

## The interplay between environmental crime and corporate sustainability due diligence

New Journal of European Criminal Law  
2024, Vol. 15(2) 209–224

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DOI: 10.1177/20322844241253182

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### Seizing the opportunity to connect the dots

**Beatriz Albuquerque** 

Nova School of Law, Portugal

#### Abstract

Environmental crimes are a growing concern of today's society, as are human rights violations committed by corporations. The European Union has defined both topics as legislative priorities and put forward two legislative instruments to better regulate these issues. On a first glance, there is no connection between these topics. However, this paper suggests that there is such a connection, and that the excellent timing of the proposals, which are being discussed at the same time, should be seized. This paper thus argues that the proposal for an Environmental Crime Directive should encompass a human rights approach by criminalizing the violation of serious due diligence obligations of the Corporate Sustainability Due Diligence Directive. Through a detailed analysis of the legislative drafting procedure leading to the proposal for an Environmental Crime Directive, this paper will assess whether such human rights approach is possible and whether it should be followed.

#### Keywords

environmental crime, corporate sustainability due diligence, CSDD, EC directive proposal, CSDDD proposal, business and human rights, BHR, protection of environment through criminal law

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#### Corresponding author:

Beatriz Albuquerque, Nova School of Law, Campus de Campolide 18, Lisboa 1099-032, Portugal.

Email: [albuquerque.beatriz94@gmail.com](mailto:albuquerque.beatriz94@gmail.com)

## Introduction

Environmental crime was considered one of the European Union ('EU') priorities for the political cycle 2018-2021<sup>1</sup> and renewed for 2022-2025.<sup>2</sup> Integrating sustainability due diligence in corporate governance has also been a much debated and prioritized topic at the EU level, aligned with the European Commission's political priority for 2019-2024 'An economy that works for people'.<sup>3</sup> Both topics are considered an EU legislative priority for 2022, according to the Joint Declaration of the European Parliament, the Council of the EU and the European Commission.<sup>4</sup>

At the time of writing, two legislative instruments are under discussion – a proposal for a Directive on the protection of the environment through criminal law<sup>5</sup> ('ECD proposal'), that will replace the previous Directive on the matter<sup>6</sup>, and a proposal for a Directive on corporate sustainability due diligence<sup>7</sup> ('CSDDD proposal'). At first sight, and apart from being EU priorities, they seem two instruments with almost no common ground. However, both share environmental concerns and result indirectly from the European Green Deal<sup>8</sup> - an initiative on sustainable corporate governance was promised as a deliverable in this context<sup>9</sup> and action to 'step up efforts against environmental crime' was also envisaged.

Since environmental crimes are mostly committed by corporations<sup>10</sup> and entail, in many cases, massive human rights violations<sup>11</sup>, this paper will analyse whether a human rights lens should and is being applied to the ECD proposal, in light of the CSDDD proposal and their coincidental timings. The paper will further contextualize and provide an overview of both proposals, taking into account their respective preparatory works. The analysis will be specially focused on the ECD proposal's drafting procedure through a comparison and assessment of the opinions of the European Parliament Committees involved in the legislative procedure, as well as the residual influence that the ECD proposal may have on the CSDDD proposal.

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1. European Parliament, 'Revision of Directive 2008/99/EC' (Briefing) PE 733.555, June 2022.
  2. Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022 – 2025, 8665/21, 12 May 2021.
  3. European Parliament, 'Corporate Sustainability due diligence' (Briefing) PE 729.424, May 2022.
  4. European Parliament, the Council of the European Union and the European Commission, 'EU Legislative Priorities for 2022' (Joint Declaration) [2021] OJ C 514I.
  5. Proposal for a Directive of the European Parliament and the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC [2021] COM(2021) 851 final (ECD proposal).
  6. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328 (Directive 2008/99/EC).
  7. Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] COM(2022) 71 final (CSDDD proposal).
  8. Commission, 'The European Green Deal' (Communication) COM/2019/640 final.
  9. CSDDD proposal (n7) 8.
  10. Commission Staff Working Document, 'Evaluation of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive)', SWD (2020) 259 final, 49.
  11. Sergio Marchisio, 'Environmental Crimes and Violations of Human Rights' (Environmental crime – current and emerging threats, Rome, October 2012), 2.

