2022/en/](https://www.amnesty.org/en/documents/asa16/6147/2022/en/).

Puma Energy announced on 5 October 2022 that it was selling its assets in Myanmar and exiting the country.

<sup>76</sup> Amnesty International, “My eye exploded”: *The global abuse of Kinetic Impact Projectiles* (Index: ACT 30/6384/2023), 14 March 2023, <https://www.amnesty.org/en/documents/act30/6384/2023/en/>

<sup>77</sup> Amnesty International, “Lebanon: Military and security forces attack unarmed protesters following explosions – new testimony”, 11 August 2020, <https://www.amnesty.org/en/latest/press-release/2020/08/lebanon-military-and-security-forces-attack-unarmed-protesters-following-explosions-new-testimony/>

<sup>78</sup> Amnesty International, *Uncovering the Iceberg: The Digital Surveillance Crisis Wrought by States and the Private Sector* (Index: DOC 10/4491/2021), 23 July 2021, <https://www.amnesty.org/en/documents/doc10/4491/2021/en>

<sup>79</sup> “Revealed: leak uncovers global abuse of cyber-surveillance weapon”, 18 July 2021,

the mobile devices of specific suspected major criminals”<sup>80</sup> – there is a simultaneous parallel misuse of the tool to target, intimidate and harass civil society.

These three cases demonstrate how products can be misused by the end-user with devastating effects. Removing ‘use’ from the definition of value chain in the CSDDD would mean that companies would not have to address the risk of their products being misused in these manners.

### ***Established business relationships***

Proposals to limit which types of business relationships companies must assess during their human rights and environmental due diligence, risk excluding cases of human rights and environmental abuse linked to various parts of a company’s value chain. For instance, the concept of “established business relationships” may remove parts of the value chain which are informal or less secure from scrutiny.

In the 2016 report “This is what we die for,” Amnesty International and Afreewatch found that children and adults were mining cobalt in exploitative and dangerous conditions in informal mines in the Democratic Republic of Congo.<sup>81</sup> Children interviewed for the report said that they worked for up to 12 hours a day in the mines, carrying heavy loads all to earn only between one and two dollars a day. Researchers showed that this cobalt entered the supply chains of leading technology and car companies - including those based or operating in Europe – via a number of other business actors, including traders in the DRC, who were not directly contracted by the international companies. The nature of the beginning of the cobalt value chain, where groups of artisanal miners sell their goods to middlemen (operating from “buying houses”) usually without a contract, who then sell onto bigger companies to export, means that the links between European companies and the extraction of cobalt are both informal and liable to change.

In ‘The Great Palm Oil Scandal’, researchers revealed a discriminatory pattern of hiring women only as casual day labourers on oil palm plantations in Indonesia, denying them permanent employment and social security benefits such as health insurance and pensions.<sup>82</sup> These roles could be seen as non-established as the women were not formally employed by the company. Yet their labour underpinned a crucial part of the palm supply chain. One worker told researchers that they never

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<https://www.theguardian.com/world/2021/jul/18/revealed-leak-uncovers-global-abuse-of-cyber-surveillance-weapon-nso-group-pegasus>

<sup>80</sup> NSO Group, “Transparency and Responsibility Report 2021”, 30 June 2021, p7, <https://www.nso-group.com/wp-content/uploads/2021/06/ReportBooklet.pdf>

<sup>81</sup> Amnesty International, “*This is what we die for: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt* (Index: AFR 62/3183/2016), 19 January 2016, <https://www.amnesty.org/en/documents/afr62/3183/2016/en/>; and Amnesty International, *Company Responses to the Report: “This is what we die for”: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt* (Index: AFR 62/3412/2016), 9 February 2016, <https://www.amnesty.org/en/documents/afr62/3412/2016/en/>

<sup>82</sup> Amnesty International, *Indonesia: The Great Palm Oil Scandal: Labour abuses behind big brand names* (Index: ASA: 21/5184/2016), 30 November 2016, <https://www.amnesty.org/en/documents/asa21/5184/2016/en/>

even asked for a permanent contract because “it is impossible for a woman to be a permanent worker (on this plantation)”. Amnesty International traced palm oil from these plantations to global food and household good companies – including several operating in the EU.

In both of these cases it is unlikely that the relationships where the human rights harm occurs would be deemed ‘established’. Therefore, if the concept of ‘established business relationships’ were to be included in the final directive, companies would not have to assess these relationships for human rights risks and impacts, and cases like this risk being overlooked.

## Conclusion

International standards establish that companies should assess the entire value chain for human rights risks and impacts as part of human rights due diligence. Once a full assessment of the value chain has been made, attention should be focused on the parts of the value chain where the most salient risks lie. For some companies this may mean a focus on the upstream, whereas for others, such as technology companies, the most salient risks may lie downstream. A requirement to look at the full value chain with a risk-based approach allows flexibility for companies across different sectors to focus on the human rights issues that are most pertinent for their business.

If the CSDDD is to advance the EU’s commitment to transform to a sustainable economy and to protect human rights in Europe and beyond it must ensure the CSDDD includes a requirement for companies to conduct human rights and environmental due diligence in relation to their full value chain.<sup>83</sup> In particular, given the human rights risks related to the use of products, such as surveillance technologies, law enforcement equipment and even fuel, EU policymakers must ensure that the full downstream part of the value chain is included in the CSDDD.

## Recommendations

- Under the CSDDD business enterprises should be required to conduct human rights and environmental due diligence in relation to their entire value chain using a risk-based approach.

## INDUSTRY SCHEMES AND THIRD-PARTY AUDITS – POP OUT BOX

The European Commission and Council both give a prominent role to the use of industry schemes in their CSDDD proposals.

The term *industry scheme* covers a broad array of voluntary initiatives that companies can join, which may support the development and implementation of their human rights and environmental due diligence. The OECD splits industry schemes into two categories: firstly, *facilitation initiatives* such as the UN Global Compact which help facilitate or inform a company’s human rights due

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<sup>83</sup> “The transformation to a sustainable economy is a key political priority of the EU. It is essential for the wellbeing of our society and our planet. Companies play a key role in creating a sustainable and fair economy and society but they need support in the form of a clear framework. EU-level legislation on corporate sustainability due diligence will advance the green transition, and protect human rights in Europe and beyond.” European Commission, “Questions and Answers: Proposal for a Directive on corporate sustainability due diligence”, 23 February 2022, [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_22\\_1146](https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1146)

diligence, but the schemes themselves do not monitor or assess the company's performance.<sup>84</sup> Secondly, there are *verification initiatives*, such as those offered by the Forestry Stewardship Council, which have a written set of requirements for companies and the compliance of members against those criteria are monitored.<sup>85</sup>

Industry schemes vary significantly and have many weaknesses.<sup>86</sup> For example, some have very weak standards that do not align with the UN Guiding Principles and OECD guidelines.<sup>87</sup> Industry schemes vary in how transparent they are and in the frequency and quality of assessments of compliance they conduct.<sup>88</sup> The extent to which such schemes promote meaningful accountability has also been called into question.<sup>89</sup> For example, there can be an inherent conflict of interest of such schemes as the entities auditing the company's compliance are often commissioned and paid by the companies they are auditing.<sup>90</sup>

Despite such well-documented concerns, Membership of an industry scheme is not enough to indicate that a company has undertaken effective human rights and environmental due diligence. For instance, despite the severe labour rights abuses that Amnesty International found on palm oil plantations in Indonesia in 2016 three out of the five palm growers that Amnesty International investigated were certified as producing "sustainable" palm oil by the multistakeholder initiative,

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<sup>84</sup> United Nations Global Compact, "Homepage: UN Global Compact", <https://unglobalcompact.org/>, Accessed on 2 May 2023

<sup>85</sup> Forest Stewardship Council, "Find the Right Certification or Licence", <https://fsc.org/en/find-the-right-certification-or-licence>, Accessed on 2 May 2023; OECD, *The role of sustainability initiatives in mandatory due diligence: Background note on Regulatory Developments concerning Due Diligence for Responsible Business Conduct*, 2022, <https://mneguidelines.oecd.org/the-role-of-sustainability-initiatives-in-mandatory-due-diligence-note-for-policy-makers.pdf>

<sup>86</sup> See for example, SOMO, *A piece, not a proxy*, November 2022, <https://corporatejustice.org/wp-content/uploads/2022/11/A-piece-not-a-proxy.pdf>; Business and Human Rights Resource Centre, "Background materials and analysis", <https://www.business-humanrights.org/en/big-issues/labour-rights/background-materials-analysis/>, Accessed on 2 May 2023; Clean Clothes Campaign, *Fig leaf for fashion: How social auditing protects brands and fails workers*, September 2019, <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>

<sup>87</sup> See: Forest Peoples Programme, *A Comparison of Leading Palm Oil Certification Standards*, 22 November 2017, <https://www.forestpeoples.org/en/responsible-finance-palm-oil-rspo/report/2017/comparison-leading-palm-oil-certification-standards>

