

Towards Corporate Obligations for Freshwater?

The European Commission's Proposal for a Corporate Sustainability Due Diligence Directive and Freshwater Issues

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Abstract

Companies exert substantial pressures on freshwater. They may exacerbate depletion and can be a major source of pollution, adversely impacting human rights and the environment. Recent years have seen the emergence of regulatory instruments that aim to address adverse impacts by corporate activities on people and the planet. These have culminated in the European Commission's 2022 Proposal for a Corporate Sustainability Due Diligence Directive, which seeks to introduce an obligation for large EU companies to conduct human rights and environmental due diligence. Despite companies' adverse impacts on freshwater, the draft Directive does not explicitly focus on this. Nevertheless, its material scope does contain human rights and environmental standards from which its protection can potentially be extrapolated. In light of this potential, this article answers the question: to what extent does the draft Corporate Sustainability Due Diligence Directive encompass freshwater issues, and how can its role in this respect be improved? It finds that the draft Directive encompasses freshwater protection from the perspective of both human rights and environment but only to a limited extent. It is limited from a human rights perspective due to the reformulation of the human right to water, and from an environmental perspective due to the acritical transposition of international environmental obligations. Given these limitations, the article concludes with some recommendations on how freshwater issues can be more comprehensively included within the draft Directive.

Keywords: freshwater, corporate responsibility, due diligence, human rights, environment.

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1 Introduction

Freshwater is a natural resource with unique characteristics, above all, that it is essential for all life on this planet.¹ Despite this fundamental life-sustaining role, freshwater availability is limited. While seventy-one percent of the earth's surface is covered by water, less than three percent of this is freshwater. Of that three percent, only half a percent is accessible for human and environmental needs.² Although this quantity of freshwater has remained unchanged for billions of years, the anthropogenic pressures exerted thereon have increased exponentially.³ Companies can exert substantial anthropogenic pressures on freshwater resources by exacerbating freshwater depletion and contributing to freshwater pollution, thus adversely impacting human rights and the environment.

Corporate activities may exacerbate freshwater depletion owing to their volumes of freshwater extraction. Globally, approximately eighty-four percent of freshwater resources are withdrawn by the agricultural and industrial sectors.⁴ This mass extraction contributes to freshwater scarcity in the basins where companies operate.⁵ Where scarcity occurs, freshwater is unavailable for humans to meet their basic needs, including drinking,

1 F. Greco and M. Antonelli, 'Not All Drops Are the Same', in F. Greco and M. Antonelli (eds.), *The Water We Eat: Combining Virtual Water and Water Footprints* (2015) 3, at 4.

2 D.M. Chirwa, 'Access to Water as a New Right in International, Regional and Comparative Constitutional Law', in A. von Arnould, K.von der Decken & M. Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 55, at 55; World Business Council for Sustainable Development, 'Water Facts and Trends', <https://docs.wbcsd.org/2005/08/WaterFactsAndTrends.pdf> (last visited 4 May 2022).

3 S.C. McCaffrey, C. Leeb & R.T. Denoon, 'Introduction to the Research Handbook on International Water Law', in S.C. McCaffrey, C. Leeb & R.T. Denoon (eds.), *Research Handbook on International Water Law* (2019) 1, at 1.

4 United Nations-Water, 2021: Summary Progress Update 2021 –SDG 6-water and sanitation for all. Version 2021. Geneva, Switzerland, at 9-10 notes that 72% of all global freshwater withdrawals are used by agriculture, while 12% is used by industry.

5 Greco and Antonelli, above n. 1, at 4; S. Sojamo and E.A. Larson, 'Investigating Food and Agribusiness Corporations as Global Water Security, Management and Governance Agents: The Case of Nestle, Bunge, and Cargill', *5 Water Alternatives* 619 (2012).

hygiene, and cooking. Freshwater is also unavailable to meet environmental needs, and this results in disappearing wetlands, damaged ecosystem services and the inability to sustain plant and animal life.⁶

Corporate activities can also be a major source of freshwater pollution. This is caused, for instance, by the discharge of harmful agricultural effluents like fertilisers, herbicides and pesticides,⁷ as well as industrial wastewater contaminated with chemical and radiological substances into surrounding freshwater sources.⁸ This can create serious health problems for people and destroy ecosystems by deteriorating freshwater quality so that natural vegetation and healthy aquatic ecosystems cannot be sustained.⁹

Companies may be connected to adverse impacts to freshwater in different ways. On the one hand, there are companies operating directly on the ground and in the water basins where the freshwater depletion and pollution occurs. On the other hand, there may be many other companies that are indirectly linked to those same adverse impacts through their global value chains.¹⁰ There have been some notable cases in which EU-based companies have been connected to freshwater depletion and pollution with serious adverse impacts on human rights and the environment outside the EU.

A depletion-related case is that of Danish supermarkets that imported and sold avocados that had been harvested from plantations in a water scarce region of Chile.¹¹ The plantations' freshwater extractions from riverine systems and groundwater aquifers caused freshwater depletion and the deterioration of the ecosystems dependent thereon. Vegetation was reduced to piles of roots and dead tree stumps, and animals died from dehydration. Local communities had insufficient freshwater for necessities like drinking water, hygiene, cooking

and cleaning.¹² A pollution-related case is that of Royal Dutch Shell being held responsible for polluting the Niger Delta's waterways as a result of numerous oil spills from pipelines operated by its Nigerian subsidiary.¹³ These oil spills have had irreparable impacts. Freshwater has been so polluted that it cannot be used for drinking, cooking or cleaning by the communities living in the vicinity of the affected pipelines, fish have died, and no vegetation will grow in or near it.¹⁴ Globally, the instances of companies adversely impacting freshwater are countless.

The past two decades have seen an increasing focus on the ways in which corporate activities may directly and indirectly cause adverse impacts on human rights and the environment and on the question of how this should be addressed. In recent years this has resulted in the emergence of a growing variety of regulatory instruments seeking to address companies' responsibility to prevent, mitigate and/or redress adverse human rights or environmental impacts that directly or indirectly result from their operations. Over time these instruments have become increasingly binding in nature, culminating in the European Commission's 2022 Proposal for a Corporate Sustainability Due Diligence Directive,¹⁵ which seeks to introduce an obligation for large EU companies to conduct human rights and environmental due diligence.

However, despite the fundamental life-sustaining role of freshwater, and despite the pressures exerted on this resource by corporate activities that result in adverse impacts to human rights and the environment, the draft Directive does not specifically address this issue. Yet its material scope does contain human rights and environmental standards from which a corporate responsibility to respect freshwater can potentially be extrapolated. In light of this potential, this article answers the question: to what extent does the draft Corporate Sustainability Due Diligence Directive (hereinafter: draft Directive) encompass freshwater issues, and how can its role in this respect be improved?

Using doctrinal legal methodology, this article will first outline the foundational international instruments establishing companies' responsibilities with respect to human rights and the environment and the role of due diligence in this context (Section 2.1), as well as the international human right to water (Section 2.2). It will then explore how freshwater issues have been encompassed within human rights and environmental due diligence as prescribed by these foundational instruments,

6 World Wildlife Fund, 'Water Scarcity', www.worldwildlife.org/threats/water-scarcity (last visited 4 May 2022).

7 Organisation for Economic Co-operation and Development, 'Water and Agriculture', www.oecd.org/agriculture/topics/water-and-agriculture/ (last visited 4 May 2022); United Nations-Water, 'Water Quality and Wastewater', www.unwater.org/water-facts/quality-and-wastewater/ (last visited 4 May 2022).

8 Pacific Institute, 'Bringing a Human Rights Lens to Corporate Water Stewardship: Results of Initial Research', https://pacinst.org/wp-content/uploads/2013/02/full_report33.pdf (last visited 4 May 2022) (2012); Swedwatch, 'To The Last Drop: Water and Human Rights Impacts of the Agro Export Industry in Ica, Peru: The Responsibility of Buyers', <https://swedwatch.org/region/food-companies-fail-to-address-water-risks-in-peru/> (last visited 4 May 2022) (2018), at 13.

9 Water Footprint Network, <https://waterfootprint.org/en/water-footprint/frequently-asked-questions/#CP30> (last visited 4 May 2022).

10 Global value chains are functionally integrated but geographically dispersed networks that encompass the full range of activities required to bring a product or service from conception, through its phases production, to its distribution to consumers, and finally its disposal after use. See: D. Danielsen and J. Blair, 'The Role of Law in Global Value Chains: A Window Into Law and Global Political Economy', <https://lpeproject.org/blog/the-role-of-law-in-global-value-chains-a-window-into-law-and-global-political-economy/> (last visited 10 May 2022); and R. Kaplinsky and M. Morris, *A Handbook for Value Chain Research* (2001), at 4; OECD, 'Global Value Chains', <https://www.oecd.org/sti/ind/global-value-chains.htm> (last visited 10 May 2022).

11 Danwatch, 'Avocados and Stolen Water', <https://old.danwatch.dk/en/undersogelse/avocados-and-stolen-water/> (last visited 4 May 2022) (2017).

12 *Ibid.*

13 Milieudéfense: Friends of the Earth Netherlands, 'Milieudéfense's Lawsuit Against Shell in Nigeria', <https://en.milieudéfense.nl/shell-in-nigeria/milieudéfense-lawsuit-against-shell-nigeria> (last visited 4 May 2022).

14 *Ibid.*; for case ECLI:NL:GHDHA:2021:1825 see <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:1825> (last visited 4 May 2022).

15 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, 2022/0051(COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> (last visited 4 May 2022). (2022).

focusing on the UN Guiding Principles on Business and Human Rights in Section 3.1 and on the OECD Guidelines in Section 3.2 and how this works in practice (Section 3.3). It will then explore the draft Directive's material scope with respect to human rights, specifically focusing on the human right to water (Section 4.1), and with respect to the environment, specifically focusing on the environmental aspect of freshwater issues (Section 4.2). It will also provide a critical reflection on the extent to which freshwater issues are included within the draft Directive as it currently stands. The article concludes with recommendations on how it could include freshwater issues more comprehensively (Section 5).

2 Setting the Scene

Before delving into an analysis of due diligence and freshwater issues, a brief exploration of human rights and environmental due diligence, as well as the status of the human right to water is in order.

