

Response to the EU Commission's draft Directive on corporate sustainability due diligence - UN Special Rapporteur on the situation of human rights defenders - May 2022

The nexus between corporate activity and human rights defenders has been a priority area for me since I took up the mandate of Special Rapporteur in May 2020. My aim has been to promote the potential alliances between defenders and businesses that could help build a more just and sustainable world. But we're not there yet. Again and again, I have been called on to remind businesses and UN Member States of their human rights responsibilities in response to attacks against defenders highlighting corporate abuse. The situation is grave. The Business and Human Rights Resource Centre, in 2021 alone, documented the killing of 76 defenders who had been standing up for the rights of others in the face of abusive corporate activities¹. It is an issue that the Working Group on Business and Human Rights has also addressed, in particular in their Guidance on ensuring respect for human rights defenders.² And we know that many cases go undocumented.

This trend needs to be halted, and the current EU initiative aimed at transforming the corporate responsibility to respect human rights, as already outlined in non-binding instruments, into mandatory human rights and environmental due diligence obligations marks a step in the right direction.

I have been following the EU's movement towards a Directive on the matter over the course of my mandate, and last year published a position paper³ outlining the key considerations concerning human rights defenders for the EU Commission to take on board in drafting their initial proposal. While the proposal presented by the Commission in February this year acknowledged elements of some of the provisions I had hoped to see included, if the current draft is not strengthened in these areas and others the EU risks missing its opportunity to tackle one of the primary drivers of attacks against human rights defenders.

While the Directive is strong in certain respects, such as in its extension of due diligence duties to the entire value chain and its inclusion of civil liability where companies fail to take the necessary action to address negative human rights and environmental impacts, it is worryingly weak in others. This includes when it comes to the limited scope of companies covered, the failure to address well-documented barriers to remedy for victims of corporate harms, such as the unfair distribution of the burden of proof, the heavy emphasis put on contractual clauses, contractual cascading and third-party verification of compliance, the introduction of the concept of an 'established business relationship' and the absence of an explicit gender dimension in the due diligence process.

What follows are proposals to improve those areas of the Directive which relate most directly to the situation of human rights defenders, including women human rights defenders, and thus most directly to my mandate. They have been informed by conversations I have had with hundreds of defenders since taking up my position, notably those defending the right to a healthy environment and trying to combat climate change, as well as indigenous human rights defenders. It is my sincere hope that they will be championed by representatives in the European Parliament and Member States in the Council of the European Union, as well as by businesses seeking to contribute to the promotion of human rights, the protection of the environment, and the empowerment of those who would seek to take a stand for both.

1 See: <https://www.business-humanrights.org/en/from-us/briefings/hrds-2021/human-rights-defenders-business-in-2021-protecting-the-rights-of-people-driving-a-just-transition/>.

2 See: *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. June 2021 (A/HRC/47/39/Add.2)

3 See: <https://srdefenders.org/resource/position-paper-concerning-human-rights-defenders-and-the-eus-mandatory-due-diligence-initiative/>

Summary of Recommendations		
Recommendation	Relevant articles	Impact
Explicit reference to the UN Declaration on Human Rights Defenders and a more appropriate definition of a human rights adverse impact	Annex Part I Section I Annex Part I Section II Article 3 (c)	Alignment of the threshold for considering corporate abuse an adverse human rights impact with the UN Guiding Principles on Business and Human Rights Recognition that corporate activity can impact upon the right to defend rights, as laid out in the UN Declaration on Human Rights Defenders
Mandatory stakeholder engagement at each stage of the due diligence process and the naming of human rights defenders as a key group to engage with	Article 3 (n) Article 4 Article 6, particularly 6.2 Article 7, particularly 7.2 Article 8, particularly 8.3 Article 10	Strengthening of the overall effectiveness of due diligence through meaningful consultation with human rights defenders and others throughout the process
Obligations to mitigate risks of retaliation against human rights defenders, the extension of civil liability to cover such attacks, and clearer standing for defenders and civil society to raise concerns with companies	Article 9, notably 9.2 (c) Article 22 Article 23	Mitigation of the risks for human rights defenders and others raising concerns about adverse human rights and environmental impacts Provision of a path to remedy for those who do suffer retaliation Broader standing for those seeking to raise concerns about compliance with the terms of the Directive Strengthening of the overall effectiveness of the due diligence obligations

