

**CEPRI Miniconference**  
**Virksomheders værdikæder i et**  
**bæredygtighedsperspektiv**

**Det nye direktivforslag –  
overblik og menneskeretlig baggrund**

**Jonas Christoffersen and Claire Methven O'Brien**

**10 January 2023**

# 1. Background and evolution of standards

# *“The Social Responsibility of Business is to Increase its Profits”*

In a free society, "there is one and only one social responsibility of business--to use its resources and engage in activities designed **to increase its profits so long as it stays within the rules of the game**, which is to say, engages in open and free competition **without deception or fraud**".



“...discussions of the "social responsibilities of business" are notable for their analytical looseness and lack of rigor. **What does it mean to say that "business" has responsibilities?**

...The first step toward clarity in examining the doctrine of the social responsibility of *business is to ask precisely what it implies for whom.*”

*Milton Friedman, The New York Times Magazine  
13 September 1970*



## UN Guiding Principles on Business and Human Rights

### **The State duty to protect**

How can the State exercise its duty of protecting human rights from influences of third parties (including companies)?

### **Corporate responsibility**

How can companies exercise their responsibility to respect human rights?

### **Access to remedy**

In case of negative impacts on human rights, the access to remedy is crucial for the persons concerned.

FIGURE 1. DUE DILIGENCE PROCESS & SUPPORTING MEASURES



*(Source: OECD Due Diligence Guidance)*

- § Applies to all enterprises regardless of size, sector, operational context, ownership or structure
- § Scale and complexity may vary according to these factors and with the severity of the enterprise's adverse human rights impacts

- § Avoid causing or contributing to adverse human rights impacts through own activities and address impacts when they occur
- § Seek to prevent or mitigate adverse human rights impacts directly linked to own operations, products or services by their business relationships, even if they have not contributed to those impacts
- § Prioritise efforts to avoid and mitigate negative impact





# 2011 White Paper on CSR

The responsibility of enterprises for their impacts on society

Companies should have in place *a process* to integrate social, environmental, ethical, *human rights* and consumer concerns into business operations and core strategy to maximise creation of shared value and identify, prevent and mitigate possible adverse impacts