<sup>88</sup> See for example: SOMO, *A piece, not a proxy*, November 2022, <https://corporatejustice.org/wp-content/uploads/2022/11/A-piece-not-a-proxy.pdf>;

<sup>89</sup> See: Transnational Institute (TNI), *Multistakeholderism: a critical look*, 10 September 2019, <https://www.tni.org/en/publication/multistakeholderism-a-critical-look>

<sup>90</sup> See: European Centre for Constitutional and Human Rights (ECCHR), Brot für die Welt (BfdW) and MISEREOR, *Human rights fitness of the auditing and certification industry?*, June 2021, [https://www.ecchr.eu/fileadmin/Publikationen/ECCHR\\_BfdW\\_MIS\\_AUDITS\\_EN.pdf](https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_BfdW_MIS_AUDITS_EN.pdf) and SOMO, *A piece, not a proxy*, November 2022, <https://corporatejustice.org/wp-content/uploads/2022/11/A-piece-not-a-proxy.pdf>;

the Roundtable on Sustainable Palm Oil (RSPO).<sup>91</sup> <sup>92</sup> The RSPO's standards include a number of requirements for companies to respect workers' rights including that no forms of forced labour are used in the company's operations.<sup>93</sup> However, Amnesty's research found that the implementation and monitoring of the RSPO's sustainability criteria at the time was extremely weak and that membership of the RSPO should not be used as proof of compliance with workers' human rights.<sup>94</sup>

Despite, both the European Commission and the Council state in their CSDDD proposals that "companies may rely on industry schemes and multi-stakeholder initiatives to support the implementation of their obligations (under this directive<sup>95</sup>)." <sup>96</sup> This language means there is a risk that companies outsource their human rights and environmental due diligence to a weak industry scheme.<sup>97</sup> <sup>98</sup>

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<sup>91</sup> Amnesty International, *Indonesia: The Great Palm Oil Scandal: Labour abuses behind big brand names* (Index: ASA: 21/5184/2016), 30 November 2016, <https://www.amnesty.org/en/documents/asa21/5184/2016/en/>

<sup>92</sup> The Roundtable on Sustainable Palm Oil (RSPO) is a voluntary, global membership organisation for companies in the palm oil supply chain. To become RSPO Certified, organisations are required to demonstrate compliance with the applicable RSPO Standards. See: RSPO, "Certification", <https://rspo.org/as-an-organisation/certification/>, Accessed on 2 May 2023

<sup>93</sup> RSPO, *P&C Principles and Criteria for the production of sustainable palm oil*, 2018, <https://rspo.org/resources/?id=6025>

<sup>94</sup> In response to these findings, the RSPO announced it would take steps to "strengthen its assurance framework." See: RSPO, "Response to Amnesty International report "The great palm oil scandal: Labour abuses behind big brand names", 29 November 2016, <https://rspo.org/rspo-response-to-amnesty-international-report-the-great-palm-oil-scandal-labour-abuses-behind-big-brand-names/>

<sup>95</sup> More specifically articles 5-11 of the directive including 'Integrating due diligence into company's policies and risk management systems', Identifying actual and potential adverse impacts, Prioritisation of identified actual and potential adverse impacts, Preventing potential adverse impacts, Bringing actual adverse impacts to an end, Complaints procedure, Monitoring and Communicating.

<sup>96</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en); European Council, *Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach*, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

<sup>97</sup> See European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, article 7 (4), article 8 (5) and article 22 (2), 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>98</sup> Transparentem, *Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform*, October 2021, <https://transparentem.org/project/hidden-harm/>; Clean Clothes Campaign, *Fig leaf for fashion: How social auditing protects brands and fails workers*, September 2019, <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>; and, ECCHR, BfdW and MISEREOR, *Human rights fitness of the auditing and certification industry?*, June 2021,



The co-legislators also propose a prominent role for *third-party audits*. For example, the European Commission proposes a provision specifying that companies shall not be held liable for harm caused by *indirect* business partners if they require their partners to sign a contract compelling them to comply with a code of conduct as well as prevention and correction action plans. These detail how the company and their business partners will address the human rights and environmental impacts risks and impacts identified in the company's due diligence. Companies then need to seek third-party verification of compliance with these requirements.<sup>99</sup> Unfortunately third-party audits also have significant weaknesses. These weaknesses include the risk of audit-deception or fraud where suppliers conceal labour rights violations in a bid to ensure they pass audits and are not subject to further oversight, as well as poor engagement strategies which mean workers and other stakeholders do not feel able to share their experiences candidly.<sup>100</sup> A significant role for industry schemes and third-party audits in the CSDDD could create a *safe harbour* for companies, where they can avoid being held to account for harm they have contributed to through the actions of their business partners. In line with the OECD guidelines,<sup>101</sup> Amnesty International recommends that under the CSDDD, although businesses may utilise industry schemes and auditors if they wish, they should remain individually responsible for their human rights and environmental due diligence.

### 3. COMPANY & SECTOR SCOPE

This section explores the proposals of EU co-legislators to only include companies of a certain size in the scope of the CSDDD as well as to exclude some sectors from the scope of the Directive, including financial institutions and companies producing products subject to export control. It is outlined here why such limitations fail to meet international standards, why export controls are not sufficient without due diligence, and why proposals to exclude certain sectors from the scope of the directive would lead to egregious human rights and environmental harm being left unaddressed by the CSDDD.

#### **International standards on company and sector scope**

International standards on business and human rights articulate that all businesses - of all sizes,

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[https://www.echr.eu/fileadmin/Publikationen/ECCHR\\_BfdW\\_MIS\\_AUDITS\\_EN.pdf](https://www.echr.eu/fileadmin/Publikationen/ECCHR_BfdW_MIS_AUDITS_EN.pdf)

<sup>99</sup> European Commission, Proposal for a Directive on corporate sustainability due diligence and annex, 23 February 2022, article 7 (4), article 8 (5) and article 22 (2),

[https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>100</sup> Transparentem, *Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform*, October 2021, <https://transparentem.org/project/hidden-harm/>; Clean Clothes Campaign, *Fig leaf for fashion: How social auditing protects brands and fails workers*, September 2019, <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>; and, ECCHR, BfdW and MISEREOR, *Human rights fitness of the auditing and certification industry?*, June 2021,

[https://www.echr.eu/fileadmin/Publikationen/ECCHR\\_BfdW\\_MIS\\_AUDITS\\_EN.pdf](https://www.echr.eu/fileadmin/Publikationen/ECCHR_BfdW_MIS_AUDITS_EN.pdf)

<sup>101</sup> "Enterprises can collaborate at an industry or multi-industry level as well as with relevant stakeholders throughout the due diligence process, although they always remain responsible for ensuring that their due diligence is carried out effectively." OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

and in all sectors - are responsible for respecting human rights and for conducting human rights due diligence. As stated in the UN Guiding Principles 'the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.'<sup>102</sup>

This responsibility to respect human rights extends to the financial sector, and financial institutions, just like all companies, can cause, contribute or be linked to harm.<sup>103</sup> The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group on Business and Human Rights) have stated "as part of their responsibility to respect human rights, investors are expected to carry out human rights due diligence during the pre-investment phase as well as during the life of their investment in order to know how their investment activities are connected with human rights risks and show how they take steps to address these risks."<sup>104</sup> The OECD has also recognised that "recommendations of the OECD Guidelines apply across all sectors including the financial sector"<sup>105</sup> and have developed sector specific guidance for responsible business conduct in the finance sector including for institutional investors,<sup>106</sup> for corporate lending and securities underwriting<sup>107</sup> and for project and asset finance transactions<sup>108</sup>.