Recommendation 1: The inclusion of an explicit reference to the UN Declaration on Human Rights Defenders and the expansion of the definition of a human rights adverse impact

Article 1 of the Directive as proposed by the EU Commission lays out its subject matter: rules on obligations for companies regarding **actual and potential human rights adverse impacts** and environmental adverse impacts connected to a company's operations, those of its subsidiaries, and operations of companies with whom it has an 'established business relationship' along its value chain, as well as rules on liability for violations of these obligations.

The approach taken by the Commission in defining the precise meaning of potential adverse human rights adverse impacts is novel, with Article 3 (c) of the proposal establishing that it is to be considered **“an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2”**.

Within Part I Section I of the Annex, the Commission includes a **list of specific human rights adverse impacts**, i.e., of violations of internationally recognised human rights, albeit in some uncommon formulations. This is then followed by a **catch-all provision**, included in point 21 of this section of the Annex, which states that **the violation of a prohibition or right not included in the prior points in the Annex shall also be considered a human rights adverse impact so long as it is included in the human rights agreements listed in the subsequent section of the Annex, Part I Section 2, and certain thresholds are met**, namely:

- a) the violation directly impairs a legal interest protected in one of the listed agreements;
- b) the company could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with its due diligence obligations as referred to in Article 4 of this Directive, taking into account all relevant circumstances of their operations, such as the sector and operational context.

While most international human rights treaties are included in Part I Section 2 of the Annex, **the UN Declaration on Human Rights Defenders⁴ is absent**. Similarly, there is **no reference to the Declaration or human rights defenders in the Part I Section 1 of the Annex**.

If the EU wishes to persevere with this two-pronged approach to defining human rights adverse impacts, and thus the material scope of the human rights due diligence obligations being placed on companies by way of the Directive, I strongly recommend that the UN Declaration on Human Rights Defenders be included among the instruments listed in the Part I Section 2 of the Annex.

If a simplified approach involving eliminating the first section of the Annex is ultimately preferred, the UN Declaration on Human Rights Defenders should be included among a comprehensive list of internationally recognised human rights instruments to provide clarity as to the definition of adverse impacts.

Such an amendment should be **coupled with the refinement of the Directive's current standard for considering abuse as amounting to an adverse impact, namely a “violation”** of one of the rights included in Annex Part I Section 1 or in the instruments listed in Part I Section 2. This **should be brought into line with the UN Guiding Principles on Business and Human Rights (UNGPs)**, which, as cited in paragraph 5 of the preamble to the Directive, expresses the corporate responsibility to respect human rights as the duty of businesses to “avoid infringing on the human rights of others” (GP 11). This has been expanded upon by the OHCHR through its interpretative guide to the UNGPs, wherein it defines an adverse human rights impact as an action which “removes or reduces the ability of an individual to enjoy his or her human rights”.⁵

Together, such changes to the Directive would place an obligation on companies to consider, in their due diligence process, potential infringements of the right to promote, protect and strive for the

⁴ Formally the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms' (A/RES//53/144)

⁵ *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, Office of the High Commissioner for Human Rights (OHCHR), 2012, p. 5.

realisation of human rights, as defined in the UN Declaration on Human Rights Defenders.

Under such circumstances, to provide an example, if a company were entering into operations in a context where those exercising the right to promote and protect human rights, i.e., human rights defenders, had previously been retaliated against for highlighting human rights concerns related to corporate activities, the company would be expected to identify, assess and address the risks of similar issues arising in the context of their own operations. If women human rights defenders had been subjected to gender-specific retaliation in this context, the company would be expected to implement differentiated measures to mitigate such gender-specific risks.