## The Proposal for a new Directive on the Protection of the Environment through Criminal Law

Environmental crime is steadily growing across the world and the EU is no exception. According to recent data from UNEP and INTERPOL, it has become the fourth largest criminal sector worldwide.<sup>12</sup> A 2021 report from Eurojust provides that most cases it had to deal with between 2014 and 2018 concerned illegal trafficking in waste, in wildlife species, in hazardous substances and pollution crimes.<sup>13</sup> One aspect that makes environmental crime especially ‘attractive’ for transgressors is the profit-risk ratio that these crimes have: environmental offenders make huge profits and run very low risks of detection and detention.<sup>14</sup> If, in addition, the existing sanctions are low and not effectively enforced, transgressors will not be deterred from committing these crimes.<sup>15</sup> It is especially in such cases where the probability of detection is considerably lower than 100% that civil liability may not be enough.<sup>16</sup>

Another aspect that makes environmental crime more difficult to detect is its transboundary character. Environmental crimes are, by nature, not confined to geographical borders. Therefore, they may be a problem that several affected countries have to deal with simultaneously. In that sense, cross-border cooperation would be essential but is still largely missing.<sup>17</sup> This was identified by the Commission as one of the main problems the new ECD proposal should address.<sup>18</sup> Furthermore, these crimes will mostly happen in developing countries, but many of them will be committed by European companies or by companies linked through their supply chain to European companies. Enterprises, in fact, are one of the main actors involved in cases of environmental crimes, especially occurring throughout their supply chain and in more vulnerable markets.

It is against this background that a proposal for a new directive to replace the Directive 2008/99/EC on the protection of environment through criminal law has been published on 15 December 2021 (‘Directive 2008/99/EC’). The ECD proposal intends to improve the effectiveness of investigations and prosecutions, create a stronger, more uniform, and more dissuasive sanctions regime, strengthen the enforcement chain and foster cross-border cooperation.<sup>19</sup> Consequently, it will have a broader scope in comparison to that of Directive 2008/99/EC.

The Directive 2008/99/EC lacked effectiveness on the ground, as the European Commission concluded in its 2020 evaluation.<sup>20</sup> This was mainly due to its generic provisions, the existence of enforcement gaps between Member States and their low and differentiated sanction levels, which were not dissuasive and blocked the creation of a level playing field across the EU.<sup>21</sup> Consequently, over the

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12. UNEP and Interpol Rapid Response Assessment, ‘The rise of environmental crime. A growing threat to natural resources, peace, development and security’ (UNEP 2016).

13. European Union Agency for Criminal Justice Cooperation, ‘Eurojust’s Casework on Environmental Crime’, (Eurojust 2021).

14. Commission Staff Working Document, ‘Impact Assessment Report Accompanying the document “Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC”, SWD(2021) 465 final, 9.

15. Communication from the Commission to the European Parliament and the Council on stepping up the fight against environmental crime, COM(2021) 814 final, 2.

16. Michael Faure, ‘Environmental Liability of Companies in Europe’ [2022] *Ariz. j. int. comp. law* 1, 93.

17. Commission Staff Working Document (nr10), 81.

18. Impact Assessment Report (n14), 25.

19. Communication (n15) 1.

20. Commission Staff Working Document (n10).

21. ECD proposal (n5) 3.

past 10 years the number of environmental crimes successfully investigated and sentenced was very low.<sup>22</sup> Despite these facts, Directive 2008/99/EC had some added value, since it was the first instrument defining a common legal framework for environmental criminal offences.<sup>23</sup>

One main difference introduced by the ECD proposal is the inclusion of a provision opening up the possibility for criminal liability for legal persons, although the national legislator may still opt for non-criminal fines. Such was not the case in the Directive 2008/99/EC, which only mentioned the possibility of ‘effective, proportionate and dissuasive criminal penalties’ for natural persons, but did not include a similar provision for legal persons.

Criminal penalties for legal persons, when compared to administrative or civil, have a higher shaming effect, demonstrating a ‘stronger form of social disapproval compared to administrative penalties’,<sup>24</sup> as well as a more widespread deterrent effect.<sup>25</sup> This is so, even if for legal persons, in practice, the sanction will nevertheless be a monetary penalty.<sup>26</sup> Furthermore, imposing non-criminal liability for very serious offences committed wilfully ‘puts the severity of the crime and the importance of the protected value in doubt, if not in disrepute’.<sup>27</sup> However, the introduction of criminal penalties for legal persons at an international level have had limited support, mostly due to the unequal treatment corporations face in different countries, depending on their various legal traditions.<sup>28</sup> This happens even within the European Union. Nonetheless, and as early as 2004, the European Commission was already drawing attention to the possible consequences of a lack of harmonization of criminal penalties against legal persons amongst Member States. In fact, ‘considering that most legal persons have activities and assets in more than one Member State, it could not reasonably be excluded that they relocated in the Member State where the risk of penalty is the lowest or even does not exist’.<sup>29</sup>

Some authors argue that the discussion around recourse to criminal liability is not ‘a major issue in the practical enforcement of environmental law’.<sup>30</sup> In fact, there are many examples of laws that do not

22. *ibid* 1.

23. Impact Assessment Report (n14) 10.

24. ECD proposal (n5) 6.

25. Robert McMurry and Stephen Ramsey, ‘Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws’ (1986) 19 L.A. L. Rev. 1133, 1164. Further stating that ‘*compliance could and should be strengthened by the availability of criminal penalties*’, see also C Mackie, ‘Environmental Due Diligence in Global Supply Chains’ (2020) 34.

26. Michael Faure, ‘Tackling Environmental Crimes under EU Law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions’ [2021], 67.

