

Supply Chains Responsibilities in the “Democratic and Equitable International Order” – the Tasks for the European Union and its Member States

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Abstract

Supply chains laws are not only legal and legitimate from the perspective of international law; they are even required by both international law and EU law. Otherwise a “democratic and equitable international order” will remain elusive. The European Commission has recognised this in its recent proposal for a Directive on Corporate Sustainability Due Diligence.

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A. Foundations of the “Democratic and Equitable International Order”

Liberty, equality, security, wealth and opportunities have always been and still are unevenly distributed across the world’s regions and among the almost eight billion members of the human family. According to the Universal Declaration of Human Rights of 1948, each and every one of these many human beings is “born free and equal in dignity and rights.” We are all “endowed with reason and conscience and

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should act towards one another in a spirit of brotherhood.”¹ Yet, we are obviously far from the “democratic and equitable international order” that was in substance first proclaimed over 70 years ago in Art. 28 of the Universal Declaration of Human Rights² and has been reconfirmed time and again by the UN General Assembly³ and its subsidiary organ, the Human Rights Council, most recently last month.⁴

It is true that the pertinent General Assembly and Human Rights Council Resolutions were adopted by contentious votes and that the EU Member States and associated States voted unanimously against them. However, this is not because these States reject the concept as such but because some formulations used in those resolutions refer to the New International Economic Order.⁵ That concept was advocated by the developing States with the support of the East bloc in the 1970s in an attempt at achieving “economic decolonisation” by a planned development of the world economy and has since then been anathema to the Western industrialised States.⁶ Despite this, in my view, there is international consensus on the goal of making the international order more democratic and equitable.

This is confirmed by the World Summit Outcome that was adopted by the UN General Assembly without a vote in 2005.⁷ There the Heads of State and Government of the UN Member States resolved “to create a more peaceful, prosperous and democratic world”⁸ and reaffirmed their commitment “to promote sustained economic growth, sustainable development and global prosperity for all”,⁹ to protect “our common environment”¹⁰ and to “promote sustainable consumption and production patterns.”¹¹ Ten years later, the Heads of State and Government adopted the 2030 Agenda for Sustainable Development with 17 sustainable development goals, to be implemented by “[a]ll countries and stakeholders, acting in collaborative partner-

1 Art. 1 of the Universal Declaration of Human Rights, UNGA Res. 217 (III) A of 10 Dec. 1948.

2 Art. 28 speaks of an “international order in which the rights and freedom set forth in this Declaration can be fully realized”.

3 UN General Assembly Resolution A/RES/75/178 of 16 December 2020 on the “Promotion of a democratic and equitable international order”, adopted by a vote of 125 in favour and 55 against with 8 abstentions.

4 Human Rights Council Resolution A/HRC/48/L.13 of 8 October 2021 on the “Promotion of a democratic and equitable international order”, adopted by a vote of 30 in favour and 14 against with 3 abstentions. The resolution was sponsored by developing States and/or gross human rights offenders, such as Belarus, North Korea and Syria.

5 See para. 13 of UNGA Resolution A/RES/75/178 and the slightly modified para. 13 of Human Rights Council Resolution A/HRC/48/L.13.

6 *Sacerdoti*, in: Max Planck Encyclopedia of Public International Law.

7 UN General Assembly Resolution 60/1 of 16 September 2005.

8 Para. 16.

9 Para. 19.

10 Headline above para. 48.

11 Para. 49.

ship.”¹² They envisaged a world “in which democracy, good governance and the rule of law (...) are essential for sustainable development”.¹³

B. Legal Obligations and Political Promises of EU Law

For us Europeans, who are mostly living on the sunny side of our insecure and unjust world, the undemocratic and inequitable character of the international order is of particular concern for a number of reasons: Firstly, European colonialism is co-responsible for the current situation in many parts of the world. Secondly, we Europeans profit more than many others from the unsustainable exploitation of material and human resources around the globe. Thirdly and most importantly, we Europeans need to live up to our own commitments, which are clearly set forth in Art. 3 (5) and Art. 21 TEU.

In Art. 3 (5) TEU, the EU promises to “contribute to (...) solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights”. In Art. 21 (1) TEU, the EU declares that it seeks to advance the following principles in the wider world: “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, (...) equality and solidarity”.