The responsibility also extends to companies producing products that are subject to export controls including arms and dual use items – where "dual-use items" means items, including software and

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<sup>102</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (Principle 14), 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>103</sup> For a more detailed analysis of this please see: OHCHR, "OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector," 12 June 2017, [https://www.banktrack.org/download/letter\\_from\\_ohchr\\_to\\_banktrack\\_on\\_application\\_of\\_the\\_un\\_guiding\\_principles\\_in\\_the\\_banking\\_sector/banktrack\\_response\\_final.pdf](https://www.banktrack.org/download/letter_from_ohchr_to_banktrack_on_application_of_the_un_guiding_principles_in_the_banking_sector/banktrack_response_final.pdf)

<sup>104</sup> OHCHR, *Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights*, June 2021, <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>

<sup>105</sup> OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, 2017, <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf> (oecd.org)

<sup>106</sup> OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, 2017, <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf> (oecd.org)

<sup>107</sup> OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises*, 2019, <https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf>

<sup>108</sup> OECD, *Responsible Business Conduct Due Diligence for Project and Asset Finance Transactions*, 2022, [https://www.oecd-ilibrary.org/finance-and-investment/responsible-business-conduct-due-diligence-for-project-and-asset-finance-transactions\\_952805e9-en](https://www.oecd-ilibrary.org/finance-and-investment/responsible-business-conduct-due-diligence-for-project-and-asset-finance-transactions_952805e9-en)

technology, which can be used for both civil and military purposes”.<sup>109</sup> This is because export control requirements do not absolve companies of their responsibility to respect human rights and to conduct human rights due diligence as outlined in international standards. As the UN Working Group on Business and Human Rights states, “export controls cannot replace human rights due diligence.”<sup>110</sup>

### **European Commission and Council of the EU positions on company and sector scope**

The European Commission proposal includes all sectors but with a few important caveats. The proposal differentiates between high and low risk sectors with high-risk sectors having a lower threshold of company size and income before they come into scope of the directive. For low risk sectors, companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million would be in scope, but for high risk sectors - including the manufacture and wholesale trade of textiles, clothing and footwear, the agricultural and food product sectors as well as the extraction of mineral resources – the size threshold is reduced to 250 employees and a net worldwide turnover of more than EUR 40 million.<sup>111</sup> For both high and low-risk sectors companies smaller than this were excluded from the scope of the proposal.<sup>112</sup>

The European Commission proposal also proposes different due diligence obligations for the financial sector meaning that financial institutions would only have to conduct due diligence in relation to their direct clients (and other companies in the same direct group should they exist) and only before providing the loan or other service but not in an ongoing manner. Financial institutions would also not have to conduct due diligence in relation to small and medium sized enterprises even

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<sup>109</sup> European Union, *Regulation (EU) 2021/821 of the European Parliament and of the Council*, 20 May 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:206:FULL&from=EN>

<sup>110</sup> OHCHR, *Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights*, p6, 30 August 2022, <https://www.ohchr.org/en/documents/tools-and-resources/responsible-business-conduct-arms-sector-ensuring-business-practice>

<sup>111</sup> The high risk sectors include “(i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear; (ii) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; (iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).” See Commission proposal article 2 (b) p46-47 See: European Commission, *Proposal for a Directive on corporate sustainability due diligence and annex*, article 2 (b) p46-47, 23 February 2022, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>112</sup> The European Union defines small and medium size enterprises as companies with fewer than 250 employees and EUR50 million turnover or less. See: European Commission, “SME definition”, [https://single-market-economy.ec.europa.eu/smes/sme-definition\\_en](https://single-market-economy.ec.europa.eu/smes/sme-definition_en), Accessed 2 May 2023

when they are a direct client.

The Council maintained the same thresholds for high-risk sectors as the European Commission. They also created a carve out for the financial sector, leaving it to individual member states to decide whether or not to include it, once the directive is transposed into national law. The Council also introduced exemptions for products subject to export control both under Regulation (EU) 2021/821 of the European Parliament and of the Council, which regulates exports of dual use items such as surveillance technologies, as well as export controls related to weapons, munitions, or war materials.

### **The impact on rightsholders**

People around the world have suffered horrendous harm as the result of the misuse of weapons and dual use products such as surveillance technologies, regardless of the existence of export controls. Amnesty International investigations have exposed linkages between arms companies and human rights abuses despite their being exported from countries (including within the EU) that have export controls. For example in 2019, Amnesty International documented how a number of European, British and US defence companies continued to supply high volumes of arms exports to members of the Saudi Arabia and United Arab Emirates coalition deployed in Yemen, seemingly ignoring a litany of probable war crimes committed by coalition forces.<sup>113</sup> As of August 2018, the Office of the High Commissioner for Human Rights (OHCHR) had documented a total of 10,471 civilian casualties as a result of airstrikes by the Saudi Arabia/UAE-led coalition.<sup>114</sup> The conflict has displaced millions and put up to half of Yemen's population at risk of starvation.<sup>115</sup> Serious violations of international human rights and humanitarian law have been committed by all parties to the conflict. On the coalition side, this has involved air and ground attacks and a naval blockade which has arbitrarily restricted the import of essential goods and the delivery of humanitarian aid.<sup>116</sup>

Targeted surveillance technologies such as NSO Groups' Pegasus spyware have been found by Amnesty International and others to be used to target, intimidate and harass civil society, journalists and politicians around the world.<sup>117</sup> Moroccan lawyer and human rights defender Abdessadak El Bouchattaoui, who was sentenced to 20 months in prison in February 2017 for online posts criticising the use of excessive force by Moroccan authorities during social justice protests in Hirak El-Rif in 2016 and 2017, was repeatedly targeted by malicious SMS messages that carried links to

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<sup>113</sup> For further information as well as company responses see: Amnesty international, *Outsourcing Responsibility: Human Rights Policies in the defence Sector* (Index: ACT 30/0893/2019), 9 September 2019, <https://www.amnesty.org/en/documents/act30/0893/2019/en/>

<sup>114</sup> OHCHR, "Press briefing notes on Yemen civilian casualties", 10 August 2018,

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23439&LangID=E>

<sup>115</sup> UN News, "Half the population of Yemen at risk of famine: UN emergency relief chief", 23 October 2018, <https://news.un.org/en/story/2018/10/1023962>

<sup>116</sup> Amnesty International, *The State of the World's Human Rights 2017-18*, 22 February 2018, (Index: POL 10/6700/2018), 'Yemen entry', <https://www.amnesty.org/en/countries/middle-east-and-north-africa/yemen/report-yemen/>

<sup>117</sup> See: Amnesty International, *Operating from the Shadows: Inside NSO Group's Corporate Structure* (Index: DOC 10/4182/2021), 31 May 2021, <https://www.amnesty.org/en/documents/doc10/4182/2021/en/>; and Amnesty International, *Operating in the shadows: Investor risk from the private surveillance industry* (Index: DOC 10/4359/2021), 21 October 2021, <https://www.amnesty.org/en/documents/doc10/4359/2021/en/>

websites connected to Pegasus.<sup>118</sup> About the impact this targeting had Abdessadak said:

*“Surveillance in Morocco is carried out in an open and brazen way... Surveillance is a type of punishment. You can't behave freely. It is part of their strategy to make you suspect you're being watched so you feel like you're under pressure all the time.”*

Most contracts to deploy NSO Groups' targeted surveillance technologies require an export licence.<sup>119</sup> Although the majority of these are granted in Israel, in 2021, NSO Group confirmed in correspondence with Amnesty International and others that it also exports products from Bulgaria and Cyprus, “and their respective export control authorities.”<sup>120</sup> Although it is not known which products these export licenses were granted for, the targeted surveillance products that NSO Group produces undoubtedly pose a serious threat to human rights defenders globally. The European Parliament's Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware, better known as the PEGA committee, issued a draft report in January 2023 concluding that the export of these products from the Union was a gross violation of union rules and that it exposed weaknesses in the EU's export control regime.<sup>121</sup> In conclusion the committee called for “additional European legislation that requires corporate actors producing and/or exporting surveillance technologies to include human rights and due diligence frameworks in line with the UN Guiding Principles on Business and Human Rights”.

In 2021, research by Amnesty International, Privacy International and SOMO mapped NSO Groups' corporate structure and financing.<sup>122</sup> This covers multiple jurisdictions across the world and includes investment funds and companies based in the EU. Financial institutions which provide funds, insurance, and other support to businesses such as NSO Group are, just like other companies, at risk of being linked to human rights abuses, and should also conduct human rights and environmental due diligence.

## Conclusion

International standards outline that the responsibility to respect human rights and thus conduct human rights due diligence applies to all companies regardless of size or their sector including

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<sup>118</sup> Amnesty International, “Morocco: Human Rights Defenders targeted with NSO group's spyware”, 10 October 2019, <https://www.amnesty.org/en/latest/research/2019/10/morocco-human-rights-defenders-targeted-with-nso-groups-spyware/>

<sup>119</sup> Amnesty International, *Novalpina Capital's response to NGO coalition's open letter (18 February 2019)* (Index: DOC 10/0210/2019), 15 April 2019, <https://www.amnesty.org/en/documents/doc10/0210/2019/en/>

<sup>120</sup> Amnesty International, *Operating from the Shadows: Inside NSO Group's Corporate Structure* (Index DOC 10/4182/2021), 31 May 2021, <https://www.amnesty.org/en/documents/doc10/4182/2021/en/>

<sup>121</sup> European Parliament, “European Parliament Draft Recommendation to the Council and the Commission pursuant to Rule 208(12) of the Rules of Procedure following the investigation of alleged contraventions and maladministration in the application of Union law in relation to the use of Pegasus and equivalent surveillance spyware”, B9-0000/2023, 4 January 2023, Point 6, [https://www.europarl.europa.eu/doceo/document/PEGA-RD-740554\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/PEGA-RD-740554_EN.pdf)

<sup>122</sup> For full details see: Amnesty International, *Operating from the Shadows: Inside NSO Group's Corporate Structure* (Index: DOC 10/4182/2021), 31 May 2021, <https://www.amnesty.org/en/documents/doc10/4182/2021/en/>

financial institutions and companies that are also subject to export control. Funding from financial institutions can in fact facilitate harm through supporting projects which impact negatively on human rights and the environment. Because of this, it is crucial that the CSDDD requires financial institutions to conduct human rights and environmental due diligence in line with the requirements of other companies.