27. Mordechai Kremnitzer, ‘A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law’ (2010) 8 JICJ 909, 915. The author presents in detail the arguments justifying imposing criminal liability on corporations and the advantages it presents in comparison to administrative sanctions, as well as the counterarguments commonly referred to in such debate. For an economic justification for corporate criminal liability, see also W.P Mullin and C.M. Snyder, ‘Corporate crime’ in N. Garoupa (ed), *Criminal Law and Economics* (2nd edn, Vol. 3, Edward Elgar, 2009); L. Friedman, ‘A defense of corporate criminal liability’ (2000) 23 Harvard Journal of Law and Public Policy 833.

28. Adam Stanislas, Gert Vermeulen and Wendy De Bondt, ‘Corporate Criminal Liability and the EC/EU’ in S Adam, N Colette-Basiecz and M Nihoul (eds), *La responsabilité pénale des personnes morales en Europe – Corporate Criminal Liability in Europe* (Projucit, La Chartre, 2008) 388.

29. Commission, ‘Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union’, COM(2004) 334 final 52.

30. Faure (n16) 106. See also A. Oguis and C. Abbot, ‘Sanctions for pollution: do we have the right regime?’ (2002) 13 Journal of Environmental Law 283

include criminal sanctions, but still have a major deterrent effect, for instance by providing for very high pecuniary administrative sanctions (i.e. data protection legislation).<sup>31</sup> Administrative procedures also tend to be simpler, far less costly and requiring lower thresholds of proof.<sup>32</sup>

Nonetheless, the inclusion of criminal sanctions has been considered very relevant by the European Commission to ensure effective implementation of EU policies on the prevention of environmental crimes. In fact, the Commission stated that '[t]he adoption of and reliance on administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on protection of the environment which calls for stronger measures on preventing and fighting environmental crime'.<sup>33</sup>

A so-called 'toolbox approach' should be sought, where civil, administrative and criminal law measures are applicable, when necessary, as long as they do not amount to a double punishment in breach of the *ne bis in idem* principle,<sup>34</sup> as the ECtHR<sup>35</sup> and the CJEU<sup>36</sup> have repeatedly determined. Despite the interest of this debate, going into further details would fall out of the scope of this paper.<sup>37</sup>

## The Proposal for a Directive on Corporate Sustainability Due Diligence

In a globalized world, enterprises, especially transnational and multinational ones, have extremely complex supply chains spread throughout the world, mainly in developing countries, which are cheaper, but also more vulnerable to human rights and environmental violations. Due to the complexity of these value chains, enterprises struggle to identify and assess risks related to human rights and environmental violations along the chain. In fact, 'negative externalities from EU production and consumption are being observed both inside and outside the Union'.<sup>38</sup> Against this background, conducting human rights and environmental due diligence is imperative for enterprises to ensure that existing risks are addressed, and potential ones are prevented.

Voluntary standards, although a welcome development, revealed ineffective, as most companies will not act upon them, and victims' concerns are mostly left unaddressed. Society has been gradually paying more attention to these issues, and consumers are increasingly concerned with the conditions under which the products they buy are made. Consequently, several EU Member States have approved mandatory due diligence laws with different scopes, mostly limited to specific sustainability concerns in the value chain.<sup>39</sup>

31. In the same sense, see D. Roef, 'Corporate criminal liability' in J. Keiler and D. Roef (eds), *Comparative Concepts of Criminal Law* (3rd edn, Intersentia, 2019).

32. Michael Faure, Anthony Ogun and Niels Philipsen, 'Curbing consumer financial losses: the economics of regulatory enforcement' (2009) 31 *Law & Policy* 161, 174.

33. ECD proposal (n5) 5.

34. Communication (n15) 4. See also EFFACE, *Conclusions and recommendations* (Del n7.4) 15.

35. See Case *A. and B. v. Norway* (GC), no. 24130/11 29758/11, 15.11.2016.

36. See Case C-524/15, *Luca Mancini* [2018] OJ C166/2; Joined Cases C-596/16 and C-597/16 *Enzo Di Puma v Consob and Consob v Antonio Zecca* [2018] OJ C166/15.

37. For a thorough analysis about the need for corporate criminal liability in the context of environmental crimes and the Directive 2008/99/EC, see Faure (n26). The author argues, for instance, that since environmental crimes, such as pollution, will in practice be very difficult to detect, the optimal sanction to deter the commitment of those crimes would have to be so high that an individual offender would likely not be able to pay it without becoming insolvent. For further discussion on the topic, see also McMurry and Ramsey (n25) and Sally Simpson and others, 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies' (2013) 103 *J. Crim. L. & Criminology* 231.

38. CSDDD proposal (n7) 2.

39. See the French "*Loi relative au devoir de vigilance*", approved in 2017 or the Dutch "*Wet zorgplicht kinderarbeid*", approved in 2019 and specifically addressing child labour.