2.1 Human Rights and Environmental Due Diligence

Recent decades have seen increased global scrutiny of companies' adverse impacts¹⁶ on human rights and the environment,¹⁷ prompting a rapid flourishing of instruments that attempt to prevent, mitigate and/or redress such impacts by introducing human rights and environmental due diligence.¹⁸ This section introduces the concept of human rights and environmental due diligence (hereinafter: due diligence) by exploring the relevant sections of the international instruments that established it: the 2011 UN Guiding Principles on Business and Human Rights (UNGPs)¹⁹ and the 2011 version of the OECD Guidelines for Multinational Enterprises (OECD Guidelines)²⁰

Seeking to establish a consensus on human rights standards applicable to companies, UN Special Representative John Ruggie²¹ introduced, in 2008, the 'Protect, Respect and Remedy' policy framework.²² This consists of three pillars, wherein states and companies are assigned different roles regarding human rights: I) the state duty to protect the human rights of those within their jurisdiction;²³ II) the corporate responsibility to respect the human rights of third parties; and III) access to remedies for victims of companies' adverse impacts on human rights. The second pillar outlines what is required of companies for them to respect the human rights of third parties who may be detrimentally impacted by activities in which these companies are directly or indirectly involved.²⁴ It introduces the concept of human rights-related due diligence as '...a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.'²⁵

The 'Protect, Respect and Remedy' framework was operationalised into the 2011 UNGPs,²⁶ according to which the corporate responsibility to respect encompasses three core aspects: 1) the adoption of a policy commitment to respect human rights;²⁷ 2) the implementation of an ongoing human rights due diligence process;²⁸ and 3) the adoption of remediation processes.²⁹ According to the UNGPs, companies should carry out due diligence³⁰

- 16 An 'adverse human rights impact' occurs when an action removes or reduces the ability of an individual to enjoy [their] human rights; see Office of the United Nations High Commissioner for Human Rights, 'The Corporate Responsibility to Respect: An Interpretive Guide', www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf (last visited 24 November 2022) (2012), at 5; see also D. Birchall, 'Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights', 2(1) *Oxford Human Rights Hub Journal* 120 (2019).
- 17 L. Enneking and J. Veldman, 'Towards Responsible Business Conduct in Global Value Chains: Relevant Legal Developments in the Netherlands', 4 *Erasmus Law Review* 1 (2019).
- 18 N. Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (2016), at 210; C. Scott, F. Cafaggi & L. Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', 38 *Journal of Law and Society* 1, at 6 (2011); A. Paul, 'Human Right to Water Obligations, Corporate Entities, and Accountability Mechanisms', in N. Singh (ed.), *The Human Right to Water: From Concept to Reality* (2016) 1667, at 173.
- 19 United Nations, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy"', *Framework*, www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (last visited 4 May 2022). (2011).
- 20 Organisation for Economic Co-operation and Development (OECD), 'OECD Guidelines for Multinational Enterprises', www.oecd.org/corporate/mne/

oecdguidelinesformultinationalenterprises.htm (last visited 4 May 2022). (2011).

- 21 In 2005 Ruggie was appointed as the Special Representative on human rights and transnational corporations and other business enterprises. UN Commission on Human Rights, Res. E/CN.4/RES/2005/69, 20 April 2005; UN Press Release SG/A/934, <https://press.un.org/en/2005/sga934.doc.htm> (last visited 24 November 2022). (28 July 2005); Enneking and Veldman, above n. 17, at 2.
- 22 UN Human Rights Council, A/HRC/8/5 'Protect, Respect and Remedy: A Policy Framework for Business and Human Rights', <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement> (last visited 24 November 2022) (7 April 2008).
- 23 This duty is applicable to both home and host states, UNGPs, above n. 19, at 1.
- 24 United Nations Human Rights Council Report A/HRC/14/27, 9 April 2010, at 12; A.F.S. Russell, 'Incorporating Social Rights in Development: Transnational Corporations and The Right to Water', 7 *International Journal of Law in Context* 1, at 7 (2011); N. Chowdhury, B. Mustu, H. St. Dennis & M. Yao, 'The Human Right to Water and the Responsibilities of Businesses: An Analysis of Legal Issues', *SOAS School of Law Research Paper No. 03/2011*, at 17 (2011).
- 25 Protect, Respect and Remedy, above n. 22, at 9.
- 26 UNGPs, above n. 19; Enneking and Veldman, above n. 17, at 2; Bernaz, above n. 18, at 193. E. Morgera, *Corporate Environmental Accountability in International Law* (2020), at 43.
- 27 UNGPs, above n. 19, at Principle 15 and 16; C.M. O'Brien and S. Dhana- rajan, 'The Corporate Responsibility to Respect Human Rights: A Status Review', *Accounting, Auditing & Accountability Journal* 542, at 545 (2016); Shift, 'UN Guiding Principles Reporting Framework with Implementation Guidance' (2015), at 17.
- 28 UNGPs, above n. 19, at Principle 17-21, UNGPs Reporting, 'Human Rights Due Diligence', www.ungpreporting.org/glossary/human-rights-due-diligence/ (last visited 10 May 2022); O'Brien and Dhana- rajan, above n. 27, at 545; Shift, above n. 27, at 17.
- 29 UNGPs, above n. 19, at Principles 15 and 22; Shift, above n. 27, 17; A.M. Esteves, G. Factor, F. Vanclay, et al., 'Adapting Social Impact Assessment to Address a Project's Human Rights Impacts and Risks', *Environmental Impact Assessment Review* 67, at 75 (2017).
- 30 UNGPs above n. 19, at Principles 15-21.

to 'identify, prevent, mitigate and account for'³¹ actual or potential adverse human rights impacts that they may be involved in through their own activities or through their business relationships.³² Doing so requires them to take four essential steps:³³ 1) assessing the actual and potential adverse impacts of their business activities on human rights;³⁴ 2) acting on the findings of this assessment, including by integrating appropriate measures to address impacts into company policies and practices;³⁵ 3) tracking how effective the measures the company has taken are in preventing or mitigating adverse human rights impacts;³⁶ and 4) communicating publicly about the due diligence process and results on how impacts are addressed.³⁷

Although the UNGPs are not legally binding, they have been widely accepted and have proven highly influential in the decade since their unanimous adoption by the UN Human Rights Council. Since its introduction by the UNGPs, the due diligence concept has also found its way into other international soft law instruments, like the 2011 revised version of the OECD Guidelines for Multi-national Enterprises.³⁸ Since the OECD Guidelines cover a range of topics that is broader than human rights, including, for instance, the environment, this has expanded the material scope of due diligence.³⁹ The OECD Working Party on Responsible Business Conduct has subsequently issued a number of guidance documents on what is required of companies in implementing due diligence, including a general guidance⁴⁰ (featuring, among other things, a six-step graphic representation of the due diligence process and supporting measures; see

figure 1) as well as several sector-specific and/or thematic guidances.

In 2018, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises noted that '[s]ince the endorsement of the Guiding Principles by the Human Rights Council in 2011, corporate human rights due diligence has become a norm of expected conduct'.⁴¹ This statement is corroborated by the fact that in an increasing number of countries, especially in Europe, legislative initiatives have been introduced featuring human rights and environmental due diligence obligations for companies. Examples include the French Law on Duty of Vigilance,⁴² the Norwegian Law on Transparency,⁴³ the German Lieferkettengesetz⁴⁴ and several instruments in varying stages of development in the Netherlands,⁴⁵ Austria⁴⁶ and Belgium.⁴⁷ This development has provided the main impetus for the introduction at the EU level of the draft Corporate Sustainability Due Diligence Directive.⁴⁸

31 *Ibid.*, at Principle 15.

32 Protect, Respect and Remedy, above n. 22, at para 56; UNGPs above n. 19, at Principle 15 and 17; R. McCorquodale, L. Smit, Neely S., et al., 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises', 2 *Business and Human Rights Journal* 195, at 196-7 (2017); A. Lafarre and B. Rombouts, 'Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value Chains', 13(4) *European Journal of Risk Regulation* 1, at 7 (2022); European Commission, 'Study on Due Diligence Requirements Through the Supply Chain, Part I: Synthesis Report' (2020), at 22; L. Smit, G. Holly, R. McCorquodale & S. Neely, 'Human Rights Due Diligence In Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard', 17(6) *The International Journal of Human Rights* 945, at 946 (2021).

33 UNGPs above n. 19, Principles 18-22; Castan Centre for Human Rights Law, 'Human Rights Translated 2.0: A Business Reference Guide' (2016), at 4; Smit et al., above n. 32, at 946.

34 UNGPs above n. 19, Principles 18-22; O'Brien and Dhanarajan, above n. 27, at 545; Castan Centre for Human Rights Law, above n.33, at 4; Shift, above n. 27, at 17; Esteves et al., above n. 29, at 75.

35 *Ibid* UNGPs.

36 *Ibid.*

37 *Ibid.*

38 OECD Guidelines, above n. 20, Chapter V, at para 1, 35; Lafarre and Rombouts, above n. 32, at 7; European Commission above n. 32, at 9.

39 OECD Guidelines, above n. 20, Commentary to Chapter II: General Policies, at para 14, 23-24; S. Maljean-Dubois, 'The Applicability of International Environmental Law To Private Enterprises', in P.M. Dupuy and J.E. Viñuales (eds.), *Harnessing Foreign Investments to Promote Environmental Protection: Incentives and Safeguards* (2013) 69, at 88; Enneking and Veldman, above n. 17, at 2.

40 OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct', <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> (last visited 4 May 2022). (2018).

41 UN Working Group on the issue of human rights and transnational corporations and other business enterprises, A/73/163 (16 July 2018), at para 20; European Commission above n. 32, at 22.

42 LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/ (last visited 6 May 2022). (2017).

43 Vedtak til lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), Lovvedtak 176 (2020–2021), <https://stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2020-2021/vedtak-202021-176/> (last visited 6 May 2022). (2021).

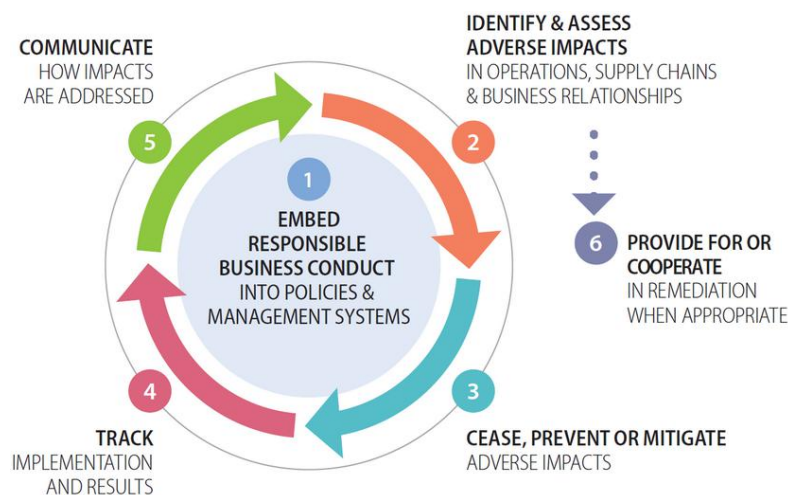
44 Deutscher Bundestag, Drucksache 19/28649, Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, <https://dserver.bundestag.de/btd/19/286/1928649.pdf> (last visited 6 May 2022). (2021).

45 Tweede Kamer, vergaderjaar 2020–2021, 35 761, nr. 2, Voorstel van wet van de leden Voordewind, Alkaya, Van den Hul en Van den Nieuwenhuijzen houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), www.tweedekamer.nl/kamerstukken/detail?id=2021D09817 (last visited 6 May 2022). (2021).