Such an obligation would be in line with the recommendations of the UN Working Group on Business and Human Rights, who in their guidance on the UNGPs and human rights defenders state that businesses should "... develop due diligence processes in relation to all areas in which it may cause, contribute to, or be directly linked to, human rights abuses. This includes anticipating impacts on human rights defenders."⁶

Recommendation 2: The strengthening of obligations around stakeholder engagement and the naming of human rights defenders as key stakeholders

The Directive as proposed by the Commission contains several references to stakeholder engagement, however, in none of these instances are the obligations placed on companies strong enough to reflect the essential nature of meaningful engagement to effective corporate due diligence, including consultation with human rights defenders.

The UNGPs state that the processes put in place by businesses to identify adverse impacts should involve meaningful consultation with potentially affected groups and relevant stakeholders, as appropriate to the size of the business involved and the nature and context of the operation (GP 18). The Directive, in its current form, falls far short of this standard.

Article 4 of the current draft, which lists the actions that make up due diligence, **should clearly establish the expectation that companies will engage in safe and meaningful stakeholder consultation on an ongoing basis throughout the entire due diligence process.** As stressed in the UNGPs, all consultation mandated under the Directive should **take into account potential barriers to effective engagement. This should be considered to include fear and the possibility of retaliation.**

Article 6, which lays out the substance of the duty to identify and assess actual and potential adverse impacts, states that companies shall, **"where relevant"**, carry out consultations with potentially affected groups, including workers and other relevant stakeholders, to gather information on adverse impacts.

There can be no effective human rights and environmental due diligence by businesses without meaningful stakeholder engagement. As such, I recommend that the "where relevant" clause in article 6.4 is removed.

Furthermore, given the unique knowledge that human rights defenders have of local human rights and environmental risks, as has been highlighted by the Working Group on Business and Human Rights⁷, as well as their crucial role as intermediaries between affected groups, State authorities and companies, defenders should be specifically named within the group of

⁶ A/HRC/47/39/Add.2, para 60

⁷ Ibid., para 61

“other relevant stakeholders” to be consulted with at this stage of the due diligence process. Such an amendment would ensure that defenders, in particular those acting as intermediaries, are not excluded from the process of identifying and assessing adverse impacts, and in turn that the process stands a better chance of proving effective. This should be **coupled with the inclusion of a definition of human rights defenders in article 3 (n)**, based on the UN Declaration on Human Rights Defenders, as reflected in the EU Guidelines on Human Rights Defenders first produced in 2008.

In articles 7 and 8, when establishing the obligations flowing from the identification and assessment stage of due diligence, the Commission's proposal is again positive in its inclusion of stakeholder engagement, but let down by the caveats it surrounds engagement with.

Article 7, on preventing and mitigating potential adverse impacts, requires companies to develop **action plans** to prevent the potential adverse impacts identified from materialising, and to do so in **consultation with affected stakeholders**, however, such plans are only to be developed **“where necessary** due to the nature or complexity of the measures required”, and **“where relevant”**. The article makes **no further mention of stakeholder** engagement, and thus **would seem to place no obligation on companies to engage with stakeholders**, including affected groups, communities and human rights defenders among them, **when addressing potential adverse impacts in situations where the company deems it unnecessary or irrelevant.**

The issues seen in article 7 arise again in **article 8**, on bringing actual adverse impacts to an end, wherein **corrective action plans** are foreseen as being developed in **consultation with stakeholders**, but only **“where relevant”** and **“where necessary** due to the fact that the adverse impact cannot be immediately brought to an end”.

The steps taken by companies to address potential adverse impacts identified in the due diligence process should always be developed in consultation with those who stand to see their human rights, including the right to a healthy environment, directly affected. Without this consultation, companies will not be able to be sure they have taken the appropriate action to prevent or successfully mitigate against the possible harm.