Although this is a positive trend that demonstrates a growing concern in society, this variety of laws with different requirements may lead to fragmentation of the internal market, thus creating an uneven playing field. Additionally, since the laws have different scopes, companies may fall simultaneously within the scope of two or more different national legal frameworks, which leads to duplication of requirements, difficulty in complying with the laws, lack of legal certainty and even mutually incompatible requirements (with possible distortions of the free movement of goods in the Union).<sup>40</sup>

These factors led to a call for action at the EU-level, with both the European Parliament and the Council demanding action from the European Commission<sup>41</sup> to propose rules applicable throughout the Union, thereby levelling the playing field and reducing the existent fragmentation. Legislating on this matter thus turned into a priority for 2022.<sup>42</sup>

On 23 February 2022, the European Commission published a proposal for a Directive on Corporate Sustainability Due Diligence. It is a cross-sectorial proposal directed at EU companies and non-EU companies operating in the EU that surpass certain thresholds (e.g. size, volume of business) and establishes a due diligence duty for companies to address their human rights and environmental impacts. As a horizontal framework, it will complement other sectorial measures which also address challenges related to responsible business conduct.<sup>43</sup>

An ambitious innovation of the CSDDD proposal is the applicability of this due diligence duty not only to the operations of the companies within its scope, but also to their subsidiaries and value chains, ‘to the extent of their established business relationship’.<sup>44</sup> The extension of the CSDDD proposal’s reach over the value chain has been thoroughly debated since the proposal has been published, but such debate is out of the scope of this paper.

Another important aspect of the CSDDD proposal that distinguishes it from voluntary standards is the existence of sanctions and civil liability for companies. Member States shall establish effective, proportionate, and dissuasive rules on sanctions for the infringement of the national provisions they will adopt pursuant to the Directive. Pecuniary sanctions should be based on the company’s turnover (Article 20(3)). Although ‘Member States shall ensure that companies applying for public support certify that no sanctions have been imposed on them for failure to comply with the obligations of this Directive’, the exclusion of non-compliant companies from public procurement is not expressly established as a sanction, contrasting to what was proposed by the European Parliament.<sup>45</sup>

In terms of liability, Member States are required to lay down rules to govern civil liability of companies for damages arising from their failure to comply with their due diligence obligations, i.e., failing to prevent or mitigate potential adverse impacts and end or minimise actual adverse impacts.<sup>46</sup> However, if enterprises have taken these actions, this will work as a ‘partial shield to civil liability’.<sup>47</sup> No provision on criminal liability was established, although the Foreign Affairs Committee

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40. CSDDD proposal (n7) 11.

41. European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability [2021] OJ C474/11; Council Conclusions on Human Rights and Decent Work in Global Supply Chains [2020] 13512/20.

42. See n3.

43. CSDDD Proposal (n7) 3.

44. *ibid* art1.

45. ECCJ, ‘European Commission’s proposal for a directive on Corporate Sustainability Due Diligence A comprehensive analysis’ (Legal Brief 2022) 19.

46. CSDDD Proposal (n7) 42.

47. Claire O’Brien and Olga Martin-Ortega, ‘Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective: in-depth analysis’ (European Parliament, 2022) 16.

called for ‘the exploration of criminal liability for the most severe violations’.<sup>48</sup> This silence in what concerns criminal liability is problematic, as companies may consider that paying fines is a low price compared to the high profits that non-compliant business practices bring.<sup>49</sup> Criminal liability could provide a stronger deterrent effect and be applied for repeated breaches of the CSDDD.<sup>50</sup>

## Human rights impact of environmental crimes and the interplay between the Proposals

Environmental crimes are often committed by legal persons and not only have negative consequences to the environment, but also, for example, to the communities that live in areas surrounding the places affected by those crimes. Such negative impacts may and often do amount to human rights violations. In fact, according to a report from the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations, ‘nearly a third of cases of alleged environmental harm had corresponding impacts on human rights’.<sup>51</sup> Therefore, ‘the protection of the environment against environmental crimes is also a condition for the effective protection of human rights’.<sup>52</sup>

From a human rights perspective, protecting the environment is ‘a vital part of contemporary human rights doctrine, for it is a *sine qua non* condition for numerous human rights such as the right to health and the right to life itself’.<sup>53</sup> This is one way of applying a human rights optic to

48. Ibid 16.

49. ECCJ (n46) 19; Heli Korkka-Knuts, ‘Evaluating Corporate Accountability for Human Rights Violations: The (Uncertain) Efficacy of Administrative Sanctions under the EU Sustainability Due Diligence Directive’, (2023) Helsinki Legal Studies Research Paper No.80, 7. Reaching the same conclusion, but on environmental crimes, see also Council of the EU, ‘Final report of the Eighth round of mutual evaluations on environmental crime’ (14065/19) 58 and McMurry and Ramsey (n25) 1143.