46 Entschließungsantrag, 1454/A(E) XXVII. GP, betreffend ein Lieferkettengesetz für eine soziale, menschenrechtskonforme und nachhaltige Produktionsweise, www.parlament.gv.at/PAKT/VHG/XXVII/A/A_01454/fnameorig_935996.html (last visited 6 May 2022) (2021).

47 Belgische Kamer van Volksvertegenwoordigers, DOC 55 1903/001, Wetvoorstel: houdende de instelling van een zorg- en verantwoordingsplicht voor de ondernemingen, over hun hele waardeketen heen, www.dekamer.be/FLWB/PDF/55/1903/55K1903001.pdf (last visited 6 May 2022). (2021).

48 Draft Directive, above n.15, at 10-13.

Figure 1 Due diligence process and supporting measures^{Ibid.}, at 21.

2.2 The International Human Right to Water

Although the idea that everyone has a right to water is not new – and water’s indispensability for human survival has been recognised throughout history –⁴⁹ the human right to water is contentious in the field of international human rights.⁵⁰ The primary reason for this is that it has not been explicitly recognised in the three most authoritative instruments outlining fundamental international human rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁵¹ Nonetheless, the international human right to water has been recognised in two ways. First, it has been explicitly recognised as an individual human right in a few binding international human rights instruments. Second, it has been implicitly recognised in a wide array of international documents, notably in several non-binding Resolutions and Declarations⁵² as a derivative right.⁵³

The explicit recognition of the human right to water is made in a number of international instruments that require states to ensure that freshwater is available to specific groups of people who require special protection. The right to a basic water supply was explicitly recognised in instruments like the Convention on the Elimination of All Forms of Discrimination Against Women,⁵⁴

the Convention on the Rights of the Child⁵⁵ and the Convention on the Rights of Persons with Disabilities.⁵⁶ The right has been implicitly recognised by the UN Committee on Economic, Social and Cultural Rights, which derived the human right to water from the International Covenant on Economic, Social and Cultural Rights (ICESCR) in General Comment 15, guided by the belief that water is essential to ensure human dignity, life and health.⁵⁷ The human right to water was derived primarily from Article 11 on the right to an adequate standard of living⁵⁸ and from Article 12 on the right to the highest attainable standard of health.⁵⁹

General Comment 15 defined the right as ‘entitling everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.⁶⁰ This definition also elaborates why the human right to water is necessary, detailing that ‘an adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases, and to provide for consumption, cooking, personal and domestic hygienic requirements’.⁶¹

General Comment 15 is considered the most authoritative interpretation of the right, establishing its norma-

49 O. Spijkers, D. Misiedjan, C. Foot & M. van Rijswijk, ‘Editorial for Localising the Sustainable Human Right to Water’, 16(2) *Utrecht Law Review* 1, at 1 (2020).

50 Chirwa, above n. 2, at 55; Paul, above n. 18, at 177; T.S. Bulto, ‘The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?’, 12(2) *Melbourne Journal of International Law* 290 (2011) at 2.

51 Universal Declaration of Human Rights, 10 December 1948; The International Covenant on Civil and Political Rights, 16 December 1966; and the International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

52 T. Lambooy, ‘Corporate Social Responsibility: Sustainable Water Use’, 19 *Journal of Cleaner Production* 852, at 853 (2011); A. Cahill, ‘The Human right to Water- A Right of Unique Status’: The Legal Status and Normative Content of the Right to Water’, 9(3) *The International Journal of Human Rights* 390-1 (2005).

53 A derivative right is a right deriving from other related or ‘dependent’ rights, Cahill, above n. 53, at 391.

54 Convention on the Elimination of All Forms of Discrimination against Women (18 December 1978) at Art. 14(2)(h), Art. 12(2)(h).

55 Convention on the Rights of the Child (20 November 1989), at Art 24(2) (c).

56 Convention on the Rights of Persons with Disabilities (13 December 2006), at Art 28(2)(a).

57 Paul, above n. 18, at 177-8; United Nations Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (20 January 2003); R.S. Shukla and N. Singh, ‘Human Right to Water in a Bottled Water Regime’, in N. Singh (ed.), *The Human Right to Water: From Concept to Reality* (2016) 124, at 126; P. Thielborger, ‘Something Old, Something New, Something Borrowed and Something Blue: Lessons to Be Learned from the Oldest of the ‘New’ Rights- the Human Right to Water’, in A. von Arnould, K von der Decken & M. Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 70, at 73.

58 General Comment 15, above n. 58, at para 3.

59 *Ibid.*

60 *Ibid.*, at para 2; Lambooy, above n. 53, at 853.

61 General Comment 15, above n. 58, at para 2.

tive content⁶² that entails three components: freshwater availability (quantity), quality and accessibility. It is important to note that the three components of the normative content of the human right to water are indivisible and, thus, in order to realise the human right to water, respect should be given to all the constituent elements thereof. Unless all these elements are respected, the human right to water is not fully fledged.⁶³

Availability (quantity) means that each individual's freshwater supply must be sufficient and continuous for personal and domestic uses.⁶⁴ The UN has not determined the precise amount that entails a sufficient quantity; however, it follows World Health Organisation Guidelines in this regard,⁶⁵ which set twenty litres per person daily as the minimum quantity.⁶⁶ This minimum standard is set exceptionally low, especially considering that, globally, approximately eighty-four percent of freshwater resources are withdrawn by agriculture and industry,⁶⁷ and the water footprint of some products, which are offered a far greater amount of freshwater per unit. For example, one cup of coffee requires 130 litres of freshwater, and one kilogram of beef 15, 400 litres.⁶⁸ Quality entails that water should be clean and free from harmful substances like micro-organisms, chemicals and radiological substances. It should also be of an 'acceptable colour, odour and taste for each personal or domestic use'.⁶⁹ This definition is broad and encompasses all possible types of freshwater pollution and does not limit this to specified chemicals. Accessibility has four overlapping dimensions: physical, economic and information accessibility, as well as non-discrimination.⁷⁰ Physical accessibility requires water facilities and services to be within the safe physical reach of all sections of the population and should be accessible within, or in the immediate vicinity of, each household, educational institution and workplace.⁷¹ Economic accessibility requires that water be affordable for all persons and that the cost of water does not compromise the realisation of other Covenant rights.⁷² Information accessibility 'includes the right to seek, receive and impart information concerning water issues'.⁷³ Non-discrimination⁷⁴ entails accessibility to all water facilities and services, without discrimination on any prohibited grounds.⁷⁵

After its establishment in General Comment 15, the international human right to water has been affirmed or reinforced in multiple instruments since.⁷⁶⁷⁷ These include UN General Assembly Resolution 64/292 (2010), which reinforced the human right to water as a self-standing justiciable human right,⁷⁸ and UN Human Rights Council Resolution 15/9 (2010), which recognised the right to water as instrumental to the realisation of other human rights and affirmed that it is derived from the rights to an adequate standard of living, health, life and human dignity.⁷⁹ As Chirwa highlights, these developments demonstrate that the right to water is 'going through a process of achieving formal affirmation' and that there 'is a strong trend towards its full legal recognition'.⁸⁰

3 Due Diligence and Freshwater Issues

Given that human rights and environmental due diligence has become a norm of expected conduct for companies, the question arises as to whether this also means that companies are expected to include or even prioritise freshwater issues when conducting due diligence. Before going into an analysis of the draft Directive, this section will look at (and, where relevant, beyond) the foundational instruments that have established companies' due diligence expectations, the UNGPs and the OECD Guidelines to explore whether and to what extent freshwater protection is encompassed within their material scope. In addition, it will also look at studies that indicate whether companies do in fact conduct due diligence and, if so, what the material scope is of the activities they carry out in this respect.

3.1 The UNGPs and Freshwater Issues

According to Principle 12 of the UNGPs, due diligence should encompass, at a minimum, all internationally recognised human rights.⁸¹ According to Principle 12

62 Cahill, above n. 53, at 392.

63 J. Cernic, 'Corporate Obligations Under the Human Right to Water', 39 *Denver Journal of International Law and Policy*, 303, at 315 (2011).

64 General Comment 15, above n. 58.

65 *Ibid.*, at para 12(a).

66 World Health Organisation, *Guidelines for Drinking - Water Quality* (2017), at 84.

67 United Nations-Water, above n. 4 notes that approximately 72% of all global freshwater withdrawals are used by agriculture, while 12%-19% are used by industry.

68 Water Footprint Network, above n. 9.

69 General Comment 15, above n. 58, at para 12(b).

70 *Ibid.*, at para 12(c); Chowdhury et al., above n. 24, at 6.

71 *Ibid* General Comment 15.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 D. Chirwa and N. Amodu, 'Economic, Social and Cultural Rights, Sustainable Development Goals, and duties of Corporations: Rejecting the False

Dichotomies', 6 *Business and Human Rights Journal* 21, at 37 (2021); General Comment 15, above n. 58, at para 12(c)(iii).

76 These include UN Economic and Social Council, 'Realisation of the right to drinking water and sanitation, Report of the Special Rapporteur, El Hadji Guissé', E/CN.4/Sub.2/2005/25, 11 July 2005; UNHRC, 'Annual Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments', A/HRC/6/3, 16 August 2007; UNHRC, Resolution 27/7 The human right to safe drinking water and sanitation, A/HRC/RES/27/7, 2 October 2014; UNGA, Resolution 70/169 The human rights to safe drinking water and sanitation, A/RES/70/169, 22 February 2016; UNGA, Resolution 74/141. The human rights to safe drinking water and sanitation, A/RES/74/141, 29 January 2020.

77 M. Arden, 'Water for All? Developing A Human Right to Water in National and International Law', 65(4) *The International and Comparative Law Quarterly* 771, at 785 (2016).

78 UN General Assembly, A/RES/64/292, 3 August 2010.

79 UN Human Rights Council, A/HRC/RES/15/9, 6 October 2010.

80 Chirwa and Amodu, above n. 76.

81 UNGPs, above n. 19, at Principle 12; M.B. Taylor, 'Human Rights Due Diligence in Theory And Practice', in S. Deva and D. Birchall (eds.), *Research*

and its commentary, these include those human rights expressed in the International Bill of Rights, which is composed of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the ICESCR, as well as the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.⁸² Organisations like the UN Global Compact⁸³ and the Danish Institute for Human Rights⁸⁴ have pointed out in this respect that understanding the meaning of rights in relation to the material scope of the UNGPs requires more than a textual reading of instruments and that their substantive content is elaborated in a multitude of places. These include declarations and general comments on human rights made by UN bodies, reports by UN special procedures on specific themes, as well as regional and national instruments and jurisprudence.⁸⁵ General Comment 15 as well as the UN General Assembly and Human Rights Council resolutions recognising the human right to water in Articles 11 and 12 of the ICESCR are instruments that elaborate the substantive content of human rights contained within the material scope of the UNGPs.