## OECD Guidelines for Multinational Enterprises

2011 EDITION



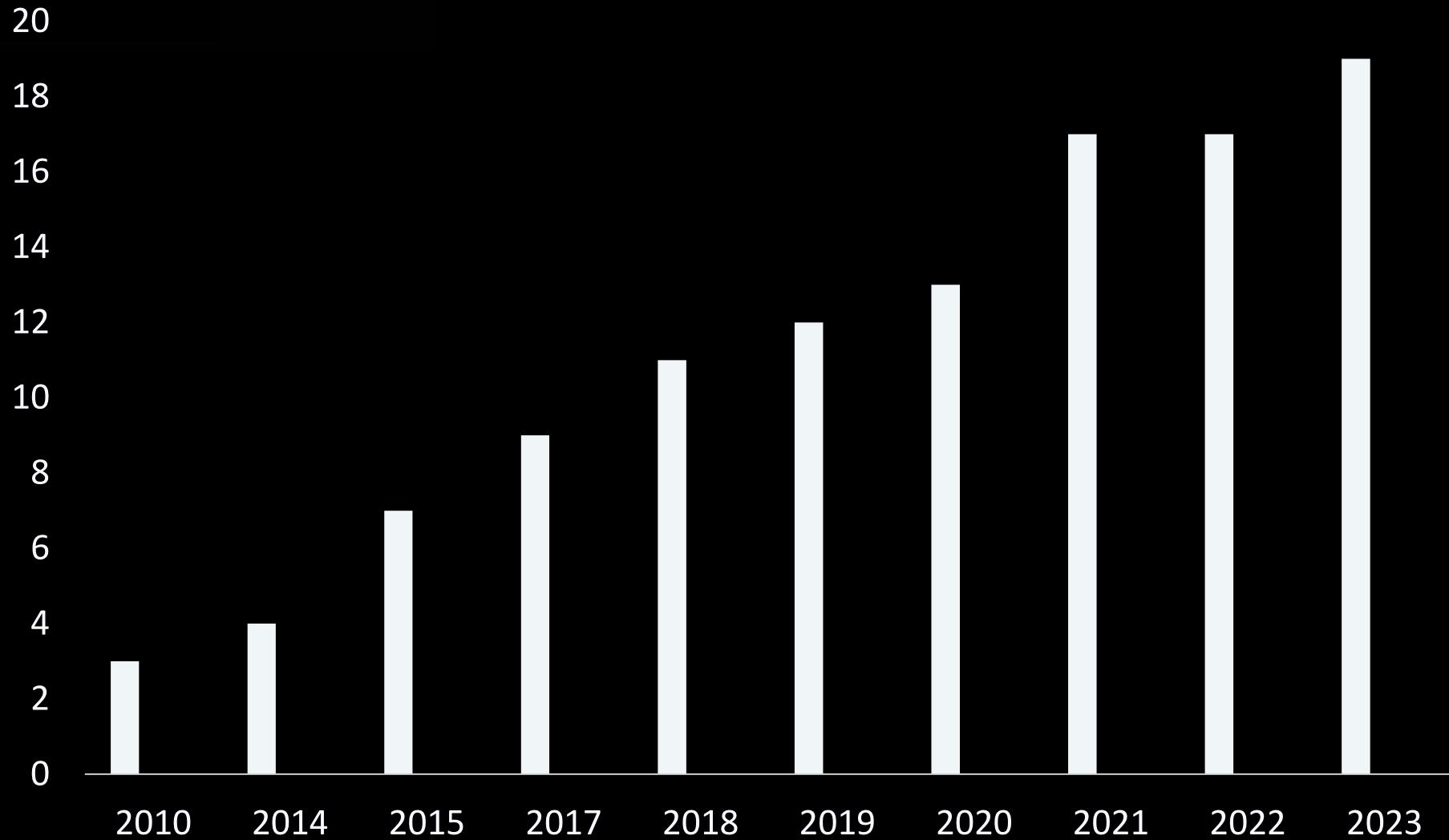
OECD

- A new and comprehensive approach to **due diligence** and responsible supply chain management representing significant progress relative to earlier approaches.

10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

14. For the purposes of the *Guidelines*, due diligence is understood as the **process through** which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the *Guidelines*. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The *Guidelines* concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship, as described in paragraphs A.11 and A.12. Due diligence can help enterprises avoid the

# New due diligence laws - worldwide



# Loi de vigilance 2017



- 5,000 employees in France OR 10,000 employees in France and abroad
- Elaborate, disclose and implement a vigilance plan to identify risks and prevent violations concerning human rights and environment
- Adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights or the environment – includes supply chain
- Victims of harm resulting from negligence can seek civil damages under French Civil Code
- Fines

# Act on corporate due diligence in supply chains (2021)



- > 3,000 employees; from 2024 > 1,000 employees
- identify risks of human rights violations and environmental destruction by direct suppliers and, where relevant, indirect suppliers
- Risk management system, grievance mechanisms, reporting
- Fines, exclusion from public procurement
- No supply chain liability beyond existing vicarious liability



## 1. **Scope: EU companies:**

- Group 1: EU limited liability **companies of substantial size** and economic power (with 500+ employees and EUR 150 million+ in net turnover worldwide)
- Group 2: Other limited liability companies in defined **high impact sectors**, with more than 250 employees and net turnover minimum EUR 40 million worldwide (entry into effect after 2 years).
- **Non-EU companies** active in EU with turnover thresholds aligned to Group 1 and 2, generated in the EU.
- **Small and medium enterprises (SMEs)** not directly in scope - but **indirect** consequences

2. **Scope:** company's **own** operations, **subsidiaries** and value chains (direct and indirect '**established business relationships**').



### 3. Content: To comply, **companies need to:**

- integrate due diligence into policies;
- identify actual or potential adverse human rights and environmental impacts;
- prevent or mitigate potential impacts;
- **bring to an end or minimise** actual impacts;
- establish and maintain a complaints procedure;
- monitor effectiveness of due diligence policy and measures;
- publicly communicate on due diligence.