50. Arguing in favour of the introduction of corporate criminal liability for certain ESG breaches, see Vladimir Hrlc, ‘Corporate criminal liability as a tool for mandatory human rights /ESG due diligence and disclosure – a missed opportunity’ (*International Bar Association*, 2 June 2023); Korkka-Knuts (n50), 20; Committee of Ministers of the Council of Europe, ‘Human Rights and Business’ [2016] Recommendation CM/Rec(2016)3.

51. Elisa Morgera, ‘Benefit-sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations’ [2014] University of Edinburgh, School of Law, Working Papers 7, citing UNHRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse’ (23 March 2008) UN Doc. A/HRC/8/5/Add.2.

52. Marchisio (n11) 2.

53. Marchisio (n11) 6 citing *Gabcikovo-Nagymaros case (Hungary v Slovakia)* [1997] (separate opinion, Judge Weeramantry). On the already much debated interconnection between the environment and human rights, see, e.g., D. K. Anton and D. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2012); Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 EJIL 613; Dinah Shelton, ‘Human rights and the Environment: What specific environmental rights have been recognized?’ (2006) 35 Denv. J. Int’l L. & Pol. 129. See also the Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, (30 December 2013) UN Doc A/HRC/25/53; UNHCR, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) UN Doc A/HRC/37/59.

environmental protection: by focusing on how it may affect ‘the realization and enjoyment of established human rights’.<sup>54</sup>

It is also a concern from an intergenerational equity perspective, as one should aim not only to protect the rights of present generations, but also to ensure that future generations will still be able to enjoy the same rights.<sup>55</sup> Environmental due diligence should thus be conducted to reduce negative environmental impacts which, in turn, entail indirect benefits for human rights.<sup>56</sup> The ECtHR has followed a human rights approach to environmental harm in several instances<sup>57</sup>, falling short of developing a ‘right to a decent or satisfactory environment if that concept is understood in broader, essentially qualitative terms unrelated to impacts on specific humans’.<sup>58</sup>

In fact, one should not forget the importance of protecting the environment *per se* and not just as an ancillary aspect of human rights protection. Otherwise, a strict human rights approach would risk reducing ‘all other environmental values to an instrumental use for humanity’.<sup>59</sup> The CSDDD proposal did not neglect this aspect, as its material scope exceeds the scope of the United Nations Guiding Principles on Business and Human Rights in relation to the environment, while making an effort to avoid treating it as a ‘mere annex to human rights protection’.<sup>60</sup>

It is precisely due to the deep connection between environmental crimes, human rights violations, and corporations being usual suspects for committing both that there is space for a potential interplay between the two above-mentioned proposals.

The European Parliament stated that ‘ensuring liability for environmental damage is key to making European businesses more sustainable in the long term; (...) such an achievement is closely interlinked through the development of related legislation on corporate due diligence, corporate

54. Daniel Bodansky, Jutta Brunée and Lavanya Rajamani, *International climate change law* (1st edn, Oxford University Press, 2017) 301. The authors also mention that the creation of an autonomous human right to a healthy and clean environment would be a second way of applying a human rights lens to the protection of the environment and, in particular, to the climate change issue. Recognizing such an autonomous right, see UNHRC, ‘Resolution 48/13, ‘The human right to a clean, healthy and sustainable environment’, 21 October 2021, A/HRC/RES/48/13.

55. Bridget Lewis, ‘Human Rights and Environmental Wrongs: Achieving Environmental Justice through Human Rights Law’ [2012] IJCL 65, 70. See also Patricia Birnie, Alan Boyle and Catherine Ridgwell, *International law and the Environment* (4th edition, Oxford University Press, 2021), 306.

56. O’Brien (n48) 19.

57. For an excellent review see Council of Europe, ‘Guide on the case-law of the European Court of Human Rights - Environment’ (2022) and Council of Europe, ‘Manual on Human Rights and Environment’ (3rd edn, Council of Europe Publishing 2022). In the landmark Case Lopez Ostra, the ECtHR stated that ‘severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely’ [ECtHR, *Lopez Ostra* (1994) 20 EHRR 277]. In the Case Krytatos, the ECtHR held that ‘environmental harm can constitute a human rights violation only if it impacts a person’s enjoyment of a protected right’ [ECtHR, *Krytatos v. Greece* (2005) 40 EHRR 16]. On this topic, see also Loukis Loucaides, ‘Environmental protection through the jurisprudence of the European Convention on Human Rights’ (2004) 75 British Yearbook of International Law 249.

58. Birnie, Boyle and Ridgwell (n56) 290.

59. Mary Ann Glendon, Donald Anton and Dinah Shelton, ‘The Environment as a Human Rights Issue’ in D. Anton and D. Shelton (eds) *Environmental Protection and Human Rights* (Cambridge University Press 2012), 119. In the Case *Duarte Agostinho and Others v. Portugal and 32 Others*, no. 39371/20, the applicants invite the Grand Chamber of the ECtHR to take an ambitious step forward in this direction, but their application faces a major admissibility obstacle, due to the *actio popularis* nature of the complaint.