In addition to those instruments explicitly included, Principle 12 also states that '[d]epending on the circumstances, business enterprises may need to consider additional standards' like the rights of 'individuals belonging to specific groups or populations that require particular attention'.⁸⁶ The 2012 Interpretive Guide for the Responsibility to Respect by the Office of the UN High Commissioner for Human Rights (hereinafter, OHCHR) provides examples of additional standards that should be considered under different circumstances, emphasising those protecting specific groups of people like children, women, indigenous people, people belonging to ethnic or other minorities or persons with disabilities.⁸⁷ Many of the instruments that have been considered 'additional standards' that companies may need to consider explicitly include the human right to water. Examples include the right to a basic water supply in the Convention on the Elimination of All Forms of Discrimination Against Women,⁸⁸ the right to water as part of the right to health in the Convention on the Rights of the Child,⁸⁹ and the right of equal access by persons with disabilities to clean water services in the Convention on the Rights of Persons with Disabilities.⁹⁰

Handbook on Human rights and Business (2020) 88, at 89.

82 UNGPs, above n. 19, at Principle 12 and Commentary to Principles 12, at 14.

83 A voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals; see: www.unglobalcompact.org/about.

84 A leading and independent institution that works on promoting and protecting human rights; see: www.humanrights.dk/about-us.

85 UN Global Compact, 'A Structured Process to Prioritize Supply Chain Human Rights Risks' (2015), at 11; Danish Institute for Human Rights, 'Human Rights Impact Assessment Guidance and Toolbox' (2020), at 40.

86 UNGPs, above n. 19, Commentary to Principle 12, at 13

87 OHCHR Interpretive Guide, above n. 16, at 11.

88 CEDAW, above n. 55, at Art. 14(2)(h), Art. 12(2)(h).

89 CRC, above n. 56, at Art. 24(2)(c).

90 CRPD, above n. 57, at Art. 28(2)(a).

Additionally, to illustrate how human rights are relevant to companies and how human rights issues can be managed, the OHCHR Interpretive Guide refers to the 2008 'Human Rights Translated: A Business Reference Guide' by the Castan Centre for Human Rights Law, the International Business Leaders Forum and the OHCHR.⁹¹ In this guide, it is observed that Article 11 ICESCR on the right to an adequate standard living has been interpreted to include the right to water,⁹² and an interpretation of its normative content is provided on the basis of, *inter alia*, General Comment 15.⁹³ On this basis, the guide provides a number of recommendations as to how companies can include the human right to water within their due diligence processes, including: i) that companies should ensure that their human rights impact assessments identify any impacts on the right to water; ii) that they take steps to establish systems to monitor the impact of company activities on the water table and avoid overuse; and iii) that they establish systems to ensure that their activities do not pollute or otherwise damage water supplies and sources, for example by planning for the safe removal of toxic chemicals that could prove environmentally damaging.⁹⁴

With respect to the material scope of the UNGPs, it can be concluded that this encompasses all internationally recognised human rights, which in turn include the human right to water. Furthermore, it should be noted that whereas most authors view the material scope of the UNGPs as limited to internationally recognised human rights and/or not directly involving environmental issues,^{95,96} not everyone agrees that this is the case. Macchi, for instance, has highlighted that although the UNGPs do not expressly include environmental issues, this does not bar a holistic interpretation of the open-ended due diligence standard, which contains an inherent degree of flexibility.⁹⁷ In line with this, Macchi notes that because environmental and human rights issues are fundamentally interrelated, it is appropriate to advocate for a holistic due diligence process with standards of

91 OHCHR Interpretive Guide, above n. 16, at 11; Castan Centre for Human Rights Law, 'Human Rights Translated: A Business Reference Guide' (2008), at vii; Castan Centre for Human Rights Law, above n. 33, at ix.

92 Castan Centre for Human Rights Law, 2008, above n. 92, at 113; Castan Centre for Human Rights Law, above n. 33, at 100.

93 Castan Centre for Human Rights Law, 2008, above n. 92, at 118; the 2008 version also references the Report of the United Nations High Commissioner for Human Rights on the scope and content of relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, A/HRC/6/3, and the UN HRC 'Human rights and access to safe drinking water and sanitation', Resolution 7/22, 28 March 2008; Castan Centre for Human Rights Law, above n. 33, at xi and 101.

94 Castan Centre for Human Rights Law, 2008, above n. 92, at 124.

95 For example: Taylor, above n. 82, at 89-91; Birchall, above n. 16, at 136-7; and O'Brien and Dhanarajan, above n. 27, at 545.

96 C. O'Brien, 'Sustainable Corporate Governance: Submission to Consultation on European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence', COM(2022)71 final, at 3.

97 C. Macchi, 'The Climate Change Dimensions of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"', 6 *Business and Human Rights Journal* 93, at 108-9 (2019).

conduct that are interpreted considering environmental law as well.⁹⁸

At the same time, however, the UNGPs leave it up to companies to determine which human rights risks should be prioritised for further action, based on the identification of the risks that are related to their operations (or those of their subsidiaries or supply chain partners) and an assessment of their severity and irremediability.⁹⁹ Furthermore, the scale and complexity of the means through which they address such risks may vary according to not only the severity of the risks but also the specific features of the company, including its size, sector, operational context, ownership and structure.¹⁰⁰ This means that the question of whether and to what extent a company is required to take action, as part of its due diligence process, on freshwater issues related to its operations (or those of their subsidiaries or supply chain partners), can only be determined on a case-by-case and a company-by-company basis.¹⁰¹

3.2 The OECD Guidelines and Freshwater Issues

Apart from the fact that their personal scope is limited to multinational enterprises, the OECD Guidelines have been formulated from an open and broad perspective to facilitate their application in numerous contexts. Their material scope is broader than the UNGPs as they cover not only human rights but also a number of other broad categories: disclosure; employment and industrial relations; environment; bribery, bribe solicitation and extortion; consumer interests; science and technology; competition; and taxation.¹⁰² However, neither the 2011 Guidelines¹⁰³ nor the 2018 Due Diligence Guidance¹⁰⁴ are explicit about specific subjects or issues that fall outside of their scope. The recommendation that companies should carry out due diligence is laid down in the General Policies chapter of the Guidelines.¹⁰⁵ According to the commentary, this recommendation applies to all matters in the Guidelines that are related to adverse impacts but does not extend to the chapters on Science and Technology, Competition and Taxation.¹⁰⁶ Other than this, the material scope of due diligence in the OECD Guidelines is not clearly delineated or restricted, mean-

ing that it is not immediately evident whether or not freshwater issues fall within their material scope.¹⁰⁷

Chapter IV of the OECD Guidelines on Human Rights is consistent with the UNGPs in that it expresses that companies should respect internationally recognised human rights.¹⁰⁸ The content and language of this Chapter replicates that of the UNGPs, also indicating that internationally recognised human rights encompass those in the International Bill of Rights, as well as additional standards like those protecting rights of individuals belonging to specific groups like women, children and persons with disabilities.¹⁰⁹ As previously established in the context of the UNGPs, the human right to water is an internationally recognised right within the scope of the instruments and standards referenced and is thus a human right that should be considered in the due diligence process that multinational enterprises are required to conduct under the OECD Guidelines.

Chapter VI of the OECD Guidelines on Environment takes a broad approach to material scope. It expresses that companies should, 'within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives and standards, take due account of the need to protect the environment ... and generally to conduct their activities in a manner contributing to the wider goal of sustainable development'.¹¹⁰ The Chapter refers to general standards of environmental protection and lists tools, with a view to broadly reflecting the principles and objectives contained in several international environmental instruments. These include the Rio Declaration, Agenda 21 and the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.¹¹¹ It also provides a list of tools to achieve corporate environmental responsibility, including environmental management systems, life-cycle assessments, communication and stakeholder involvement and environmental impact assessments.¹¹² Whereas the reference in the OECD Guidelines to these standards, principles and objectives makes clear that companies are expected to protect the environment and act sustainably, the environmental protection of freshwater resources is not explicitly included within the Chapter.

This means that although owing to their broad set-up, freshwater issues can be said to fall within the material scope of the OECD Guidelines, the exact nature of their

98 See *Ibid.*

99 UNGPs, above n. 19, at Principle 24.

100 *Ibid.*, at Principle 14.

101 S. Deva, 'Global Compact: A Critique of the UN's "Public-Private" Partnership for Promoting Corporate Citizenship', 34 *Syracuse Journal of International Law and Commerce* 107, at 111 (2006), at 11.

102 European Commission, above n. 32, at 24; Taylor, above n. 82, at 90; A. Newton, *The Business of Human Rights: Best Practice and the UN Guiding Principles* (2019), at 111; S. Maljean-Dubois, 'The Applicability Of International Environmental Law To Private Enterprises', in P.M. Dupuy and J.E. Viñuales (eds.), *Harnessing Foreign Investments to Promote Environmental Protection: Incentives and Safeguards* (2013) 69, at 88; Enneking and Veldman, above n. 17, at 2.

103 OECD Guidelines, above n. 20.

104 OECD Due Diligence Guidance, above n. 41.

105 OECD Guidelines, above n. 20, at para. A.10 *et seq.*

106 *Ibid.*, at Commentary on General Policies, para.14.

107 OECD Due Diligence Guidance for Responsible Business Conduct, www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm (last visited 10 November 2022).

108 OECD Guidelines, above n. 20, Chapter IV Human Rights, at 31

109 *Ibid.*, at para 39 and 40, at 31.

110 *Ibid.*, Chapter VI. Environment, at 42.

111 *Ibid.*, para. 60; United Nations Conference on Environment and Development, Rio de Janeiro, Brazil 3-14 June 1992, Rio Declaration and Agenda 21, www.un.org/en/conferences/environment/rio1992 (last visited 16 November 2022) (1992); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998); Morgera, above n. 26.