Furthermore, the existence of export controls does not, and should not, absolve companies of their responsibility to carry out human rights due diligence. In fact, the EU already acknowledges this. In the EU's Recast Dual Use Regulation (Regulation No. 2021/821), exporters of dual use items are assumed to be conducting ongoing due diligence to establish whether or not these items may be used in connection with internal repression or violations of human rights and humanitarian law.<sup>123</sup>

The UN Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression recommends that "the granting of export licences should be prohibited under domestic law unless a company regularly demonstrates that it has rigorously implemented its responsibilities under the Guiding Principles... (including developing) human rights due diligence processes."<sup>124</sup> In line with this, export controls and human rights and environmental due diligence requirements should be seen, not as mutually exclusive, but as complementary, and all companies, including those subject to export control, should be required to conduct human rights and environmental due diligence under the CSDDD.

#### **Recommendations**

- The obligation to conduct human rights and environmental due diligence under the CSDDD should apply to all companies regardless of size or sector including financial institutions and companies whose products are subject to export controls.

## **4. STAKEHOLDER ENGAGEMENT & FREE, PRIOR AND INFORMED CONSENT**

Stakeholder engagement, particularly engaging with rightsholders, is an important component of human rights and environmental due diligence and yet current proposals for the CSDDD fail to include requirements for companies to meaningfully engage with rightsholders. Under international law Indigenous peoples also have specific rights to give or withhold their free, prior and informed consent which is not currently adequately reflected in the requirements under the CSDDD. This

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<sup>123</sup> Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) (Recast Dual Use regulation)

"Where an exporter is aware, according to its due diligence findings, that cyber-surveillance items which the exporter proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraph 1\* of this Article, the exporter shall notify the competent authority."

\*The uses listed in paragraph 1 are "the items in question are or may be intended, in their entirety or in part, for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law."

<sup>124</sup> UNGA, Resolution adopted by the Human Rights Council on 11 July 2019 41/3: Enhancement of international cooperation in the field of human rights, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/17/PDF/G1921817.pdf?OpenElement>

section explains why the current CSDDD proposals do not align with international standards on stakeholder engagement and free, prior and informed consent. And why, for the CSDDD to be effective in addressing corporate harm and to align with international law it must strengthen these provisions.

### **International standards on stakeholder engagement and free, prior and informed consent**

In order to assess human rights risks and impacts – and to inform all stages of the due diligence process - the UN Guiding Principles state that companies should meaningfully consult with potentially affected groups and other relevant stakeholders.<sup>125</sup> The OECD due diligence guidance for responsible business conduct outlines that “meaningful stakeholder engagement is a key component of the due diligence process”.<sup>126</sup> Companies should engage with all stakeholders where stakeholders include “persons or groups who have interests that are or could be impacted by an enterprise’s activities”<sup>127</sup> but as stated by the OECD “in particular, when the enterprise may cause or contribute to, or has caused or contributed to an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important.”<sup>128</sup>

The OECD Guidelines also outline that in the context of human rights due diligence stakeholder engagement must be meaningful, which is “characterised by two-way communication and depends on the good faith of the participants on both sides. It is also responsive and on-going.”<sup>129</sup> They also state that “meaningful engagement is important throughout the due diligence process”<sup>130</sup> (emphasis added) meaning it should be included at all stages of the due diligence procedure including when identifying actual or potential impacts, devising response plans, identifying effective remedy for adverse impacts, and monitoring the effectiveness of response plans.

The provision of relevant and timely information sharing is critical. As the OECD Due Diligence Guidance explains, meaningful stakeholder engagement “involves the timely provision of all information needed by the potentially impacted stakeholders and rightsholders to be able to make an

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<sup>125</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>126</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>127</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p48, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>128</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p18/19, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>129</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p49, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>130</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p30, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

informed decision as to how the decision of the enterprise could affect their interests."<sup>131</sup> The UN Guiding Principles establish that, "business enterprises should be prepared to communicate (how they address their human rights impacts) externally, particularly when concerns are raised by, or on behalf of, affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them."<sup>132</sup> The failure by companies to gather or disclose information about the impacts of their operations can affect many rights, including the right to effective remedy.<sup>133</sup>

For engagement to be meaningful companies must also address the barriers rightsholders, particularly marginalised communities, may face in participating in engagement processes. As stated by the OECD, "identifying and seeking to remove potential barriers to stakeholder engagement (e.g. language, culture, gender and power imbalances, divisions within the community etc.) is important to ensuring it is effective."<sup>134</sup>

For many companies, Indigenous peoples will be one of the rightsholder groups who may be impacted by their operations and value chains. It is important to note that as described in the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169,<sup>135</sup> Indigenous peoples also have the right to be consulted in order to obtain their free, prior and informed consent (FPIC) as derived from their right to self-determination as peoples, and their rights to their lands, territories and resources.<sup>136</sup> FPIC is the principle that Indigenous peoples are able to make informed decisions

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<sup>131</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p49,

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>132</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (Principle 21), 1 January 2012,

<https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>133</sup> Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Index: POL 30/001/2014), 7 March 2014, p157, <https://www.amnesty.org/en/documents/POL30/001/2014/en/>

<sup>134</sup> OECD, *Due Diligence Guidelines for Responsible Business Conduct*, 2018, p51,

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>135</sup> International Labour Organisation, Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) (ilo.org), Convention C169 - Indigenous and Tribal Peoples Convention, 1989,

[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169); OHCHR, *UN Declaration on the Rights of Indigenous Peoples*, 2007; OHCHR, *UN Declaration on the Rights of Indigenous Peoples*, 13 September 2007, <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples>; and OHCHR, General recommendation XXIII on the rights of Indigenous People, 1997, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2FCERD%2FGEC%2F7495&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2FCERD%2FGEC%2F7495&Lang=en)

<sup>136</sup> Confirmed by UN Committee on the Elimination of Racial Discrimination (See UN Committee on the Elimination of Racial Discrimination, "General Recommendation XXIII: Indigenous Peoples" (18 August 1997) A/52/18, annex V, Para 5: calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ...'); OHCHR, General recommendation XXIII on the rights of Indigenous People, 1997,



about matters that affect their territories and thus their communities and ways of life. This goes well beyond the right to consultation. The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector accordingly includes a section with guidance on engaging with Indigenous peoples, which elaborates on how companies might appropriately identify and engage with Indigenous peoples in a way which aligns with their internationally recognised rights.<sup>137</sup>

Finally, engagement should also be safe. The UN Working Group on Business and Human Rights has stated that businesses should “regard constructive engagement with human rights defenders as a central aspect of human rights due diligence.”<sup>138</sup> Human rights defenders – meaning people who stand up for their rights and the rights of others – are often at risk for expressing their views.<sup>139</sup> The UN Working Group on Business and Human Rights has stated that companies should “consider the risks that human rights defenders may face in raising concerns, including the risk of reprisals, and what steps they can take to ensure the safety, security and well-being of those individuals.”<sup>140</sup>

### **European Commission and Council of the EU positions on rightsholder engagement**

The European Commission and the Council both take a similar approach to stakeholder engagement in their CSDDD proposals.<sup>141</sup> They propose that as part of the identification of actual and potential adverse impacts “companies shall, where relevant, also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or

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[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2FCERD%2FGEC%2F7495&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2FCERD%2FGEC%2F7495&Lang=en)

<sup>137</sup> OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2017, <https://doi.org/10.1787/9789264252462-en>

<sup>138</sup> OHCHR, *The UN Guiding Principles on Business and Human Rights: Guidance on ensuring respect for human rights defenders*, 2021, p21, [https://www.ohchr.org/sites/default/files/2022-02/Formatted-version-of-the-guidance-EN\\_0.pdf](https://www.ohchr.org/sites/default/files/2022-02/Formatted-version-of-the-guidance-EN_0.pdf)

A Human Rights Defender (HRD) is “a person who, individually or with others, acts peacefully to promote or protect human rights in accordance with the UN Declaration on Human Rights Defenders.” UN Special Rapporteur on Human Rights Defenders, <https://srdefenders.org/who-is-an-hrd/who-is-a-human-rights-defender/>, Accessed on 2 May 2023

<sup>139</sup> Front line Defenders, *Global Analysis 2022*, 4 April 2023, <https://www.frontlinedefenders.org/en/resource-publication/global-analysis-2022>

<sup>140</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p21, 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>141</sup> The definition of stakeholders under the European Commission’s proposal is as follows: “‘stakeholders’ means the company’s employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships”. The Council added specific reference to civil society organisations, national human rights and environmental institutions, and human rights and environmental defenders.

potential adverse impacts.”<sup>142</sup> They also state that where relevant companies should develop action plans for the prevention of adverse impacts or for bringing actual adverse impacts to an end.<sup>143</sup> These action plans shall be developed in consultation with affected stakeholders.