BUT restrictions /qualifications including:

- Only severe adverse impacts ‘relevant to sector’ for high-risk sector companies (Art 6(2))
- *Ex ante* not ongoing DD for financial sector (Art 6(3))
- Qualifiers: ‘relevant’, ‘appropriate’- render extent of duty unclear
- Limited depth: own operations, subsidiaries, established business relationships (Art 6, Art 3 (e),(f))



# EU Draft Directive on Corporate Sustainability Due Diligence



**Enforcement:** National administrative **authorities** appointed by Member States responsible for supervising; may impose **fin**es in case of non-compliance

**Remedy:** Victims may take legal action for **damages** that could have been avoided with appropriate due diligence measures.

**Accompanying measures:** to **support** all companies, including SMEs, that may be indirectly affected; development of individually or jointly dedicated websites, platforms or portals and potential financial support for SMEs; EC guidance, including about model contract clauses; new measures, including helping companies in third countries.

## 2. Challenges and dilemmas

Challenge 1:  
Coherence with existing  
human rights and EU law

Are human rights human rights?

May 19, 2022

## The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes

Written by [Claire Methven O'Brien](#) and [Jacques Hartmann](#)



It can first be remarked that, despite the reference to “agreements” and “conventions”, the lists include references not only to treaties but also other instruments such as the [Universal Declaration of Human Rights](#) (UDHR); the [Declaration on the Rights of Indigenous Peoples](#); and, the [Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities](#). Although various provisions in these declarations may reflect customary international law, general principles of law or elementary considerations of humanity, they are not themselves legally binding and hence not as such capable of establishing “violations” even by States. Part

Secondly, it is noteworthy that nowhere in the proposal or Annex is mention made of [European regional or EU human rights instruments](#), such as the European Convention on Human Rights (ECHR), the European Social Charter (ESC) or (with exception of the protection of privacy and personal data) the European Charter of Fundamental Rights (ECFR), which are by contrast *lex lata*. This appears, to say the least, ironic. The ECFR enjoys the [same legal status as the EU's founding treaties](#) while EU Member States are required to give effect to it when implementing EU law, including the proposal. As regards the ECHR, this is recognised as part of the [common constitutional traditions](#), with special significance in EU law. All EU

# The Demise of Viking and Laval



**Hans Petter Graver**

Hans Petter Graver is Professor at the Institute of Private Law at the University of Oslo (Norway).

## The Holship Ruling of the ECtHR and the Protection of Fundamental Rights in Europe

The ECtHR explicitly took issue with the ECJ's statement in *Viking* that the right to collective action could not be considered inherent to the very exercise of trade unions' rights (paragraph 52). Contrary to this, and closer to reality, the ECtHR stated in *Holship* "that for a collective action to achieve its aim, it may have to interfere with internal market freedoms such as those at issue in the case before the Supreme Court. [...]"

The ECtHR's findings in *Holship* have implications far beyond trade union rights and Article 11 of the ECHR, and go to the core of the ECJ jurisprudence on the protection of human rights. In dealing with other human rights than the right to collective

The ECtHR found that there had been no violation of Article 11 ECHR by the decision of the Supreme Court to uphold the ban on the boycott. The reason for this was the large margin of appreciation the ECtHR granted the national authorities in the case,

Challenge 2:  
Coherence with existing  
human rights and EU law

Do adverse impacts violate human rights?



### Preventing potential adverse impacts

1. Member States shall ensure that companies take appropriate measures to prevent, or where prevention is not possible, or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified pursuant to Article 6, in accordance with paragraphs 2, 3, 4 and 5 of this Article.
2. Companies shall be required to take the following actions, where relevant:
  - (a) where necessary due to the nature or complexity of the measures required for prevention, develop and implement a prevention action plan, with reasonable and clearly defined timelines for action and qualitative and quantitative indicators for measuring improvement. The prevention action plan shall be developed in consultation with affected stakeholders;
  - (b) seek contractual assurances from a business partner with whom it has a direct business relationship that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan, including by seeking corresponding contractual assurances from its partners, to the extent that their activities are part of the company's value chain (contractual cascading). When such contractual assurances are obtained, paragraph 4 shall apply;
  - (c) make necessary investments, such as into management or production processes and infrastructures, to comply with paragraph 1;
  - (d) provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SME;
  - (e) in compliance with Union law including competition law, collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective.