These are objectives for the EU’s external action as a whole, no matter whether in intergovernmental form in the Common Foreign and Security Policy or in supranational form pursuant to the Union’s competences conferred by the TFEU.¹⁴ Pursuant to Art. 24 (3) TEU, the Member States are obligated to support the EU’s external policy “actively and unreservedly in a spirit of loyalty and mutual solidarity” and to refrain from any action which is contrary to the interests of the Union. This also results from the principle of sincere cooperation in Art. 4 (3) TEU, according to which “the Union and the Member States shall (...) assist each other in carrying out tasks which flow from the Treaties”. Member States shall also “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

In other words, the “democratic and equitable international order” can easily be identified as a joint commitment of both the EU and the Member States according to EU law. They are legally bound towards each other to pursue that common goal. While they enjoy a broad margin of discretion on how to do it, doing nothing is certainly insufficient. A political strategy needs to be developed “with all deliberate speed”.¹⁵ It would go too far to assume that the EU and Member States even made a unilateral declaration toward the wider world capable of creating international legal

12 UN General Assembly Resolution A/RES/70/1 of 25 September 2015, second paragraph of the preamble.

13 Ibid., para. 9.

14 See also Art. 205 TFEU.

15 The quotation is taken from *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301 (1955), which concerned the termination of racial segregation in the school systems in the U.S.

obligations in this regard.¹⁶ But they have publicly made a political promise to hold them to.

C. “Democratic and Equitable International Order” – Joint Tasks of a Public-Private Partnership

It has long been recognised that the sovereign States alone are unable to establish, maintain and adequately implement a “democratic and equitable international order”. As a matter of fact, the Universal Declaration of Human Rights already tried to recruit “every individual and every organ of society (...) to promote respect for these rights and freedoms and (...) to secure their universal and effective recognition and observance”.¹⁷ Today, the “democratic and equitable international order” is generally considered as the joint task of a public-private partnership of, on the one hand, sovereign States and intergovernmental organisations established by them and, on the other hand, a variety of non-state actors such as non-governmental organisations and businesses, in particular transnational corporations. The UN Human Rights Council thus takes “all actors on the international scene” as well as “States, civil society organizations and other stakeholders” to task for promoting that “democratic and equitable international order”.¹⁸

For many years now, business enterprises, particularly the powerful transnational corporations, have been the focus of international concern due to their negative and positive capacities with regard to human rights and the environment: They can gravely breach international human rights and environmental standards but also effectively protect and promote these standards. It is therefore important to suppress the negative and advance the positive human rights and environmental impacts of business.

This is the purpose of the UN Guiding Principles on Business and Human Rights which were developed by John Ruggie as Special Representative of the UN Secretary General and endorsed by the Human Rights Council in 2011.¹⁹ These Principles are based on the States’ duty to protect human rights from encroachment by business and provide access to effective remedies against abuses, together with the corporate responsibility to respect human rights.

While the UN Guiding Principles as such are only soft law, they reflect hard-law regarding the protective duty of States.²⁰ A process with uncertain outcome is cur-

16 See the International Law Commission’s Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (GAOR, 61st Session, Supplement no. 10 [A/61/10], p. 367).

17 Last paragraph of the preamble.

18 See paras. 10, 14 of Resolution A/HRC/48/L.13 (note xx).

19 https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (4/3/2022).

20 See the German Federal Government’s National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016–2020, p. 4, available at: <https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf> (4/3/2022).

rently under way under the auspices of the UN Human Rights Council to draft a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.²¹

The care for the environment as such has not made it into the UN Guiding Principles, neither regarding pertinent corporate responsibilities nor States’ obligations. However, we are currently witnessing the “greening” of human rights²² – a process of deriving obligations from existing human rights to protect the environment in general and climate in particular.²³

Accordingly, the UN Human Rights Council adopted a resolution last year in which it recognised the “right to a safe, clean, healthy and sustainable environment” as a human right.²⁴ It also encouraged States “to enhance cooperation with (...) relevant non-State stakeholders, including (...) business, on the implementation of the right to a safe, clean, healthy and sustainable environment”.²⁵ The Council noted the relation of that new right “to other rights that are in accordance with existing international law”, thereby indicating that the new right was still in the process of progressively developing into hard law. While the resolution is rather soft with regard to both corporate responsibilities and States’ obligations, it shows that the human rights debate has begun to cover the situation of the environment. Consequently, the pertinent corporate responsibilities to respect and States’ obligations to protect human rights are extending to the environment, not least because a safe, clean, healthy and sustainable environment is “critical to the enjoyment of all human rights”.²⁶

D. Supply Chains Laws as a Step toward Performing as Promised

Tying the ends of corporate responsibilities and States’ obligations together, some European States such as France and Germany have meanwhile enacted laws attributing responsibility to businesses for the adherence to fundamental human rights, including labour and social rights, as well as environmental standards throughout their supply chains also in third countries.