This approach does not align with international standards in a few ways. Firstly, these proposals only require stakeholder engagement *where relevant*, whereas it is always relevant for companies to engage with stakeholders. As stated by the OECD in the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector “regardless of the requirements of law, meaningful stakeholder engagement is critical to avoiding some of the potential adverse impacts of the extractive operations.”<sup>144</sup> Secondly the Commission and Council proposal do not require stakeholder engagement to be ongoing. Specifically, the proposal does not specify stakeholder engagement in relation to monitoring of the effectiveness of plans to address actual or potential human rights and environmental impacts.<sup>145</sup> Finally, the proposals do not require this engagement to be safe, meaningful or include any quality requirements for what stakeholder engagement should look like and thus ensure it is meaningful.

Regarding Indigenous peoples, the European Commission proposal includes references to their rights to their lands, territories and resources. It also refers to the UN Declaration on the Rights of Indigenous Peoples in its annex, which means that companies would be required to assess and address the impact of their operations and value chain with respect to these rights. However, the Council did not include these provisions in its proposal. Furthermore, neither proposal mentions nor requires companies to secure the free, prior and informed consent of Indigenous peoples for activities that may affect their rights.

### **The impact on rightsholders**

The failure of companies to disclose critical information and meaningfully engage with affected people has been a common issue identified in Amnesty research of human rights abuse involving corporate actors.

From the Bhopal gas tragedy to the composition of toxic waste that was dumped in Côte d’Ivoire; from the ground water contamination in the Niger Delta to the contamination of the Omai and

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<sup>142</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, 23 February 2022, article 6 (4) p54, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en); Council of the EU general approach article 6 (4) p82

<sup>143</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, 23 February 2022, Commission proposal Article 8 3(b), [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>144</sup> OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2017, <https://doi.org/10.1787/9789264252462-en>

<sup>145</sup> The recitals of the Council of the EU General Approach state “Companies should monitor the implementation and effectiveness of their due diligence measures, with due consideration of relevant information from stakeholders” but stakeholder engagement is not mentioned in the operative part of the text with regard to monitoring.

Essequibo rivers in Guyana, Amnesty International's research has shown that companies have withheld data.<sup>146</sup> In each of these cases people knew that they were living with contamination linked to the company's operations, but they did not have basic details about specific contaminants, levels of contamination or the health risks to which they were exposed. In such a context, meaningful consultation was impossible.

An investigation into one of the largest copper mining projects in the world – at Monywa in Myanmar - revealed that thousands of people faced numerous harms, including forced evictions, loss of livelihood, poor environmental management which put their health at risk, and the repression, sometimes brutal, of those who protested against the mines.<sup>147</sup> Although the companies involved did conduct some community consultations, the research found that these started too late, with construction of the mine already underway, and many forced evictions and police violence against those protesting the project having already taken place. The companies conducting consultations also excluded a number of villages from the process – including those that were going to be resettled.

In 2010 Amnesty International researchers exposed how a bauxite mining project and expansion of the nearby refinery in Orissa, India had serious implications for the human rights of local communities, including their rights to water, food, health, work and an adequate standard of living.<sup>148</sup> The research found that processes to assess the impact of the projects on local communities were wholly inadequate and that companies had ignored community concerns. The bauxite mining project was located in the Niyamgiri Hills, which are considered sacred by the Dongria Kondh, an Adivasi Indigenous community that for centuries has depended entirely on the area for its economic, physical and cultural survival. Despite this the research found that, at that time, the government of Orissa had not made any attempt to seek the free, prior and informed consent of the Dongria Kondh before granting a lease to mine bauxite on their ancestral lands.<sup>149</sup>

For companies to truly understand the human rights and environmental risks of their operations and value chains, rightsholders must be consulted in a meaningful way. If communities lack information, as in the two examples provided here, consultations can become a 'tick-box' exercise which ultimately means that human rights and environmental harm highlighted by communities are not properly heard or addressed.

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<sup>146</sup> Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Index: POL 30/001/2014), 7 March 2014, p157, <https://www.amnesty.org/en/documents/POL30/001/2014/en/>

<sup>147</sup> Amnesty International, *Mountain of trouble: Human rights abuses continue at Myanmar's Letpadaung mine* (Index: ASA 16/5564/2017), 10 Feb 2017, <https://www.amnesty.org/en/documents/asa16/5564/2017/en/>

<sup>148</sup> Amnesty International, *Don't mine us out of existence: Bauxite mine and refinery devastate lives in India* (Index: ASA 20/001/2010), 9 February 2010, <https://www.amnesty.org/en/documents/ASA20/001/2010/en/>

<sup>149</sup> The Odisha government later consulted 12 villages regarding the mine proposal following a Supreme court ruling in April 2013 that stated that village assembly meetings of villages in the affected area would need to decide if the mine plans, in any way, affected their religious and cultural rights. A further 100 villages claimed they had been excluded from the official consultation process.

## Conclusion

International standards not only establish that engagement with stakeholders, including rightsholders, is key to effective due diligence, they also give useful detail to companies on how they should conduct such engagement. Safe and meaningful engagement is crucial to effective due diligence as it gives companies access to information which is highly relevant to their assessment of the potential and actual human rights impacts of their operations and value chains. Rightsholders are critical sources of information as they know best how corporations are, or might, impact them and their communities.

However, in order for stakeholder engagement to fulfil this, it must be done safely and in good faith. Companies must be required, not just to listen to rightsholders, but also to disclose relevant information. They must also integrate their perspectives into their prevention, mitigation and remedy measures in consultation with rightsholders. Without these elements clearly articulated in the CSDDD, the Directive risks simply creating a new ‘tick box’ requirement for companies which has little impact on victims of corporate related human rights harm.

Beyond the importance of engaging with all stakeholders, the EU co-legislators must additionally recognise the rights of Indigenous peoples under international law and the requirement for companies to acquire their free, prior and informed consent for projects which affect their rights.<sup>150</sup>

## Recommendations

- Under the CSDDD companies should be required to meaningfully and safely engage with actually and potentially impacted rightsholders throughout the due diligence process.
- Under the CSDDD companies should be required to respect the rights of Indigenous peoples including their right to be consulted in order to obtain their free, prior and informed consent.

## 5. GENDER AND THE RIGHTS OF WOMEN

Women are overrepresented in the most insecure and lowest paid jobs in global value chains.<sup>151</sup> More than two thirds – or 71% - of people living in modern slavery are women and girls.<sup>152</sup> Globally women are also responsible for three times as much unpaid domestic work as men meaning that they are more likely to suffer indirectly as the result of corporate harm.<sup>153</sup> For example, where

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<sup>150</sup> To learn more about respecting the right to FPIC please see for example: Accountability Framework, *Operational Guidance on Free, Prior and Informed Consent*, June 2019, <https://accountability-framework.org/operational-guidance/free-prior-and-informed-consent>

<sup>151</sup> ActionAid, *Women as “underutilized assets”: A critical review of IMF advice on female labour force participation and fiscal consolidation*, October 2017, [https://actionaid.org/sites/default/files/actionaid\\_2017\\_-\\_women\\_as\\_underutilized\\_assets\\_-\\_a\\_critical\\_review\\_of\\_imf\\_advice.pdf](https://actionaid.org/sites/default/files/actionaid_2017_-_women_as_underutilized_assets_-_a_critical_review_of_imf_advice.pdf)

<sup>152</sup> Global Estimates of Modern Slavery, ILO, 2017, [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575479.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf)

<sup>153</sup> Klugman, J. & Melnikova, T. (2016) *Unpaid Work and Care: a Policy Brief*, P.1, Geneva: UN Secretary-General’s High-Level Panel on Women’s Economic Empowerment

pollution causes families to become ill, it will most likely fall on the women to take on extra care responsibilities.

But under current proposals for the Corporate Sustainability Due Diligence Directive, companies are not required to conduct human rights and environmental due diligence in a gender responsive manner nor are member states required to address gendered barriers to accessing justice. This section outlines why alignment with international standards requires this approach and what companies risk overlooking should they not conduct human rights due diligence using a gender lens.

### **International standards on the gender dimensions of business and human rights**

The UN Working Group on Business and Human Rights issued a report on the ‘Gender Dimensions of the Guiding Principles on Business and Human Rights’<sup>154</sup> in 2019. The report states that “states should integrate a gender perspective in mandatory human rights due diligence laws” and “business enterprises should explicitly integrate a gender perspective in carrying out all steps of human rights due diligence as per the Guiding Principles.”<sup>155</sup> In other words, businesses should take into account the differentiated human rights risks faced by people of different genders when assessing and addressing their human rights risks and impacts.