## 2. Defining corporate impacts

- (c) ‘adverse human rights impact’ means an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2;



# Human Rights and Obligations

- Adverse impact wide in scope
- Enterprises have wider obligations to any individual anywhere subject to unclear definitions, discretion and prioritisation
- Violations narrow in scope
- States have legal obligations within their jurisdiction subject to discretion (margin of appreciation) and reasonableness (fair balance)

# Challenge 3: Coherence with existing Tort law

What do we do with by duty of care, causation and loss?

**Civil liability**



1. Member States shall ensure that companies are liable for damages if:
  - (a) they failed to comply with the obligations laid down in Articles 7 and 8 and;
  - (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage.
2. Notwithstanding paragraph 1, Member States shall ensure that where a company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.

In the assessment of the existence and extent of liability under this paragraph, due account shall be taken of the company's efforts, insofar as they relate directly to the damage in question, to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as any collaboration with other entities to address adverse impacts in its value chains.
3. The civil liability of a company for damages arising under this provision shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain.
4. The civil liability rules under this Directive shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive.

# Human Rights and Tort law

- Failure to comply
- Adverse impact occurred
- Adverse impact led to damage
- Standard of care
- Causation
- Protected interest
- Calculation of loss

Challenge 4:  
Achieving the intended policy goals

Is civil liability the tail that wags the dog?

# What is gained by civil liability?

- A. Corporate due diligence duties – detailed (checklist) descriptions – **high bar**
  - B. **Limited scope** (only large companies, not SMEs, SOEs, public procurement) – basically TNCs only (regression)
  - C. **Unclear civil liability** for violations/harm/adverse impacts by DD failures (Art 22) but
    - Subject to “safe harbour” based on contractual assurances + social auditing (failed model)
    - Only to extent of own operations, subsidiaries, and value chain “established business relationships” (open to gaming)
    - Qualifiers: ‘reasonable’, ‘necessary’ (byzantine)
- => **No legal certainty** (HR norms); no real extension of remedy (i.e. from liability provision, but maybe from DD requirement itself); **illusory gain** as lack of clarity will continue to prevent civil liability of enterprises

### 3. EU MHRDD Directive: Recommendations

Q: How to legalise HRDD so more companies do it, more do it effectively, and legislature help effectively prevent, address and remediate HR abuses/violations?