60. David Krebs, ‘Environmental Due Diligence in EU law – Considerations for Designing EU (Secondary) Legislation’ (German Environment Agency 2021) 44.

social accountability and sustainable corporate governance'.<sup>61</sup> It welcomed the CSDDD proposal and the fact that it includes a corporate liability regime.

The Commission also acknowledged that the 'fight against environmental crime will be more effective if it is part of a wider effort to enhance corporate responsibility'.<sup>62</sup>

It is in this context that I will analyse if and how the two Proposals can be of any use to one another, and I will argue that there is space to improve both by interconnecting them.

### *Bringing a human rights approach into the ECD Proposal*

As in most cases environmental crimes entail human rights violations, it is only natural that a human rights approach is brought into the ECD Proposal. In fact, this has precisely been proposed by more than one Committee appointed to provide an opinion on the ECD proposal.

The Committee on Development ('DEVE Committee') has issued its opinion for the Committee on Legal Affairs, which is the committee responsible for the subject matter, on 7 December 2022. The DEVE Committee has precisely taken the view that 'a human rights approach should be put at the core of the Directive'.<sup>63</sup> Being the EU strongly responsible for the protection of human rights, value chains related to the EU must be verified to check if they are affected by environmental crime. The DEVE Committee has made several amendments, highlighting the link between the commission of environmental crimes and companies<sup>64</sup>, and the consequent need to improve transparency in the value chains.<sup>65</sup>

The DEVE Committee suggested amending the subject matter of the Directive (Article 1) to connect the objective of protecting and combatting environmental crime with the prevention of 'human rights violations and abuses resulting from environmental criminal offences'.<sup>66</sup>

However, its biggest innovation is the broadening of the scope of criminal offences, with the inclusion of 'serious breaches of due diligence obligations' set out in the future CSDDD and 'the non-compliance with the decisions of the competent authorities in that matter', together with 'serious breaches of the Corporate Sustainability Reporting Directive'<sup>67</sup> as criminal offences under the ECD.

The DEVE Committee also proposes that Member States should be obliged to establish their jurisdiction over offences that create environmental risks on their own territories, offences committed by their citizens or legal persons in third countries, against their residents, or for the benefit of a legal person established on their territory, even if those offences have been committed outside of the EU.<sup>68</sup>

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61. European Parliament Resolution of 20 May 2021 on the liability of companies for environmental damage [2022] OJ C15/186 2.

62. Communication (n15) 7.

63. Opinion of the Committee on Development for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC [2022] 2021/0422(COD) 3.

64. See e.g. the new recital 11a proposed by the DEVE Committee.

65. See recital 12, as amended by the DEVE Committee.

66. DEVE Committee (n64) 22.

67. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15.

68. DEVE Committee (n64) 18.

Additionally, ‘the severity of human rights impacts, the vulnerability of human victims (...) or the gross violation of due diligence obligations should also be considered to be aggravating circumstances’.<sup>69</sup>

The DEVE Committee expressly included the reference to supply chains in the provision establishing that companies can also be held liable where the ‘lack of supervision or control of their supply chains’ by a person who has a leading position within the legal person has led to an offence established in the ECD for the benefit of the legal person.

Furthermore, it suggests that sanctions for legal persons shall encompass the obligation to install due diligence schemes enhancing not only compliance with environmental standards (already included in the ECD proposal), but also with human rights obligations.

Finally, the Opinion included that ‘Member States shall also ensure an effective implementation and enforcement of national and Union environmental due diligence obligations in the supply chains of their natural and legal persons operating in developing countries’<sup>70</sup> as per the CSDDD.

The Committee on the Environment, Public Health and Food Safety (‘ENVI Committee’) follows a similar path. In its Opinion of 25 October 2022, the ‘right to a healthy environment as a human right’ argument is used to conclude that environmental criminal law can play a part in the fulfilment of such right. In the recitals, the case law of the European Court of Human Rights (‘ECtHR’) is referred to reinforce the idea that environmental issues are directly linked to several human rights and that their exercise ‘can be undermined’ by the existence of harm to the environment’.<sup>71</sup>

The ENVI Committee suggests that the ECD should expressly endorse and promote human rights<sup>72</sup>, but it does not go as far as to include a specific reference to human rights in the subject matter of the ECD proposal (as the DEVE Committee did).

Nonetheless, the ENVI Committee also includes as a new criminal offence ‘the violation of standards as set in the Corporate Sustainability Due Diligence Directive and the Corporate Sustainability Reporting Directive’.<sup>73</sup> Corporate liability shall be extended throughout the supply chain. Additionally, committing offences intentionally or knowing that they cause or are likely to cause human rights violations is also included as an additional aggravating circumstance.<sup>74</sup>

On a different note, the ENVI Committee highlights the necessity of criminal liability for legal persons, but mentions that in the Member States that do not provide for criminal liability for legal persons, those countries should ensure that their administrative sanctioning systems provide ‘where possible, identical sanctions types and levels’. This way, an effort should be made to provide for sanctions as similarly deterrent as possible. The ENVI Committee also clarified that corporate criminal liability may be transferred to the successor company.<sup>75</sup>

These Opinions demonstrate that there is indeed a legislative space to connect both Proposals. It is critical to criminalize under the ECD the breach of due diligence obligations set forth in the CSDDD, as it would enhance collective deterrence and impel companies to act preventively, in

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69. *ibid* 15.