The UN Working Group on Business and Human Rights have made clear “to avoid any doubt, it should be stressed that a gender perspective is always appropriate for all States and businesses in all situations.”<sup>156</sup> “It is widely documented that women and girls experience adverse impacts of business activities differently and often disproportionately. They also face additional barriers in seeking access to effective remedies. Moreover, because of intersecting and multiple forms of discrimination, different women and girls may be affected differently by business activities in view of their age, colour, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, residence in a rural location, and migration, indigenous or minority status. It is, therefore, critical that measures taken by States and business enterprises to implement the UN Guiding Principles are gender responsive.”<sup>157</sup>

The UN Working Group on Business and Human rights also establishes that “when taking steps to reduce legal, practical and other barriers in accessing domestic judicial mechanisms for cases of business-related human rights abuse, States should pay attention to the additional barriers faced by

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<sup>154</sup> United Nations Development Programme (UNDP), *Gender Dimensions of the Guiding Principles on Business and Human Rights*, 22 November 2019, <https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

<sup>155</sup> UNDP, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, 22 November 2019, p28, <https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

<sup>156</sup> UNDP, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, 22 November 2019, p59, <https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

<sup>157</sup> UNDP, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, 22 November 2019, <https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

women in seeking effective remedies.”<sup>158</sup>

### **European Commission and Council of the EU positions on gender and the rights of women**

Instead of requiring companies to conduct human rights and environmental due diligence in relation to all human rights risks and impacts the European Commission and Council proposals on the CSDDD include a limited list of specific human rights that companies should assess in their due diligence, and then a list of UN and ILO instruments they should reference (for further explanation on this point please see the ‘human rights scope’ section of this report).

In relation to women’s rights specifically, the European Commission and the Council proposals for the CSDDD are lacking. In the limited list of human rights both include the unequal treatment in employment, in particular “the payment of unequal remuneration for work of equal value”; the Council includes “discrimination on grounds of national extraction or social origin, race, colour, sex, religion, political opinion” and the European Commission includes a reference to human trafficking especially of women and children, but further types of corporate related human rights harm women face are not explicitly mentioned.<sup>159</sup> For example, the rights not to be discriminated against in healthcare, in economic life, in political life and the right to live free from gender-based violence are not included.

In the list of relevant international human rights instruments, the European Commission includes the UN Convention on the Elimination of Discrimination Against Women, however ILO Convention 190 on Violence and Harassment in the World of Work and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, better known as the Istanbul Convention, are not included. The Council also omits these conventions and as well as removing the UN Convention on the Elimination of Discrimination Against Women from the list.<sup>160</sup>

In relation to gender more broadly, neither the European Commission’s proposal nor the Council’s General Approach require companies to use a gendered perspective when conducting their human rights and environmental due diligence and neither proposal refers to, nor requires Member States to address, the gendered barriers women and people of marginalised genders face in accessing justice (for a more detailed look at provisions related to access to justice please see the section ‘access to justice’ in this report).

### **The impact on rightsholders**

Women around the world face significant human rights and environmental impacts. Because of multiple and intersecting forms of discrimination, women and girls may be impacted differently by

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<sup>158</sup> UNDP, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, 22 November 2019, p38, <https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

<sup>159</sup> European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and annex*, 23 February 2022, Annex I part I, [https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex\\_en](https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en)

<sup>160</sup> The UN Convention on the Elimination of Discrimination Against Women has been ratified by all EU Member States.

business activities. Amnesty International has documented many cases of gender discrimination which risk being overlooked by companies should they not be explicitly required to conduct gender sensitive due diligence in the CSDDD. This section outlines two examples:

'The Great Palm Oil Scandal' released in 2016 revealed discrimination against women workers on palm oil plantations in Indonesia linked to the supply chains of several multinational companies operating in Europe.<sup>161</sup> The women workers were denied permanent employment and access to health insurance and benefits. The research found that workers in plant maintenance units, who are almost all women, continued to be casual workers even when they had worked for the company for years. In contrast most harvesters – who were always men – were employed on permanent employment contracts. If companies are not required to utilise a gendered perspective in their analysis of human rights risks and impacts, these types of harms are at risk of being overlooked.

Communities living in the vicinity of toxic pollution emitted by the petrochemical industry along the Houston Ship Channel in the United States of America report significant health impacts. In relation to women and people with internal reproductive organs in particular, pollution from the petrochemical industry has been linked to reproductive harms, fertility issues, preterm birth, miscarriages, and birth defects.<sup>162</sup> These indirect human rights impacts of pollution related sickness are significant. As local community member Yvette Arellano told Amnesty International:

*“Our future is in the crosshairs as toxic exposure increases mutagenic harm [harm causing genetic mutation] leading to sterility, birth defects, miscarriages, and low-birth weights. As women of colour... we are disenfranchised and disproportionately affected. Many including myself are diagnosed with infertility. Babies are affected in the womb before their first breath leading to developmental, neurological, and immune issues.”*<sup>163</sup>

## Conclusion

In recognition of the differentiated impacts of corporate harm faced by women and people of marginalised genders, international standards on business and human rights have articulated that due diligence should be gender sensitive and yet neither the Council nor the European Commission have included this requirement in their proposals. Without an explicit reference to gender responsive due diligence there is a significant risk that the human rights and environmental impacts of companies on women are overlooked by companies conducting their human rights and

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<sup>161</sup> Amnesty International, *Indonesia: The Great Palm Oil Scandal: Labour abuses behind big brand names* (Index: ASA: 21/5184/2016), 30 November 2016, <https://www.amnesty.org/en/documents/asa21/5184/2016/en/>

<sup>162</sup> J. Carré, N. Gatimel et al, “Does air pollution play a role in infertility?: a systematic review”, *Environmental Health*, 2017, 16:82 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5534122/>; W. Nicole, “On Wells and Wellness: Oil and Gas Flaring as a Potential Risk Factor for Preterm Birth”, *Environmental Health Perspectives*, 2020, 128 (11), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7682589/#:~:text=Overall%2C%20being%20exposed%20to%2010,weight%20or%20fetal%20growth%20restriction>

<sup>163</sup> Yvette Arellano, Founder and Director of Fenceline Watch, by email, 21 April 2023, on file with Amnesty International.

environmental due diligence. As the UN Working Group on Business and Human Rights have stated “as women remain marginalized with respect to decision-making positions... their human rights concerns are frequently overlooked or not taken seriously.”<sup>164</sup>

Moreover, as stated by the UN Development Programme (UNDP) “women who face intersecting forms of discrimination are more likely to be excluded from justice institutions and justice outcomes, often resulting in a cyclical pattern of marginalization.”<sup>165</sup> Barriers to accessing justice have not been addressed in the proposals from the European Commission and Council for the CSDDD meaning they fall short of international standards. Without sufficient access to justice the CSDDD will fail to support women from accessing justice for corporate related harm.

### **Recommendations**

- Under the CSDDD companies must be required to conduct due diligence in relation to all human rights and in relation to the full value chain using a gendered perspective.
- The CSDDD should also require member states to address the barriers to accessing justice victims of corporate harm face - in particular those faced by women and girls.

### **RACIAL JUSTICE – POP OUT BOX**

Human rights and environmental due diligence which fails to consider the discrimination faced by racialised people and Indigenous peoples including those rooted in the history of colonialism, will fail to effectively address corporate related harm.<sup>166</sup> These communities are subject to systemic racial discrimination across every aspect of life – from access to healthcare, to education, to decent work. If the differentiated and systemic human rights impacts faced by these communities are not explicitly assessed, and their historical and intersectional context included in human rights analysis, under the CSDDD they will be missed, and the exploitation of these communities will be able to continue unchecked. The CSDDD is an opportunity to start to move the world away from a global economy where racialised people and communities suffer corporate-related human rights and environmental harm, but the current approach of the EU co-legislators is unlikely to turn the tide.

It is important that the CSDDD recognises the disproportionate and differentiated impacts faced by racialised communities and requires companies to take this into account during their due diligence processes. It is also important that the barriers these communities may face when attempting to access justice, are addressed under the CSDDD (see ‘access to justice’ section for more details).

## **6. ACCESS TO JUSTICE**

The CSDDD is an opportunity to create important mechanisms for victims of corporate harm to access justice where it has previously been very difficult for victims to bring cases outside of the

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<sup>164</sup> UNDP, Gender Dimensions of the Guiding Principles on Business and Human Rights, 22 November 2019, p52, <https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

<sup>165</sup> UNDP, UN Women, UNODC, and OHCHR, *A practitioners Toolkit on Women’s Access to Justice programming*, 8 May 2018, p22, <https://www.undp.org/publications/toolkit-womens-access-justice> P22

<sup>166</sup> [Reckoning: A Dialogue About Racism, Antiracists, and Business & Human Rights by Erika R. George, Jena Martin, Tara Van Ho :: SSRN](#)



country where harm occurred. This section outlines Amnesty International's key recommendations for creating opportunities for victims to access justice, and for addressing the barriers they may face in attempting to access justice. Here we outline what the major barriers victims face in attempting to access remedy and what the CSDDD should incorporate in response, as well as to meet international standards on business and human rights.