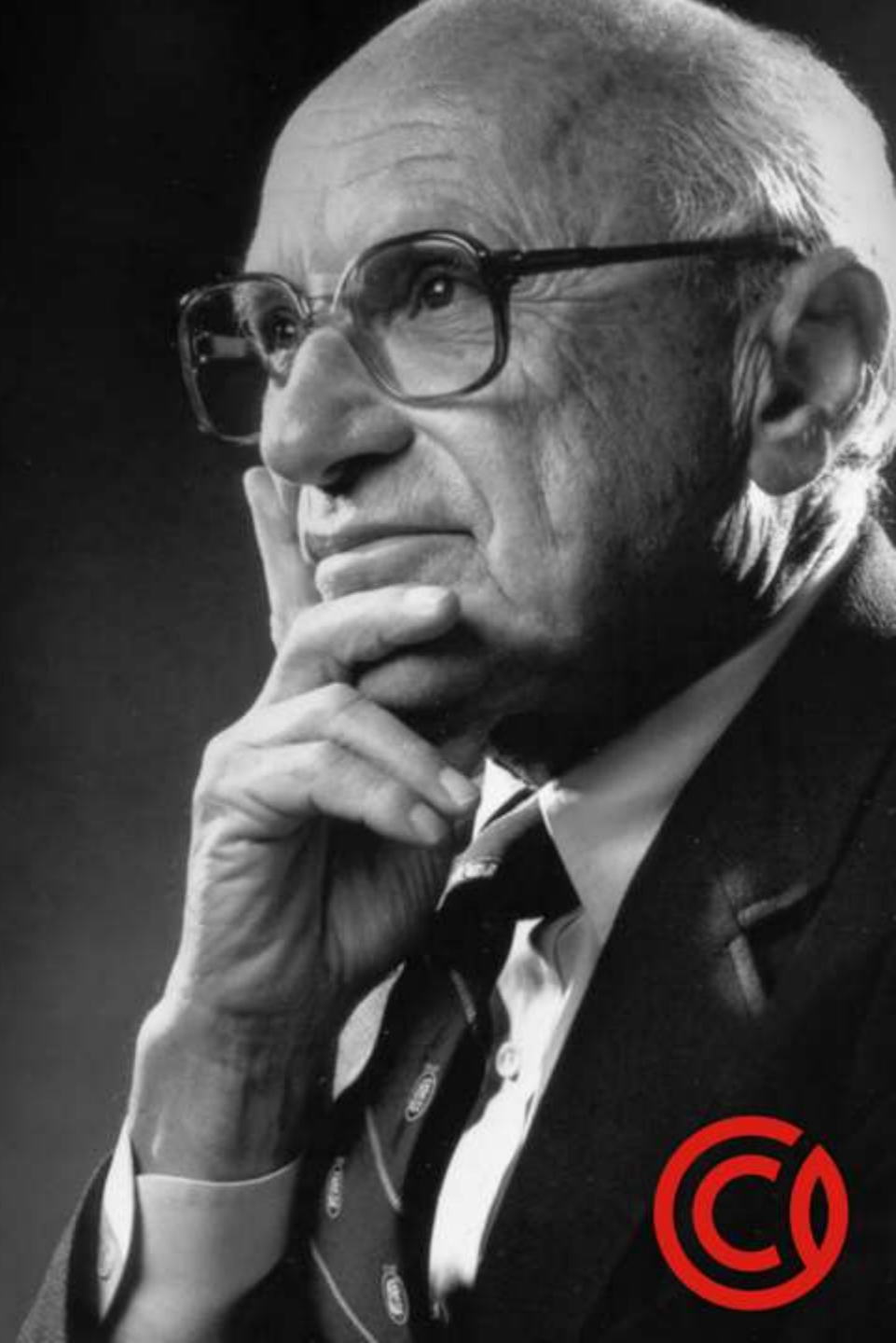
- It is a core challenge that the legislature cannot define what enterprises should do (compare EU Discrimination directives)
- The use of public power (authorities, fines and civil liability) results in a narrow HRDD-obligation
- HRDD does not establish (per se) a (tortious) duty of care, nor does it provide a standard of care, where a duty of care exists (though may inform interpretation)
- Best way forward may be to align the EUHRDD-obligation to UN Guiding Principles:
  - Duty on MS to enact statutory duty of (some) enterprises to carry out corporate HRDD
  - Penalties for default
  - Extend personal scope
  - Extend depth; remove restrictions on reach



"One of the great mistakes is to judge policies and programs by their intentions rather than their results."

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Milton Friedman



# Selected publications

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- [Methven O'Brien, C. & Martin-Ortega, O., Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective, In-depth Study for European Parliament \(DROI\) 30 May 2022.](#)
- [Methven O'Brien, C. & Hartmann, J., The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes, 19 May 2022, EJIL Talk!](#)
- [Methven O'Brien, C. & G. Holly, Briefing on Civil Liability for Due Diligence Failures, Danish Institute for Human Rights \(DIHR, 2021\).](#)
- [Methven O'Brien, C., and D. Schonfelder, A Defining Moment for the UN Business and Human Rights Treaty Process, \*Verfassungsblog\*, 26 October 2022.](#)
- [Methven O'Brien, C., 'Bounded Rationality, Metonymy, Humility. Further Arguments for a Framework-Style Business and Human Rights Treaty', \*Voelkerrechtsblog\*, 22 June 2022](#)
- [Methven O'Brien, C. & Martin-Ortega, O., , Briefing for European Parliament \(DROI\) June 2020. EU human rights due diligence legislation: Monitoring, enforcement and access to justice for victims](#)
- [Methven O'Brien, C., \*Business and Human Rights: A handbook for legal practitioners\*, \(2018, Council of Europe\).](#)