112 *Ibid.*, Chapter VI. Environment, at paras 1-8.

inclusion therein requires analysis on a case-by-case basis. Examples of such cases (or ‘specific instances’) can be located within the database of the OECD National Contact Points (NCPs), which governments adhering to the OECD Guidelines are expected to set up in order to further the effectiveness of the Guidelines by, among other things, ‘...contributing to the resolution of issues that may arise from the alleged non-observance of the Guidelines in specific instances’.¹¹³ Despite the number of specific instances NCPs have taken on in recent decades, there are only a handful that include freshwater issues from either a human rights or an environmental perspective.¹¹⁴ An example of a specific instance that did involve freshwater issues is that of *The Odoh Family & Shell Petroleum Development Company of Nigeria Ltd. (SPDC)*.¹¹⁵ In this case, the Dutch NCP demonstrated that freshwater issues, more specifically oil spillages rendering freshwater unfit for livelihood purposes as well as the construction of a pipeline that distorted the natural flow and purposes of the lake,¹¹⁶ are encompassed within the material scope of the OECD Guidelines from the perspective of both human rights and environment.¹¹⁷

Going beyond the case-by-case approach to due diligence under the OECD Guidelines, the OECD Working Party on Responsible Business Conduct has introduced sectoral guidance instruments providing detailed guidance on how companies operating in a number of specific sectors should conduct due diligence.¹¹⁸ Most of these

sectoral guidance instruments explicitly incorporate freshwater issues, albeit to different extents.¹¹⁹ The Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, for instance, recommends that companies should understand how their operations impact both freshwater in the environment and the human right to water of surrounding communities.¹²⁰ The Guidance for Responsible Agricultural Supply Chains recommends that companies engage in the sustainable use of freshwater by reducing pollution and increasing freshwater efficiency. It also recommends that companies conduct enhanced due diligence when operating in water basins that experience freshwater scarcity.¹²¹ The Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector contains an entire module on freshwater that highlights specific risks the sector poses to freshwater and also provides tools to address these.¹²² Finally, the Due Diligence for Responsible Corporate Lending and Securities Underwriting demonstrates how decision-making in the financial sector can impact freshwater resources on the ground by setting out, for example, how an investor’s decision not to install costly equipment to treat run-off at a steel factory can pollute the drinking water of local communities.¹²³

3.3 Due Diligence and Freshwater Issues in Practice

Despite the broad recognition of the UNGPs and the OECD Guidelines and the emphasis they place on due diligence, scholars like O’Brien and Ortega¹²⁴ have noted that there is a dearth of studies on the impact and effectiveness of due diligence processes in practice.¹²⁵ The few studies that exist have demonstrated a minimal uptake of due diligence by companies.

In 2016 O’Brien and Dhanarajan noted that after five years of the UNGPs promulgation, less than 350 of approximately 80,000 companies had a human rights policy, which constitutes (only) the first step of the due diligence process.¹²⁶ A 2017 empirical study by Mc-

113 See: <https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf>.

114 Cases located from the OECD NCP cases online database at: <https://mneguidelines.oecd.org/database/searchresults/?hf=10&b=0&q=water>.

115 OECD, *The Odoh Family & Shell Petroleum Development Company of Nigeria Ltd. (SPDC)*, <http://mneguidelines.oecd.org/database/instances/nl0047.htm> (last visited 20 November 2022). (2021).

116 Dutch NCP, ‘Initial Assessment Odoh Family vs The Shell Petroleum Development Company of Nigeria Ltd.’, www.oecdguidelines.nl/documents/publication/2022/02/10/ia-odoh-vs-spdc (last visited 15 November 2022), (10 February 2022), at 2, 3.

117 Dutch NCP, ‘Initial Assessment Odoh Family vs The Shell Petroleum Development Company of Nigeria Ltd.’, www.oecdguidelines.nl/documents/publication/2022/02/10/ia-odoh-vs-spdc (last visited 15 November 2022), (10 February 2022), at 6.

118 See, for example: OECD, OECD Due Diligence Guidance for Responsible Business Conduct, mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf (last visited 6 May 2022) (2018); OECD, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en (last visited 6 May 2022) (2017); OECD-FAO, OECD-FAO Guidance for Responsible Agricultural Supply Chains, www.oecd-ilibrary.org/agriculture-and-food/oecd-fao-guidance-for-responsible-agricultural-supply-chains_9789264251052-en (last visited 6 May 2022) (2016); OECD, OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-responsible-supply-chains-in-the-garment-and-footwear-sector_9789264290587-en (last visited 6 May 2022) (2018); and OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf (last visited 6 May 2022) (2016).

119 Except the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf (last visited 10 November 2022) (2016).

120 Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, above n. 119, at 37 and 46.

121 OECD Guidance for the Agricultural Sector, above, n. 119, at 28-9, 35.

122 OECD Guidance for the Textile Sector Section II, Module 9. Water, above n. 119, at 166-70.

123 OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises, <https://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf> (last visited 13 May 2022) (2019), at 43-4.

124 C. O’Brien and O. Martin-Ortega, ‘In Depth Analysis: Commission Proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights Perspective’, *European Parliament: Directorate-General for External Policies Policy Department* (2022), at 3.

125 *Ibid.*, at 2.

126 O’Brien and Dhanarajan, above n. 27, at 544, referencing Business and Human Rights Resource Centre (2016a), ‘Company Policy Statements on Human Rights’, <http://business-humanrights.org/en/company-policy-statements-on-human-rights> (last visited 18 October 2014).

Corquodale et al. surveying 150 companies found that almost half¹²⁷ of the respondents had never conducted a dedicated due diligence process.¹²⁸ In 2019 a Corporate Human Rights Benchmark assessment identified due diligence as a key weak performance area in 200 of the largest publicly traded companies globally, with almost half scoring zero points on the applicable indicators.¹²⁹ In 2020 the European Commission published a study on due diligence requirements through the supply chain that showed only 37.14% of European Union company respondents were conducting due diligence processes and that only 16% cover their entire supply chain, often relying on voluntary international standards.¹³⁰ In addition to the few studies that do provide empirical evidence indicating the extent to which there is uptake of due diligence in practice, there are some studies that detail how companies conduct their due diligence and what they consider the relevant material scope of this process to be.¹³¹ These studies indicate that in practice, companies narrow the material scope of due diligence to focus only on specific, well-determined human rights and environmental impact, and do not conduct due diligence with a material scope as broad as that recommended by the UNGPs and OECD Guidelines. A study by the UN Global Compact found that companies limit the material scope of their due diligence prematurely and that few have operationalised their due diligence to encompass all impacts.¹³² Salcito and Wielga have noted that it is increasingly common for companies to identify a few impacts as pertinent and to develop due diligence around these.¹³³ A study on due diligence through the supply chain commissioned by the European Commission has confirmed this, finding that only one third¹³⁴ of respondent companies undertook due diligence that considered all human rights and environmental impacts and that another third¹³⁵ limited their due diligence to specific areas, including health and safety, labour, non-discrimination and equality, environment, land rights and indigenous communities.¹³⁶ Studies have found that companies narrow the material scope of their due diligence in several ways. The UN Working Group on Business and Human Rights has not-

ed that rather than focusing on their significant impacts, companies focus on either those that are relatively easy to address or those that garner societal focus like modern slavery or diversity.¹³⁷ Shift has highlighted that when companies are confronted with a broad scope of impacts, not all of which they are able to address immediately, they often tend to focus on those impacts where they have the greatest leverage or control rather than on those that are most severe.¹³⁸ Additionally, companies tend to focus on impacts that are relevant to their own operations, sector or business relationships.¹³⁹ KPMG found that companies that sell products are particularly concerned with labour rights, while companies that market to consumers were primarily focused on privacy rights, whereas those in extractives and industrial manufacturing emphasise impacts like worker safety and environmental harm.¹⁴⁰

The material scope of current due diligence practices reveals that focus has mainly been placed on a limited number of specific impacts. These include labour,¹⁴¹ non-discrimination,¹⁴² Indigenous communities and land rights¹⁴³ and environmental damage.¹⁴⁴ Esteves et al. observed that as a result of this approach, community impacts like water insecurity or the loss of food production are not adequately covered.¹⁴⁵ A study by McCorquodale et al. revealed that those companies that initially narrowed but thereafter broadened the material scope of their due diligence realised that several impacts had not been covered by their preliminary approach.¹⁴⁶ This finding is supported by Smit, who notes that evidence indicates that companies that assume that their impacts are limited to those prevalent in their sector miss their other adverse impacts.¹⁴⁷

127 49.12%.

128 McCorquodale et al., above n. 32, at 206.

129 Macchi, above n. 98, at 110, referencing CHRB; 2019 Key Findings—Agricultural Products, Apparel, Extractives & ICT Manufacturing (2019), 6, www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf (last visited 27 October 2020).

130 European Commission, above n. 32; European Coalition for Corporate Justice, Evidence for mandatory human rights and environmental due diligence, <http://corporatejustice.org/wp-content/uploads/2021/03/evidence-for-mhredd-january-2021-.pdf> (last visited 2 May 2022) (2021); European Parliament, 'Corporate sustainability due diligence: Could value chains integrate human rights and environmental concerns?', (2022) at 2.

131 McCorquodale et al., above n. 32, at 196.

132 UN Global Compact, above n. 86, at 10.

133 K. Salcito and M. Wielga, 'Corporate Human Rights risk Assessment: Aligning what is Measured and Managed', 36(4) *Nordic Journal of Human Rights* 411, at 418 (2018).

134 37.14%.

135 37.71%.

136 European Commission, above n.32, at 14.

137 UN Working Group on Business and Human Rights, UN Doc. A/76/163, July 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement>, at para 25 (b).

138 Shift, 'Business and Human Rights Impacts: Identifying and Prioritizing Human Rights Risks', *Workshop Report 15 & 16 January 2014, Social and Economic Council, The Hague, The Netherlands*, at 6.

139 Institute for Human Rights and Business and Global Business Initiative on Human Rights, 'State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships' (2012), at 46; UN Global Compact, above n. 58, at 10.

140 KPMG International, 'Addressing Human Rights in Business: Executive Perspectives' (2016), at 10.

141 McCorquodale et al., above n. 32, at 206; UN Doc. A/76/163, July 2018, para 25 (b); Salcito and Wielga, above n. 134, at 418; European Commission, above n. 32, at 14; Smit et al., above n. 32, at 951; UN Global Compact, above n. 86, at 10.

142 McCorquodale et al., above n. 32, at 206; UN Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/76/163, 16 July 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement>, at para 25 (b); European Commission, above n. 32, at 14.

143 McCorquodale et al., above n. 32, at 206; European Commission, above n. 32, at 14.

144 European Commission, above n. 32, at 14.

145 Esteves et al., above n. 29, at 7 concurring with D. Kemp, S. Worden & J.R. Owen, 'Differentiated Social Risk: Rebound Dynamics and Sustainability Performance in Mining', 50 *Resources Policy* 19-26 (2016).

146 McCorquodale et al., above n. 32, at 206.

147 Smit et al., above n. 32, at 952 referencing McCorquodale et al., above n. 32, at 195.

It is clear from the foregoing that even though a wide material scope is recommended by the UNGPs and the OECD Guidelines, in practice companies are in many cases not conducting due diligence at all or, if they do, are focusing on specific impacts. What is also clear is that freshwater issues, although they fall within the material scope of the UNGPs and the OECD Guidelines, are not among the issues that are most commonly covered by companies' due diligence procedures in practice.

4 The Draft Corporate Sustainability Due Diligence Directive and Freshwater Issues

On 23 February 2022, the European Commission released its highly anticipated draft Directive introducing a European Union-wide due diligence obligation. It aims to ensure that certain large EU companies (including certain non-EU companies operating in the internal market) contribute to sustainable development by imposing a due diligence obligation with a view to minimising and ending their adverse environmental and human rights impacts. It is approximately aligned with the due diligence instruments that preceded it¹⁴⁸ but is also fundamentally different as it transforms the responsibility to respect and the due diligence process into hard law obligations.