70. *ibid* 52.

71. Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on Legal Affairs the proposal for a directive of the European Parliament and of the Council on the Protection of the environment through criminal law and replacing Directive 2008/99/EC [2022] 2021/0422(COD).

72. *ibid* 7.

73. *ibid* 59.

74. *ibid* 78.

75. *ibid* 77.

order to avoid adverse impacts that could constitute criminal offences under the ECD. Due diligence obligations without any sort of criminal liability could be set aside by less scrupulous corporations for whom breaching the law would still be a profitable trade-off. This being, although these amendments are worthy and necessary, the inclusion of vague expressions constituting criminal offences risks undermining the principles of legality and proportionality, which are especially relevant in criminal law.

In fact, not every breach of a due diligence obligation (and even less every standard set in the CSDDD) should necessarily be criminalized. When comparing the amendment suggestions from both the DEVE and the ENVI Committees, the ENVI Committee's wording is more problematic than the DEVE Committee's. In fact, the 'violation of standards as set in the CSDDD' (according to the ENVI wording) is an inadmissibly vague and broad expression in the light of the principle of legality in criminal law. A less general, but still unclear expression is 'serious breaches of the due diligence obligations' (according to the DEVE wording). Therefore, these amendments are welcome, but the concepts used, such as 'serious breaches', should be clearly delimited. The principle of legality in criminal law warrants a more detailed definition of the specific breaches of due diligence obligations attached to the risk or danger of an environmental damage. According to the ECtHR, while using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7, the referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable.<sup>76</sup>

The Committee on Civil Liberties, Justice and Home Affairs ('LIBE Committee') has issued a draft opinion on 4 October 2022. It acknowledged 'the importance of due diligence to prevent and mitigate the potential adverse impact of corporate activities on the environment and human rights'<sup>77</sup> and also includes as an offence 'the violation of standards as set in the Corporate Sustainability Due Diligence and the Corporate Sustainability Reporting Directive.'<sup>78</sup> The violation of due diligence obligations is included as an aggravating circumstance, but there is no specific reference to human rights in this regard. Unfortunately, the LIBE Committee's position changed in its opinion issued on 6 February 2023, where it eliminated the offence typified above.

The remaining opinion-giving committee is the Committee on Petitions, which has issued its final opinion on 8 December 2022 and has also taken a less bold approach. Although there is a reference to the impact environmental crimes can have on human rights, as well as to the ECtHR's case law, no explicit reference is made to the CSDDD, nor to the violation of environmental or human rights due diligence obligations.

Looking at the above-described Opinions, there seemed to be a rather strong political consensus to include as a criminal offence the breach of CSDDD provisions. However, the final word was up to the Committee on Legal Affairs ('JURI Committee'), as the lead committee. It firstly issued a draft

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76. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* (Advisory Opinion) ECHR (29 May 2020) [74].

77. Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law [2022] 2021/0422(COD) 12.

78. *ibid* 32.

report on 12 October 2022<sup>79</sup> and amendments to it were published on 11 November 2022. In the draft report, the JURI Committee acknowledged the importance of establishing ‘robust Union rules for comprehensive due diligence’ to ‘bring to an end and minimise the risk of potential or actual adverse human rights or environmental impacts connected with companies’ own operations, subsidiaries and supply chains’, but its position was considerably different from the progressive and ambitious ENVI and DEVE Committees, not drawing any practical consequence from the concerns expressed on this topic.

However, the JURI Committee’s position seemed to have positively changed when looking at the amendments published on November 11<sup>th</sup>, 2022. The JURI Committee defended the extension of the Member States’ jurisdictions to prosecute offences provided for in ECD proposal, similarly to what the DEVE Committee proposed. Additionally, it included as a criminal offence the violation of standards as set in the CSDDD, in the exact same terms as the ENVI Committee. It expressly stated that companies can be held liable if the lack of supervision or control has occurred throughout its entire supply chain for the benefit of the legal person. The fact that offences have caused ‘the violation of human rights of persons, groups or local communities’<sup>80</sup> was considered as an aggravating circumstance.

Surprisingly, the JURI Committee changed once again its view in the report adopted on March 28<sup>th</sup>, 2023.<sup>81</sup> Despite acknowledging that ‘it is important to proceed quickly with the establishment of robust Union rules for comprehensive due diligence’<sup>82</sup>, the inclusion of the violation of CSDDD standards as a criminal offence has disappeared.