### **International standards on access to justice**

Victims of human rights harm have a right to effective remedy.<sup>167</sup> This means that States have an obligation to put in place mechanisms that can deliver effective remedies and businesses involved in human rights harm must take actions to remediate the harm.<sup>168</sup> In the UN Guiding Principles 'access to remedy' is one of the three key pillars outlined in the document, demonstrating the centrality of remedy to business and human rights.

As the UN Guiding Principles state, "even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business enterprise identifies such a situation... its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors."<sup>169</sup>

As laid out in the UN Guiding Principles, remedy "may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions [...], as well as the prevention of harm".<sup>170</sup> Mechanisms to enable access to remedy can be judicial – such as civil liability regimes – or non-judicial, but it should be noted that the UN Guiding Principles consider "effective judicial mechanisms (to be) at the core of ensuring access to remedy."<sup>171</sup>

Creating mechanisms to facilitate remedy is not sufficient alone. To be effective, remedy mechanisms must be accessible, affordable, adequate, and timely.<sup>172</sup> Where barriers to accessing remedy exist, "states should take appropriate steps to ensure the effectiveness of domestic judicial

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<sup>167</sup> Declaration on Human Rights (UN), <https://www.ohchr.org/en/universal-declaration-of-human-rights>

<sup>168</sup> UN Working Group, "Human rights and transnational corporations and other business enterprises", *Report on access to effective remedy for business-related human rights abuses*, A/72/162, 19 July 2017, <https://www.ohchr.org/en/documents/thematic-reports/a72162-report-access-effective-remedy-business-related-human-rights>

<sup>169</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 22, 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>170</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 25, 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>171</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 26, 1 January 2012, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>172</sup> UN Working Group, "Human rights and transnational corporations and other business enterprises", *Report on access to effective remedy for business-related human rights abuses*, A/72/162, 19 July 2017, <https://www.ohchr.org/en/documents/thematic-reports/a72162-report-access-effective-remedy-business-related-human-rights>

mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”<sup>173</sup>

### **European Commission and Council of the EU positions on access to justice**

Both the European Commission’s CSDDD proposal and the Council’s general approach establish grounds for liability for harm caused by a company’s due diligence failure. This provision is a crucial element to ensure access to effective remedy for victims of corporate-related harm. However, some provisions in the proposals could significantly limit how many victims are actually able to access justice.

In the Council’s General Approach companies can only be held liable for harm caused by a due diligence failure providing that they ‘intentionally or negligently’ failed to comply with the due diligence obligations. Proving that harm was intentionally or negligently caused is very high bar and would be challenging for victims to prove. This concept also deviates from international standards and international human rights law, as these recognize that a right to remedy exists independently of whether the activity or omission that is causing the harm was linked to a fault.

Furthermore, neither proposal includes provisions to address the barriers to accessing justice victims may encounter. For example, both proposals leave the decision about who is required to prove whether or not the company has breached its duty to conduct human rights and environmental due diligence – the victim or the company - to national law. Neither proposal establishes parent company liability, fair limitation periods, mechanisms for victims to access financial aid or provisions to improve victim’s access to information.

Finally, both proposals stipulate that civil liability applies only where companies have failed to comply with the obligations laid out in Articles 7 (preventing potential adverse impacts) and 8 (bringing actual adverse impacts to an end) and this has resulted in harm. Harm which results from other failures – such as failure to comply with the requirements under Article 15 (combating climate change) - would therefore not be covered.

### **Barriers to accessing justice**

When companies cause or contribute to human rights abuses, adequate accountability and redress rarely occur. This is especially so when abuses are committed across borders. Systems of accountability that operate predominantly within state borders have not kept pace with the global nature of corporate operations. Victims of corporate abuse face serious obstacles to obtaining a legal remedy both in the jurisdiction where the harm occurred (“host state”) as well as where multinational companies are headquartered (“home state”). With partner organizations, and through its on-the-ground research, Amnesty International has documented numerous obstacles faced by the

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<sup>173</sup> Declaration on Human Rights (UN), Guiding Principle 26 (commentary), <https://www.ohchr.org/en/universal-declaration-of-human-rights>,

victims of corporate human rights abuses.<sup>174</sup>

For example, when multinational companies commit human right abuses in host countries, host state courts often remain the preferred forum for pursuing legal redress. However, for various reasons which include a lack of due process, political interference, mistrust of the courts or lack of affordable legal assistance, a claim in the host state may not be a viable option. In these instances, legal options in the home state also need to be accessible to ensure justice.

The introduction of a civil liability regime is thus a crucial element of the CSDDD, providing victims of corporate harm caused or contributed by companies operating in the EU an important route through which they can access justice. However, as established by international standards, creating a route to remedy is not sufficient unless the barriers victims may face while attempting to access that remedy are addressed.

There are many barriers victims face when attempting to access justice through EU courts which may frustrate the attempts of victims to bring cases against companies under the CSDDD. Some of these have been outlined by the European Union Agency for Fundamental Rights, including “the rules on burden of proof, the lack of collective redress, the considerable financial risk for claimants and the lack of sufficient information about available remedies.”<sup>175</sup>

In order to bring a claim against a corporation, the victims of human rights abuses need to prove “that a business’s action directly affects them and to establish various levels of causality (including links between parent companies with subsidiaries or affiliate firms).”<sup>176</sup> However, as the EU Agency for Fundamental Rights points out, “providing such proof is often almost impossible, especially when the supporting documentation is in the possession of a company accused of the alleged infringement.”<sup>177</sup>

Access to relevant information is essential, but there are numerous barriers to this including: “people’s lack of awareness concerning their rights and legal avenues, making it difficult for them to make a complaint; the difficulty in accessing information about available mechanisms to seek justice; and the difficulty in obtaining the evidence needed to prove wrongdoing by the business.”<sup>178</sup>

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<sup>174</sup> In particular see: Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Index: POL 30/001/2014), 7 March 2014, <https://www.amnesty.org/en/documents/POL30/001/2014/en/>; and Amnesty International and BHHRC, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse* (POL: 30/7037/2017), 4 September 2017, <https://www.amnesty.org/en/documents/pol30/7037/2017/en/>

<sup>175</sup> European Union Agency for Fundamental Rights (FRA), *Business and human rights: Access to remedy*, 2020, p59, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf)

<sup>176</sup> FRA, *Business and human rights: Access to remedy*, 2020, p59, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf)

<sup>177</sup> FRA, *Business and human rights: Access to remedy*, 2020, p59, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf)

<sup>178</sup> FRA, *Business and human rights: Access to remedy*, 2020, p59, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf)

The lack of access to information, including evidence of detrimental impacts of companies' activities, can also undermine the ability of affected individuals and communities to build a robust legal claim.

Bringing a case against a company can also be expensive.<sup>179</sup> Cases can take years. There are court fees, lawyers, legal and technical experts to pay for, and there is also the risk of covering the costs of the winning party if the case is lost. By contrast companies are likely to have access to much greater resources.

Further barriers include short limitation periods which make it difficult for victims to bring claims within a short timeframe,<sup>180</sup> choice of law rules which mean that even if the case is brought in a home state liability is governed by the law of the country in which the damage occurs (this becomes a barrier for instance when claims are barred under the law of the host state),<sup>181</sup> and the barriers for collective claims, despite corporate human rights abuses often affecting a large group of individuals.<sup>182</sup>

Barriers to justice are further exacerbated for marginalised communities. As stated by former UN Special Rapporteur on the Promotion and Protection of the Right To Freedom Of Opinion And Expression, Frank La Rue, "Minorities, indigenous peoples, migrant workers, refugees and many other vulnerable communities have faced higher barriers, some of them insurmountable, to be able to fully exercise their right to impart and also to access information... Without a means to disseminate their views and problems, these communities are in effect excluded from public debates which ultimately hinders their ability to fully enjoy their human rights."<sup>183</sup>

### **The impact on rightsholders**

For Esther Kiobel, who wrote the foreword to this report, it took more than twenty years to finally

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<sup>179</sup> FRA, Business and human rights: Access to remedy, 2020, p73, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf) p73

<sup>180</sup> For example, German courts dismissed a case in 2019 brought by survivors of the 2012 fire at Ali Enterprises textile factory in Karachi, Pakistan which killed 258 people as the statute of limitations has been exceeded. ECCHR, "Case Report: Pakistan – cheap clothes, perilous conditions, January 2021, [https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case\\_Report\\_EN\\_KiK\\_Pakistan\\_Jan2021.pdf](https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_EN_KiK_Pakistan_Jan2021.pdf), accessed on 2 May 2023

<sup>181</sup> Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Index: POL 30/001/2014), 7 March 2014, <https://www.amnesty.org/en/documents/POL30/001/2014/en/>

<sup>182</sup> FRA, Business and human rights: Access to remedy, 2020, p64, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf)

<sup>183</sup> Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right To Freedom Of Opinion And Expression*, Frank La Rue, UN Doc A/HRC/11/4, 30 April 2009, para 55. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/130/32/PDF/G0913032.pdf?OpenElement>

come face to face in a court room with representatives of the oil company Shell.<sup>184</sup> In 2017, she brought a claim against Shell in the Netherlands. She claimed damages for harm caused by Shell's actions, and a public apology.<sup>185</sup>

She had accused Shell of colluding with the Nigerian military authorities in human rights abuses during the government's campaign to silence a protest movement against the oil industry that flared up in the Ogoniland region of the Niger Delta in the early 1990s. This brutal military campaign culminated in the unlawful arrest, detention and execution of the "Ogoni Nine", including the protest leader Ken Saro-Wiwa, as well as her husband, Dr Barinem Kiobel. Her case illustrates the many difficulties facing plaintiffs.