The draft Directive introduces several obligations for companies, the primary ones being that companies should 'conduct human rights and environmental due diligence'.¹⁴⁹ This obligation comprises six steps: (1) 'integrating due diligence into their policies';¹⁵⁰ (2) 'identifying actual and potential adverse impacts';¹⁵¹ (3) 'preventing and mitigating potential adverse impacts' and ending or mitigating actual adverse impacts;¹⁵² (4) 'establishing and maintaining a complaints procedure';¹⁵³ (5) 'monitoring the effectiveness of their due diligence policies and measures';¹⁵⁴ and (6) 'publicly communicating on their due diligence'.¹⁵⁵

This due diligence obligation is relevant to only a limited number of companies as the draft Directive has a narrow scope of application.¹⁵⁶ It only pertains to very large EU-based companies and large EU-based companies that operate in high-risk sectors like textiles,¹⁵⁷ agricul-

ture¹⁵⁸ and extractive industries.¹⁵⁹ It also pertains to non-EU companies from third countries that operate and generate a high turnover in the EU market.¹⁶⁰ It thereby excludes small- and medium-sized enterprises, and hence approximately ninety-nine percent of all EU companies are exempt from the obligations imposed by the draft Directive.¹⁶¹

4.1 Material Scope

The material scope of the due diligence obligation is defined by a selective set of human rights norms and environmental standards that originate from a limited number of international instruments. These norms are listed in the two-Part Annex to the draft Directive,¹⁶² Part I on human rights, and Part II on environmental standards. In the Explanatory Memorandum to the Commission proposal, it is clarified that the material scope covers those human rights and environmental standards 'that can be clearly defined in selected international conventions'.¹⁶³

Part I of the Annex on human rights has two sections. Section 1 contains a twenty-paragraph list of specific human rights that are included in international human rights instruments.¹⁶⁴ It covers most of the foundational international human rights, including civil and political rights as well as social, economic and cultural rights.¹⁶⁵ It also covers some human rights with a specific focus on groups like women, children and persons with disabilities.¹⁶⁶ Section 1 notes that the list of human rights it provides is non-exhaustive and that the material scope of due diligence obligations can also encompass human rights that are included in the conventions that are listed in Section 2.¹⁶⁷ Section 2 lists conventions that include those encompassed within the International Bill of Human Rights,¹⁶⁸ those with a specific focus on particular groups,¹⁶⁹ as well as some non-binding human rights declarations like The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,¹⁷⁰ as well as the International Labour Organization's Declaration on Fundamental Principles and Rights at Work¹⁷¹ and Tripartite Declaration

148 UNGPs, above n. 19; OECD Guidelines, above n. 20.

149 Draft Directive, above n. 15, Art. 4(1)

150 *Ibid.*, Art. 4(1)(a), Art. 5.

151 *Ibid.*, Art. 4(1)(b), Art. 6.

152 *Ibid.*, Art. 4(1)(c), Art. 7 and 8.

153 *Ibid.*, Art. 4(1)(d), Art. 9.

154 *Ibid.*, Art. 4(1)(e), Art. 10.

155 *Ibid.*, Art. 4(1)(f), Art. 11.

156 *Ibid.*, Art. 2.

157 *Ibid.*, Art. 2(1)(b)(i).

158 *Ibid.*, Art. 2(1)(b)(ii).

159 *Ibid.*, Art. 2(1)(b)(iii); at 16 the draft Directive notes that this would encompass 13,000 EU companies and 4,000 non-EU companies.

160 *Ibid.*, Art. 2(2).

161 *Ibid.*, 14.

162 *Ibid.*, 16.

163 *Ibid.*, Explanatory Memorandum, Section 2: Legal Basis, Subsidiarity, and Proportionality, at 16.

164 *Ibid.*, Annex, Part I, Art. 1.

165 Like the UDHR, ICCPR, and ICESCR above n. 52.

166 Draft Directive, above n. 15; Annex, Part I (1) including CEDAW, above n. 55; CRC, above n. 56 and CRPD, above n. 57.

167 *Ibid.*, Annex, Part I (2) para 21.

168 UDHR, ICCPR, and ICESCR above n. 52.

169 Including CEDAW, above n. 55; CRC, above n. 56 and CRPD, above n. 57.

170 UN General Assembly, Resolution 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (18 December 1992).

171 International Labour Organisation, ILO Declaration on Fundamental Principles and Rights at Work (1998).

of Principles concerning Multinational Enterprises and Social Policy.¹⁷²

Part II of the Annex pertains to environmental standards and lists a limited number of violations of recognised objectives and prohibitions included in certain international environmental conventions or multilateral environmental agreements (MEAs).¹⁷³ It is mentioned in the Explanatory Memorandum that this list is the result of a ‘strict selection based on the need to ensure clear obligations and legal certainty’¹⁷⁴ and thus contains ‘only those environmental conventions which create an obligation that is sufficiently precise and implementable for the companies’.¹⁷⁵ The material scope of the selected standards that meet this criteria is wide but arbitrary and ranges from biological diversity,¹⁷⁶ to international trade of endangered fauna and flora,¹⁷⁷ to certain chemical pollutants.¹⁷⁸ Unlike the human rights in Part I, there is no provision in Part II that allows other environmental standards that are not explicitly listed to be encompassed within the material scope by reference to entire MEAs. The list of environmental standards is thus exhaustive and limited to those contained in the Annex’s twelve paragraphs.¹⁷⁹

Although explicitly detailed in the Annex, the draft Directive provides the opportunity for the material scope of the due diligence obligation to be reviewed. No later than seven years after the date of its entry into force, the Commission shall submit a report to the European Parliament and Council on its implementation. The report shall evaluate the effectiveness of the Directive, including whether the Annex needs to be modified considering international developments.¹⁸⁰

At first glance, the human rights norms and environmental standards that make up the material scope of the draft Directive do not seem to explicitly encompass freshwater issues. The next two sections will explore whether and to what extent the material scope of the draft Directive does in fact encompass freshwater issues, by examining the material scope from the perspective of both human rights and environment.

4.2 The Draft CSDD Directive’s Human Rights Norms and Freshwater Issues

As introduced in Section 4.1, the draft Directive covers human rights in two ways. First, it explicitly lists human rights norms, and, second, it includes a ‘catch-all’ clause that refers to a list of international human rights instru-

ments.¹⁸¹ This section will analyse whether and to what extent the international human right to water, which was outlined in Section 2.2, fits within the scope of the draft Directive’s human rights norms.

Some of the human rights explicitly listed in Part I of the Annex are contained within paragraph 18:

Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that

- a. impairs the natural bases for the preservation and production of food or
- b. denies a person access to safe and clean drinking water or
- c. makes it difficult for a person to access sanitary facilities or destroys them or
- d. harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or
- e. affects ecological integrity, such as deforestation,

in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights¹⁸²

Paragraph 18 explicitly includes the ‘prohibition of causing any measurable environmental degradation’, such as water pollution or ‘excessive water consumption’, that ‘denies a person access to safe and clean drinking water’ (paragraph 18(b)).¹⁸³ While this paragraph does refer to freshwater issues, it formulates the human right to water in a novel way that seems to limit its normative content compared with that of the international human right to water.¹⁸⁴ Paragraph 18(b) explicitly encompasses the normative content of the international right relating to accessibility¹⁸⁵ through the use of the word ‘access’¹⁸⁶ as well as the normative content of the international right relating to quality through the use of the words ‘safe and clean’.¹⁸⁷ However, there is no explicit reference to the normative content of the international right relating to quantity.¹⁸⁸

It is possible that the term ‘drinking’ should be read as an implicit reference to the quantity aspect of the human right to water.¹⁸⁹ Still, even if ‘drinking’ were to indicate that the human right to water as mentioned in the Annex also encompasses the quantity aspect, then this would be a very narrow conceptualisation compared

172 International Labour Organisation, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977).

173 Draft Directive, above n. 15, Annex, Part II.

174 European Commission, ‘Commission Staff Working Document’, SWD (2022) 39, at 5.

175 *Ibid.*, at 9.

176 Draft Directive, above n. 15, Annex, Part II, Art. 1; Convention of Biological Diversity (1992), Art. 10(b).

177 *Ibid.* Draft Directive, Annex, Part II, Art. 2; Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), Art. III, IV, and V.

178 *Ibid.* Draft Directive, Annex, Part II, Art. 3, 4, and 5; Minamata Convention on Mercury (2013), Art. 4(1), 5(2) and 11(3).

179 *Ibid.* Draft Directive, Annex, Part II.

180 *Ibid.* Draft Directive, Art. 29 (c).

181 *Ibid.* Draft Directive, Annex, Part I.

182 *Ibid.* Draft Directive, para 18.

183 *Ibid.* Draft Directive, Annex, Part I, para 18(b).

184 Danish Institute, above n. 86, at 13.

185 General Comment 15, above n. 58, at para 12(c).

186 Draft Directive, above n. 15, Annex, Part I, para 18(b).

187 *Ibid.*, Annex, Part I, para 18(b).

188 General Comment 15, above n. 58, at para 12(c).

189 Draft Directive, above n. 15, Annex, Part I, para 18(b).

with the international right. After all, the latter includes freshwater for a multitude of uses in addition to drinking, like cooking and personal and domestic hygienic requirements (see par. 2.2).¹⁹⁰

Nonetheless, a broader look at paragraph 18 as a whole reveals that it potentially has a much wider application to freshwater that encompasses both quality and quantity and that it is thus better aligned with the normative content of the international human right to water than appears to be the case at first glance. By referring to water pollution and ‘excessive water consumption’, paragraph 18 does, in fact, reference the normative elements of freshwater quality and quantity. The link between water pollution, excessive water consumption and the normative content of the human right to water relating to quality and quantity has already been established prior to the draft Directive by the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, healthy and sustainable environment, David R Boyd. In a report on ‘Human Rights and the global water crisis’, Boyd noted that water pollution adversely affects the quality and quantity of water available to sustain ecosystems and meet human needs,¹⁹¹ while water scarcity caused by overuse has led to water being unavailable to maintain healthy ecosystems and meet people’s basic needs.¹⁹²

Moreover, subsections (a) to (e) of paragraph 18 can all be related to water use and aligned with General Comment 15’s explanation of why the human right to water is necessary. For example, paragraph 18(a), ‘impairs the natural bases for the preservation and production of food’, is closely related to General Comment 15, noting that the human right to water is necessary to provide for cooking,¹⁹³ while paragraphs 18(c), ‘makes it difficult for a person to access sanitary facilities’, and 18(d), ‘harms the health ... of a person’, relate to General Comment 15, noting that the human right to water is necessary to ‘reduce the risk of water-related diseases ... and personal and domestic hygienic requirements’.¹⁹⁴

Paragraph 18 also notes that the substance of its provisions is in accordance with international human rights instruments, including the ICESCR, from which the international human right to water is derived. However, paragraph 18 only references ICESCR Article 12 on the right to the highest attainable standard of physical and mental health. This deviates from the international human right to water, which although linked to Article 12 and the right to health, has been predominantly derived

from Article 11 on an adequate standard of living,¹⁹⁵ – especially in the context of corporate responsibilities.¹⁹⁶ Perhaps the most notable deviation from the international human right to water is that paragraph 18 renders the human right to water dependent on environmental degradation, meaning that without such degradation occurring, the human right to water is not encompassed within the material scope of the draft Directive. The international human right to water, by contrast, exists independently of environmental degradation, and no international instruments render the right dependent on the occurrence of environmental degradation. When it comes to human rights violations by corporate actors, this reformulation is highly problematic, as although companies can cause environmental degradation in tandem with impacts on the human right to water, these are not synonymous, and the human right to water can be adversely impacted without environmental degradation. This is particularly prevalent when corporate conduct diverts freshwater flow. For example, the Lesotho Highlands Water Project diverts freshwater from Lesotho to South Africa using naturally occurring riverine systems and water basins, as well as constructed dams. This diversion results in the exclusion of several villages near the dammed areas from access to historically used freshwater sources, while the points of diversion allow ecosystem services to exist relatively unaffected.¹⁹⁷ Instances like these appear to be excluded from paragraph 18.