As such, **I strongly recommend that the development of the preventative and corrective action plans in consultation with stakeholders, as foreseen in the current draft, be made a mandatory obligation through the removal of the “where necessary” and “where relevant” clauses that currently undermine the provisions of articles 7 and 8.**

Under the Commission's draft of the Directive, **article 10** would place an obligation on companies covered to carry out assessments of the effectiveness of their due diligence processes at least every twelve months, as well as whenever there are reasonable grounds to believe that there are significant new risks of adverse impacts occurring. **While the inclusion of this requirement by the Commission is positive, the obligation to monitor the effectiveness of the due diligence process should be brought in line with the UNGPs (GP 20) by not only being based on qualitative and quantitative indicators, but by drawing on feedback from affected stakeholders, including human rights defenders.**

Recommendation 3: The introduction of obligations to mitigate risks of retaliation against human rights defenders

Human rights defenders all over the world, including indigenous human rights defenders, women human rights defenders and those raising concerns linked to environmental damage, face retaliation

when raising concerns connected with the activities of EU companies and others. The failure of the current draft of the Directive to take the well-documented pattern of such retaliation into account represents a serious shortcoming that must be remedied to give the Directive the greatest chance of succeeding in its stated aims, in particular when it comes to effective enforcement.

Article 9 of the Commission's proposal obliges companies to create a mechanism whereby a defined list of persons and organisations may submit complaints to them about possible adverse human rights and environmental impacts connected to their operations, those of their subsidiaries and their value chains. **Among those listed as having standing to submit complaints through such complaints mechanisms are persons actually or potentially directly affected by the adverse impact in question. It is precisely these persons, who should be considered human rights defenders when making such complaints, who are most at risk of retaliation when raising human rights and environmental concerns about corporate activity.**

This **risk of retaliation goes unacknowledged in article 9** of the draft Directive, however, **a form of retaliation is addressed in article 23**, which expands the scope of EU Directive 2019/1937 - the Whistleblower Protection Directive – “to apply to the reporting of all breaches of the due diligence Directive and the protection of persons reporting such breaches.” This is a positive step, however, as the Whistleblower Protection Directive only concerns those with a professional relationship with the company in question, and only covers retaliation perpetrated by the company itself, it **would not provide protection for most human rights defenders**, in particularly those most at risk. This oversight is reflected in the recitals to the proposal, where in paragraph 65 the key role in exposing breaches of the Directive for “persons who work for companies subject to due diligence obligations” or those “who are in contact with such companies in the context of their work-related activities” is acknowledged, along with the need to extend the protections of the Whistleblowers Protection Directive to them, but the vital role to be played by those without this professional link, including human rights defenders, is overlooked.

Considering these serious concerns, **I recommend the inclusion of a new provision in article 9 that would outline, building on the criteria around operational-level grievance mechanisms included in the UNGPs (see GP 31), the minimum standards necessary for a complaints mechanism to be effective, within which the requirement that companies take steps to mitigate the risk of any form of retaliation against those making complaints be included. In cases where retaliation does occur and a company failed to take reasonably appropriate measures to comply with this obligation, the company in question should be held accountable through civil liability, with this to be reflected in article 22 of the proposal, through an amendment to its first provision.**

This should be **coupled with an amendment of article 23 of the current proposal to ensure that Member States develop measures to mitigate the risk of retaliation against all stakeholders exercising their rights under the Directive**, not only those who would be covered by an extension of the Whistleblower's Directive.

Finally, I believe that **the standing to submit complaints established in article 9.2 should be expanded through an amendment to article 9.2 (c) that would remove the unnecessarily restrictive requirement attached to civil society standing to submit complaints, namely that they be “active in areas related to the value chain concerned”, and expressly provide for the standing of others representing directly affected communities, such as human rights defenders and lawyers.**