At the time of writing, the chances of amending the ECD proposal to include a much-needed human rights approach to environmental crime and a connection to the CSDDD have decreased and it seems that the ambitious contributions of the ENVI and DEVE Committees have been watered down. The inclusion of serious breaches of due diligence obligations arising from the CSDDD as a criminal offence under the ECD would be a remarkable opportunity to create a criminal liability regime indirectly associated to the CSDDD, which has no provisions on the matter.<sup>83</sup> Unfortunately, this scenario seems now further away from becoming reality.

A final suggestion which corresponds to the other side of the coin of several proposals referred above is the inclusion of a ‘due diligence defence’, i.e. companies could defend themselves, at least partially, against criminal liability under the ECD if they could prove that they had complied with due diligence obligations set out in the CSDDD.<sup>84</sup> This way, compliance with the CSDDD would be seen from a positive, rewarding perspective and not only through a negative lens (i.e. the violation of due diligence obligations under the CSDDD constituting a criminal offence under the ECD).

79. Committee on Legal Affairs, Draft Report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC [2022] 2021/0422(COD).

80. Committee on Legal Affairs, Amendments 371-587 [2022] 2021/0422(COD) 22.

81. Committee on Legal Affairs, Report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC [2023] 2021/0422(COD).

82. *ibid.*

83. Also defending the idea of creating a corporate criminal liability standard for the most severe human rights due diligence violations see ‘Korkka-Knuts (n50) 20 and Mackie (n25) 34.

84. This model has already been included in the Italian system by Decree 231/2001. See Mackie (n25) citing FIDH, HRIC and ECCJ, ‘Italian Legislative Decree No. 231/2001: A model for Mandatory Human Rights Due Diligence Legislations?’ (2019).

As indicated in the introductory chapter, it remains to be examined whether the ECD proposal has also been considered in the legislative process of the CSDDD proposal. Interestingly, the explanatory memorandum of the CSDDD proposal does not refer to the ECD proposal. There is a reference to environmental law and to the Environmental Liability Directive<sup>85</sup> ('ELD') when analysing the consistency of the CSDDD proposal with other EU policies, stating that 'the civil liability related to adverse environmental impacts of this Directive will be complementary to the Environmental Liability Directive'.<sup>86</sup> It is understandable that the ELD has been mentioned as it provides for a parallel, although sectorial, civil liability regime, but it is odd that the Commission did not consider the fortunate coincidence of the ECD being discussed to seize the opportunity to create an interplay between the proposals. In fact, the ECD proposal will hopefully include precisely what the ELD lacks – a way to hold accountable companies' value chains for adverse environmental impacts.

Although the Commission did not consider the ECD proposal when preparing the CSDDD one, the draft report of the JURI Committee and the opinions of the DEVE and ENVI Committees on the CSDDD proposal actually do. Both propose that the definition of 'adverse environmental impacts' that should be addressed by due diligence include violations within the meaning of the ECD.<sup>87</sup> This increases consistency between EU legislative acts and is a way of including a specific reference to the ECD in the CSDDD, because Part II of the Annex to the Directive, which includes a rather insufficient list of international environmental instruments by reference to which enterprises should conduct due diligence, makes no reference to the ECD at the time of writing.<sup>88</sup> Additionally, said scheme of referring to an Annex to define adverse environmental and human rights impacts is rather complex and will probably pose challenges of interpretation and clarity.<sup>89</sup>

## Conclusion

Both proposals address pressing issues in today's world. Environmental crimes are in many cases committed by companies and these could be prevented or mitigated through due diligence. Nonetheless, deterrence will only be achieved by means of a criminal law offence targeting corporate non-compliance with due diligence standards.

Therefore, a connection between both proposals would clearly reinforce companies' compliance with environmental standards, by establishing a criminal liability regime connected to a due diligence duty that extends throughout the supply chain. The recent developments in the legislative procedure seem to indicate that this might have been a lost opportunity to seize the excellent timing of both proposals.

This paper argues that it would indeed be crucial to include breaching due diligence obligations as a criminal offence under the ECD, as was suggested by the DEVE Committee, but the concept of 'serious breaches' should be clearly delimited. In fact, not all breaches of standards or obligations set in the CSDDD should necessarily lead to criminal offences under the ECD. On the one hand, a quantitative

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85. Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56.

86. CSDDD Proposal (n7) 8.

87. The JURI Committee's draft report still refers to Directive 2008/99/EC, but it is expected that such reference will be updated in the final report.

88. ECCJ (n36) 4.

89. O'Brien (n48) 18. See also Krebs (n61) 10 on different approaches to the design of environmental due diligence and respective pros and cons, ranging from broadly drafted general clauses (negative or positive) to specific references to existing substantive norms.

criterion should be chosen (only the most serious ones). On the other hand, a qualitative connection to the environmental damages potentially created by the breach of those standards should be established. Otherwise, it would be disproportionate to criminalize in the ECD breaches of obligations established by the CSDDD which have no potential connection with an environmental damage.

### **Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

### **ORCID iD**

Beatriz Albuquerque  <https://orcid.org/0009-0002-3414-9914>

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