In addition to paragraph 18, where the human right to water is most explicitly formulated, there are also a number of other human rights norms explicitly mentioned in Section 1 that are relevant to the right to water.¹⁹⁸ For example, paragraph 1 on the right ‘to not be deprived of means of subsistence’ can be related to the normative content of the human right to water as ‘safe and sufficient water is vital for realising the right to food, particularly for poor and marginalised people engaged in subsistence ... farming’.¹⁹⁹ This demonstrates that the normative elements of freshwater quality and quantity are encompassed therewithin.

In addition to the explicit human rights norms listed in Section 1, the human right to water can also be encompassed within the material scope of the draft Directive through Section 2 that incorporates human rights that are included in the international human rights agree-

190 General Comment 15, above n. 58, at para 2.

191 UN Human Rights Council, A/HRC/46/28, ‘Human Rights and the global water crisis: water pollution, water scarcity and water-related disasters, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, health and sustainable environment’ (19 January 2021), at 3, para 13.

192 *Ibid.*, at 4, para 14.

193 General Comment 15, above n. 58, at para 2.

194 *Ibid.*

195 *Ibid.*, at para 3.

196 Castan Centre for Human Rights Law, 2008, above n. 92, at 113; Castan Centre for Human Rights Law, above n. 33, at 100.

197 UNGA, Res A/74/197, ‘Human Rights to Safe Drinking Water and Sanitation’ (19 July 2019) at 8, para 21.

198 Other paragraphs that may be related to water include paragraph 5 on ‘violation of the prohibition of arbitrary or unlawful interference with a person’s privacy, family, home’; paragraph 9 on the rights of the child, paragraph 19 on the ‘violation of the prohibition to unlawfully evict or take ... waters’ when developing or otherwise use of waters, as well as paragraph 21 on the rights of indigenous peoples to resources that they have traditionally owned, occupied or otherwise used or acquired.

199 UNHRC, Human Rights and the Global Water Crisis, above n. 192, at 6, para 32.

ments listed therein.²⁰⁰ The instruments include the IC-ESCR, which, as established previously, is the legal basis of the international human right to water and encompasses the full normative content of the right. It also includes the treaties that encompass the human right to water for specifically protected groups²⁰¹ like women,²⁰² children and persons with disabilities.²⁰³ As the draft Directive envisioned broadening the human rights material scope with Section 2, it is plausible that the international human right to water and its normative content as defined by the international instruments listed in the Annex is included in the material scope of the draft Directive.

From the foregoing elaboration, it appears that the international human right to water is encompassed within the material scope of the draft Directive, and thus companies will be required to conduct due diligence on the full normative content of the human right to water. What the elaboration also reveals, however, is that the construction of the human right to water in the Annex creates ambiguities on the normative content of the human right to water. The draft Directive reformulates the human right to water by scattering its full normative content across Part I of the Annex. This novel framing of the right is inconsistent with the international human right to water, which clearly and consistently demonstrates that the full normative content of the right is self-contained within the right itself. Authors like O'Brien have noted that this complex scheme 'may pose challenges of interpretation and clarity'.²⁰⁴ The reformulation results in a lack of clarity when interpreting which normative elements thereof are encompassed within the draft Directive and which are not.²⁰⁵ Given the tenuous status of the human right to water, this lack of clarity has the potential to limit the practical realisation of the right within due diligence processes.²⁰⁶

4.3 The Draft CSDD Directive's Environmental Standards and Freshwater Issues

As 'there is a lack of an international framework for reference similar to that for international human rights' in relation to environmental due diligence²⁰⁷ and to 'ensure clear obligations and legal certainty',²⁰⁸ Part II of

the Annex pertains exclusively to those environmental standards from MEAs²⁰⁹ that 'create an obligation that is sufficiently precise and implementable' for companies.²¹⁰

As freshwater issues are not comprehensively regulated in the international environmental law regime, and as those MEAs that do regulate freshwater have not been determined to be translatable to companies, the only way freshwater issues can be encompassed within the material scope of the draft Directive is through MEAs focused on other environmental issues that are included in Part II of the Annex.

Some of the MEAs in the Annex contain provisions that encompass freshwater, even if freshwater is not explicitly mentioned in their environmental standards. For instance, some list chemicals that have been recorded as causing freshwater pollution. An example is that the Minamata Convention on Mercury²¹¹ includes a prohibition against the manufacture of products containing mercury and the use of mercury in manufacturing processes. The World Health Organisation (WHO) has noted that the use of mercury in industrial manufacturing processes for electrical appliances, antiseptics, preservatives and pharmaceuticals²¹² has polluted freshwater. This pollution has caused environmental degradation and the decline in drinking water quality with serious health implications.²¹³ Another example is the Stockholm Convention on Persistent Organic Pollutants, which includes a prohibition against the production and use of certain chemicals, including the insecticide dieldrin. The WHO has found that freshwater with dieldrin contamination from industrial and agricultural effluents is toxic to humans and can cause fatalities.²¹⁴

While freshwater pollution is encompassed by some MEAs and the environmental standards contained therewithin, the obligation to conduct due diligence is limited to only those chemicals explicitly listed in these instruments. Freshwater pollution caused by chemicals or substances that are not explicitly listed within these MEAs do not fall within the material scope of the draft Directive. Given that the number of chemicals in the global market has been estimated to range between 25,000 to 140,000,²¹⁵ with recent uppermost estimates

200 Draft Directive, above n. 15, at Annex, Part I (2) para 21.

201 *Ibid.*, at Annex, Part I (1).

202 CEDAW, above n. 55.

203 CRPD, above n. 57.

204 O'Brien, above n. 97, at 5.

205 Danish Institute, above n. 86, at 4.

206 *Ibid.*, at 13; European Coalition for Corporate Justice, *European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence: A Comprehensive Analysis* <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/> (last visited 9 May 2022), (2022), at 11.

207 European Commission, above n. 32, at 55, referencing C. Scherf, P. Gailhofer, N. Kampffmeyer & T. Schleicher, 'Responsibility Towards Society and the Environment: Businesses and Their Due Diligence Obligations Background Paper from the Research Project Commissioned by the Federal Environment Agency', German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, www.umweltbundesamt.de/publikationen/umweltbezogene-menschenrechtliche (2019), at 9.

208 European Commission, SWD, above n. 175, at 5.

209 Draft Directive, above n. 15, Annex, Part II.

210 European Commission, SWD, above n. 175, at 9.

211 Minamata Convention on Mercury (2013) in Draft Directive, above n. 15, Annex, Part II, 3-5.

212 World Health Organisation, *Mercury in Drinking-water: Background document for development of WHO Guidelines for Drinking-water Quality* (2005), www.who.int/docs/default-source/wash-documents/wash-chemicals/mercury-background-document.pdf?sfvrsn=9b117325_4 (last visited 6 May 2022) at 10.

213 *Ibid.*, at 15.

214 World Health Organisation, *Aldrin and dieldrin in Drinking-Water: Background Document for the Development of WHO Guidelines for Drinking-Water Quality* (2003), https://cdn.who.int/media/docs/default-source/wash-documents/wash-chemicals/adrindieldrin.pdf?sfvrsn=7b70f74_6 (last visited 6 May 2022), at 3.

215 UN Environment, *Knowledge and Information Sharing for the Sound Management of Industrial Chemicals* (2020), www.saicm.org/Portals/12/Documents/EPI/Knowledge_Information_Sharing_Study_UNEP_ICCA.pdf (last visited 1 June 2022).

at 350,000,²¹⁶ and that freshwater contaminants may include a range of physical, chemical, bacteriological and radioactive substances,²¹⁷ this significantly limits the material scope of the draft Directive as it restricts the issue of freshwater pollution to only a few chemicals. Similarly, freshwater depletion is not explicitly encompassed within any of the environmental standards referenced in the MEAs. The only way freshwater depletion can be implicitly encompassed is within the Convention on Biological Diversity (CBD),²¹⁸ which includes the obligation to take the necessary measures related to the use of biological resources in order to avoid or minimise adverse impacts on biological diversity. The CBD website elaborates that freshwater itself is not ‘biodiversity’, but rather that ‘biodiversity’ is the life associated with this resource.²¹⁹ It further notes that human impacts on freshwater, including pollution and use, impact biodiversity, and that thus freshwater and its associated biodiversity cannot be separated.²²⁰ Following this construction, it can be argued that freshwater is encompassed within biological resources and diversity because of the role that freshwater plays in maintaining biodiversity as defined within the CBD.

If this implicit interpretation is adopted, both freshwater depletion and pollution would be encompassed in the material scope of the draft Directive owing to the adverse impacts these can have on freshwater quality, quantity and its associated biodiversity. Freshwater likely falls within the material scope of this environmental standard, and thus the due diligence obligation would be applicable thereto. However, this environmental standard is limited to the extent that freshwater issues would have to relate to adverse impacts on biological diversity. Therefore, if biological diversity was not being adversely impacted by freshwater pollution and/or depletion, it would not fall within the material scope of this environmental standard. Freshwater impacts that are not related to adverse impacts on biological diversity are thus not encompassed within the draft Directive. This severely limits the material scope of the draft Directive.

Generally speaking, the transposition of international environmental standards into the material scope of the draft Directive reproduces gaps that exist in the international environmental law regime. Notably, the international environmental law regime is characterised as a highly fragmented patchwork of MEAs, each of which is focused on regulating particular transnational environmental issues.²²¹ As a result, certain environmental issues do not fall within the scope of the international

environmental law regime.²²² The structure of the draft Directive renders the material scope of the draft Directive reliant on the fragmented patchwork of MEAs in international environmental law and results in it missing the issues that this regime has not regulated. There are currently no MEAs at the global level that provide water quality or quantity standards, nor are there MEAs that comprehensively regulate freshwater pollution or extraction. As the environmental issue of freshwater has neither been explicitly nor comprehensively regulated by the international environmental law regime, it cannot be explicitly transposed into the draft Directive.²²³ Another gap that the transposition of international environmental standards reproduces is that it limits the applicable MEAs to those with translatable standards for companies and thus only utilises a limited number of the MEAs that are available. While there are currently over 250 MEAs dealing with various environmental issues,²²⁴ the draft Directive encompasses only seven.²²⁵ The majority of standards from MEAs cannot be translated for companies, and thus crucial international instruments on freshwater protection are excluded from the material scope of the draft Directive.