Esther Kiobel first initiated proceedings against Shell in the USA, where she was granted asylum, in 2002. Shell challenged the case on jurisdictional grounds. The US Supreme Court eventually ruled in Shell's favour, nine years later, in 2013, holding that the US courts were not the appropriate forum to hear a case involving foreign parties in events that took place overseas. This followed a 1996 civil case against Shell by relatives of Ken Saro-Wiwa and others, which Shell settled out of court in 2009 for 15.5 million US dollars without an admission of liability.<sup>186</sup> The US courts did not examine whether Shell played a role in the military's human rights violations. The Nigerian courts have also never examined this question.

In the Netherlands, Shell's US law firm initially refused to hand over more than 100,000 internal documents crucial to Esther's case, delaying the proceedings.<sup>187</sup> Eventually, in March 2022 Esther Kiobel lost her case in the Netherlands.<sup>188</sup> The judges ruled that there was insufficient evidence to prove that Shell had been involved. This was despite the court hearing from three men who testified that Shell and the Nigerian government had given them money and offered them other inducements in order to incriminate Esther's husband and the other men.

## Conclusion

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<sup>184</sup> Amnesty International, *On Trial: Shell in Nigeria, Legal actions against the oil multinational* (Index: AFR 44/1698/2020), P13, <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4416982020ENGLISH.pdf>

<sup>185</sup> Esther Kiobel brought the case with along with three other widows of the "Ogoni Nine": Victoria Bera, Blessing Eawo and Charity Levula. See: Amnesty International, *On Trial: Shell in Nigeria, Legal actions against the oil multinational* (Index: AFR 44/1698/2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4416982020ENGLISH.pdf>

<sup>186</sup> For details of both cases see: Center for Constitutional Rights (CCR), "Kiobel vs Royal Dutch Petroleum co. (Amicus)," 1 September 2002, <https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus>.

<sup>187</sup> Amnesty International, "I will fight to my last breath" - Esther Kiobel on her 22-year battle to get Shell in court", 29 June 2018, <https://www.amnesty.org/en/latest/news/2018/06/i-will-fight-to-my-last-breath-esther-kiobel-on-her-22year-battle-to-get-shell-in-court/>

<sup>188</sup> Amnesty International, "The Hague: Esther Kiobel vows to continue her campaign for justice," 23 March 2022, <https://www.amnesty.org/en/latest/news/2022/03/the-hague-esther-kiobel-vows-to-continue-her-campaign-for-justice/>

When the victims of human rights abuses confront massive corporate power and influence, the scales of justice are not balanced. International standards outline state obligations and business responsibilities to provide remedy to victims of corporate-related harm. Both the European Commission and the Council have included a civil liability regime which would create a mechanism through which victims of corporate harm could access justice. However, in order for this to be an effective mechanism for justice, EU lawmakers must reject attempts to make it harder for claimants to bring cases to EU courts under the CSDDD, and they must address the many barriers victims of corporate harm may face in attempting to access justice.

### **Recommendations**

- The CSDDD must include provisions stating that a business can be held liable for harm that they cause, or contribute to, as a result of their failure to carry out adequate human rights and environmental due diligence.
- The CSDDD should clarify that legal responsibility for human rights harm is assigned to controlling companies and where two or more enterprises are liable for the same damage, they should be liable jointly and severally.
- If claimants can prima facie demonstrate that they have suffered harm and that this is likely to have been the result of the company's activities, the law should shift the burden of proof to the corporate defendant.
- Under the CSDDD member states should remove barriers to accessing justice such as
  - Addressing asymmetries in access to information
  - Ensuring that legal and procedural costs are not prohibitively expensive for claimants to seek remedy
  - Allowing claimants to seek injunctive measures
  - Ensuring complainants can utilise a choice of law
  - Ensuring that limitation periods applicable to the directive are no less than ten years and do not begin to run before the claimant knows or should reasonably have known that the defendant's conduct was causally relevant to their harm.

## **CONCLUSION AND RECOMMENDATIONS**

Human rights and environmental due diligence is not intended to be a tick-box exercise.. Rather it is intended to be an approach which brings human rights and environmental harm to the forefront of company operations. It should be a process by which we begin to change the status quo which currently sees companies putting profit above people and the planet, to one where tackling human rights and environmental impacts is central to the operations of businesses.

The operations and value chains of companies, including those operating in the EU, have devastating impacts on people around the world: from Indigenous peoples whose lands have been destroyed, to women workers denied access to formalized or permanent work, to the misuse of rubber bullets to target peaceful protestors. EU policymakers should keep these cases in mind while developing this legislation and remember the impact this legislation could have for communities and human rights defenders like Esther Kiobel around the world.

In order for the CSDDD to even begin to address these types of corporate human rights and environmental harm, it must be based on current international standards on business and human rights as the floor – the minimum standard. This briefing outlines several key areas where current proposals put forward by the European Commission and the Council fail to live up to these standards, including the scope of human rights companies must assess during their human rights

and environmental due diligence, the parts of the value chain they must include in their assessments, and the access to justice measures the legislation will provide.

If the CSDDD is to meaningfully advance respect for human rights and environmental sustainability throughout the value chain, it must address these failures including by implementing the following recommendations.

#### Human rights scope

- Companies should be required to conduct human rights and environmental due diligence with respect to all human rights risks and impacts using a risk-based approach.
- A comprehensive, but non-exhaustive, list of international human rights instruments should be included in the annex of the CSDDD for reference only.

#### Climate and environment

- All companies should be required to assess and address the risks of harmful impacts from their greenhouse gas emissions in their global value chains.
- Provisions to hold companies liable for their impacts on climate should they fail to conduct effective human rights and environmental due diligence should be included in the CSDDD.
- Companies should be required to assess and address environmental damage. Environmental damage should be defined using a broad, open-ended provision including all actual and potential impacts to the environment, including climate and biodiversity.

#### Value chain scope

- Companies should be required to conduct human rights and environmental due diligence in relation to their entire value chain using a risk-based approach.

#### Industry schemes and third-party audits

- Although businesses may utilise industry schemes and auditors if they wish, the CSDDD should clarify that businesses remain individually responsible for their human rights and environmental due diligence.

#### Company scope

- The obligation to conduct human rights and environmental due diligence under the CSDDD should apply to all companies regardless of size or sector including financial institutions and companies whose products are subject to export control.

#### Stakeholder engagement and the rights of Indigenous peoples

- Companies should be required to meaningfully and safely engage with actually and potentially impacted rightsholders throughout the due diligence process.
- Companies should be required to respect the rights of Indigenous peoples including their right to be consulted in order to obtain their free, prior and informed consent.

#### Racial, Gender and intersectional justice

- Companies must be required to conduct due diligence in relation to all human rights and in relation to the full value chain using an intersectional perspective (including in relation to gender and racial justice).
- Member states should also be required to address the barriers to accessing justice faced by marginalised communities.

#### Access to Justice

- The CSDDD must include provisions stating that a business can be held liable for harm that they cause, or contribute to, as a result of their failure to carry out adequate human rights and environmental due diligence.
- The CSDDD should clarify that legal responsibility for human rights harm is assigned to controlling companies and where two or more enterprises are liable for the same damage, they should be liable, jointly and severally.
- If claimants can prima facie demonstrate that they have suffered harm and that this is likely to have been the result of the company's activities, the law should shift the burden of proof to the corporate defendant.
- Under the CSDDD member states should be address remove barriers to accessing justice such as
  - Addressing asymmetries in access to information
  - Ensuring that legal and procedural costs are not prohibitively expensive for claimants to seek remedy
  - Allowing claimants to seek injunctive measures
  - Ensuring complainants can utilise a choice of law
  - Ensuring that limitation periods applicable to the directive are no less than ten years and do not begin to run before the claimant knows or should reasonably have known that the defendant's conduct was causally relevant to their harm.

**BACK BLURB**