Some seminal freshwater MEAs that are not encompassed within the material scope include the Water Convention²²⁶ and Watercourses Convention,²²⁷ which ‘consolidate the principles and rules that underpin contemporary international water law’.²²⁸ Although standards from these MEAs have not been included in those translatable to companies, the content of some appears to be relevant to company conduct. For example, the Water Convention requires parties to take appropriate measures to ensure that transboundary waters are used in a reasonable and equitable way,²²⁹ and the Watercourses Convention details the factors that parties should take into account when utilising an international watercourse in this way, including natural factors like hydrological, climatic and ecological factors, as well as populations dependent on the watercourse.²³⁰ The draft Directive also excludes important MEAs on specific freshwater issues like the Ramsar Convention on Wetlands.²³¹

216 Z. Wang, G. Walker, D. Muir & K. Nagatani-Yoshida, ‘Towards a Global Understanding of Chemical Pollution: A First Comprehensive Analysis of National and Regional Chemical Inventories’, 54 *Environmental Science and Technology* 2575 (2020).

217 United Nations-Water, above n. 4.

218 Convention on Biological Diversity, 5 June 1992, 69 U.N.T.S. 1760.

219 Convention on Biological Diversity Website, *Inland Waters Biodiversity – What Is It?*, www.cbd.int/waters/inland-waters/ (last visited 6 May 2022).

220 *Ibid.*

221 European Coalition for Corporate Justice, above n. 207, at 9.

222 P.-M. Dupuy and J.E. Viñuales, *International Environmental Law* (2018), at 39.

223 See L. Boisson de Chazournes, *Fresh Water in International Law* (2021).

224 World Trade Organisation, *The Doha Mandate on Multilateral Environmental Agreements*, www.wto.org/english/tratop_e/envir_e/envir_neg_me_a.htm (last visited 9 May 2022).

225 Draft Directive, above n. 15, Annex II.

226 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, U.N.T.S. 1936.

227 Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, U.N.T.S. 2999.

228 UN Water, ‘The United Nations Global Water Conventions: Fostering Sustainable Development and Peace’, www.unwater.org/sites/default/files/app/uploads/2021/01/UN-Water_Policy_Brief_United_Nations_Global_Water_Conventions.pdf (last visited 10 November 2022) (2020), at 11.

229 Water Convention, above n. 228, at Article 2(2)(c).

230 Watercourses Convention, above n. 227, at Article 6.

231 Ramsar Convention on Wetlands of International Importance as Waterfowl Habitat (1971) provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources; see: www.ramsar.org/ (accessed 17 November 2022).

The transposition of international environmental standards from MEAs also limits the material scope of the draft Directive, in the sense that it excludes standards and principles from the international environmental regime that cannot be derived from MEAs. These translated environmental standards did not originally apply to companies but had to be extrapolated in order to be encompassed within the material scope of the draft Directive. There is no reason why this extrapolation cannot be done with environmental standards that are not in MEAs in order to expand the material scope of the draft Directive to more comprehensively encompass freshwater issues. This has already been done in Part I of the Annex on human rights norms, which is not limited to international conventions but also includes non-binding instruments (which, as noted by O'Brien, are not fully binding on states).²³²

These human rights instruments have the same non-binding status in international law as, for example, the Rio Declaration. The Rio Declaration incorporates foundational principles of international environmental law like the precautionary approach,²³³ which the European Commission has already acknowledged is relevant as it is 'likely to be influential in the interpretation of any due diligence standard'.²³⁴ The OECD has already provided an example of how instruments like the Rio Declaration can be translated into environmental standards applicable to companies. The Environmental Chapter notes that its text 'broadly reflects the principles and objectives contained in the Rio Declaration'²³⁵ and has translated the precautionary principle to companies, stating that enterprises should 'consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environmental, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage'.²³⁶ Freshwater issues like pollution or depletion can fit well within the wide scope of such environmental standards; however, these are currently not encompassed within the material scope of the draft Directive.

In light of the foregoing, it is clear that the draft Directive encompasses freshwater issues within its environmental material scope only to a limited extent. The transposition of international environmental standards from MEAs into the material scope of the draft Directive replicates the fragmented patchwork of obligations in international environmental law, where not all freshwater issues are covered. Limiting environmental stand-

ards to those that can be translated to companies further limits the material scope to a handful of environmental standards. The draft Directive excludes other international instruments, like the Rio Declaration, that may expand the scope of environmental standards to encompass freshwater issues more comprehensively. Limiting the material scope to translatable international environmental standards from MEAs results in the most obvious environmental risks to freshwater posed by companies, like depletion and pollution, being largely excluded from Part II of the Annex and therefore from the draft Directive.

5 Conclusion and Recommendations

While scholars like Birchall have noted that the broad material scope of due diligence instruments like the UNGPs and OECD Guidelines is widely understood,²³⁷ there has been limited engagement on the issue of whether this is a preferential approach. Most scholars and international organisations specialising in business and human rights advocate for this broad material scope of due diligence. They have acknowledged that companies can adversely impact virtually the full scope of human rights and environmental standards and should thus conduct due diligence on the complete spectrum of these rights and standards as contained in international instruments.²³⁸ Support for this wide scope has been reiterated by the late Professor Ruggie,²³⁹ the UN,²⁴⁰ scholars²⁴¹ and international organisations.²⁴²

However, while a broad material scope has been widely reiterated, it has also been criticised. SOMO notes that the UNGPs' and OECD Guidelines' lack of explicit reference to all internationally recognised human rights results in a loophole for companies to escape some of the human rights they are responsible to respect.²⁴³ This concern seems to be corroborated by Section 3, which emphasised that despite these instruments' broad material scope, in practice companies limit the material scope of their due diligence to certain human rights and environmental standards, which seldom include freshwater issues.

The draft Directive has the potential to make a difference to how companies include freshwater issues in their due diligence processes as it imposes a legally

232 Draft Directive, above n. 15, at Part I, includes the UDHR above n. 52; The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, above n. 171; the International Labour's Organisation's Declaration on Fundamental Principles and Rights at Work, above n. 172; and Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy, above n. 173; O'Brien, above n. 97, at 5.

233 Rio Declaration, above n. 112, at Principle 15.

234 European Commission, above n. 32, at 35.

235 OECD Guidelines, Environmental Chapter VI., at 44, para 60.

236 OECD Guidelines, above n. 20, at 43, para 4.

237 Birchall, above n. 16, at 139.

238 Danish Institute, above n. 86, at 12-14; European Coalition for Corporate Justice, above n. 207, at 11.

239 Protect, Respect, Remedy, above n. 22, at para 52.

240 UN, Interpretive Guide, above n. 16, at 13.

241 Esteves et al., above n. 29, at 84; Taylor, above n. 82, at 90; O'Brien, 2022, above n. 97, at 4.

242 Shift, 2015, above n. 27, at 16; Global Compact, 'Assessing Human Rights Risks and Impacts: Perspectives from Corporate Practice' (2016), at 11; Danish Institute, above n. 86, at 39.

243 SOMO, 'How to Use the UN Guiding Principles on Business and Human Rights in Company Research and Advocacy', (2012), at 12.

binding obligation for companies to conduct due diligence that includes freshwater issues from both a human rights and an environmental perspective that was previously non-existent. The potential of legal obligations to influence the material scope of due diligence has been noted by McCorquodale et al., who emphasised that those human rights and environmental standards that are regulated have a higher likelihood of being considered in due diligence processes.²⁴⁴

The potential of the draft Directive to influence the material scope of due diligence in practice remains limited, however, as the draft Directive does not encompass all the adverse impacts that companies can have on freshwater from both a human rights and an environmental perspective. From a human rights perspective, the Annex reformulates the internationally recognised human right to water and scatters its normative content over several other rights, as well as making the right dependent on ecological degradation. From an environmental perspective, the Annex's transposition of international environmental standards from MEAs reproduces the limitations of the international environmental law regime, resulting in a patchwork of protection on a limited number of specific issues only.

Thus, while the draft Directive takes positive steps towards implementing legal obligations for companies to include freshwater issues in their due diligence processes from both a human rights and an environmental perspective, it only does so to a limited extent. The material scope of the draft Directive is insufficient to cover some of the most significant adverse impacts that companies can have on freshwater from both a human rights and an environmental perspective. If the draft Directive were to move forward in its current form, some of the adverse impacts that EU companies have on freshwater, either directly or indirectly through their global value chains, may fall within the scope of the obligation to conduct due diligence, but many may not.

As proposed by UN Special Rapporteur David R. Boyd, instruments that address companies' adverse impacts on freshwater should align with relevant human rights and environmental standards, because if they are only partially included this will inevitably result in protection gaps in practice.²⁴⁵ In order to fill those gaps identified in this article, the draft Directive's material scope should be amended to encompass freshwater issues more comprehensively.

From a human rights perspective, the human right to water in paragraph 18(b) should be amended to align with the full normative scope of the right as it exists in international instruments like General Comment 15,²⁴⁶ UNGA Resolution 64/292²⁴⁷ and UNHRC Resolution

15/9.²⁴⁸ It should also be amended so that it is not conditional on 'measurable environmental degradation'.²⁴⁹ From an environmental perspective, a wider range of MEA standards that encompass freshwater should be included in Part II of the Annex, like the Water Convention requiring parties to take appropriate measures to ensure that transboundary waters are used in a reasonable and equitable way.²⁵⁰ Even if this approach were to be adopted, however, the material scope would still be limited to those specific environmental issues that are regulated by MEAs and that are also translatable to companies. The better option would therefore be to amend Part II of the Annex in such a way that instead of merely listing environmental standards from MEAs, it would align with the 'catch-all' approach in Part I. It should then list an array of environmental instruments that are wider than just MEA standards but that also include references to specific environmental principles, like, for instance, the precautionary principle as contained in the Rio Declaration.

Amending the material scope of the draft Directive to more comprehensively include freshwater issues is essential if it is to have any meaningful impact on how this life-sustaining resource is used by companies.

244 McCorquodale et al., above n. 32, at 223 referencing R. Hamman et al., 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence', 87(2) *Journal of Business Ethics* at 453-73, at 453 (2009).

245 UNGA, Res A/74/197, above n. 198, at 6 para 13 and 8 para 22.

246 General Comment 15, above n. 58.

247 UNGA Res 64/292, above n. 79.

248 UNHRC Res 15/9, above n. 80.

249 Draft Directive Annex Part I Section 1, above n. 15, para 18.

250 Water Convention, Art. 2(2)(c), above n. 228, at 12.