21 Third Revised Draft (17 August 2021) by the Open-ended Intergovernmental Working Group (OEIGWG), established by Human Rights Council Resolution 26/9 of 26 June 2014, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (4/3/2022).

22 Knox, Greening Human Rights, 14 July 2015, available at: <https://www.opendemocracy.net/en/openglobalrights-openpage/greening-human-rights/> (4/3/2022).

23 See e.g. Joint Statement on Human Rights and Climate Change by five UN human rights treaty bodies of 16 September 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998> (4/3/2022).

24 Resolution 48/13 of 8 October 2021 (adopted by a vote of 40:0, with 4 abstentions by China, India, Japan and the Russian Federation). See Jauer, Two Milestones in Favour of the Environment in Just a Few Days?, *Völkerrechtsblog*, 2 November 2021, available at: <https://voelkerrechtsblog.org/de/two-milestones-in-favour-of-the-environment-in-just-a-few-days/> (4/3/2022).

25 Resolution 48/13, para. 3 (a).

26 Ibid., para. 14 of the preamble.

In her State of the Union Address to the European Parliament on 15 September 2021, European Commission President *von der Leyen* promised a ban on products in the European Union market that have been made by forced labour.²⁷ She rightly affirmed that global trade must not take place at the expense of people's dignity and freedom. But why then tackle only forced labour and not all the other indignities, such as child labour and contamination of soil and drinking water?

As a matter of fact, we Europeans are just beginning to do our homework when we enact supply chains laws prohibiting European businesses from participating in the violation of core human rights and environmental standards outside Europe. But how far can we go in this regard? Are we effectively engaging in neo-colonialism by imposing our human rights and environmental standards on suppliers in developing countries, regardless of local standards? Or are we on the contrary only trying to enforce globally binding international standards which the developing countries are anyhow bound to respect and implement? Do European supply chains laws constitute exercise of extraterritorial jurisdiction or even intervention in third countries' domestic affairs in violation of international law?²⁸ Or does the active personality principle on the contrary provide sufficient justification because supply chains laws do no more than binding our European businesses to respect mostly global human rights and environmental standards when doing business in the Third World?

In this regard, international environmental law and international human rights law need to be read together and the concept of jurisdiction adapted to the potential for causing harm, as we were taught in 2017 by a Third World Court: The Inter-American Court of Human Rights demonstrated this in its Advisory Opinion on the environment and human rights under the American Convention on Human Rights.²⁹ It unanimously expressed the opinion that "individuals whose rights under the Convention have been violated owing to transboundary harm are subject to the jurisdiction of the State of origin of the harm, because that State exercises effective control over the activities carried out in its territory or under its jurisdiction (...). States have the obligation to prevent significant environmental damage within or outside their territory and, to this end, must regulate, supervise and monitor activities within their jurisdiction that could produce significant environmental damage."

If one transfers that to the supply chains scenario, this is what one gets: Individuals whose human rights – environmental or other – are violated at the lower end of the supply chain in a third country, owing to transboundary harm caused by the act or omission of a European business at the upper end of the supply chain, are subject to the jurisdiction of the State of origin of the harm, i.e. the State of domicile of that business. In order to prevent significant human rights or environmental damage at the lower end of the supply chain, the States of domicile must regulate, supervise

27 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701 (4/3/2022).

28 See in this sense *Thalhammer*, DÖV 2021/18, pp. 827 ff.

29 Advisory Opinion OC-23/17 of Nov. 15, 2017, available at: <https://elaw.org/system/files/attachments/publicresource/English%20version%20of%20AdvOp%20OC-23.pdf> (4/3/2022).

and monitor the business activities within their jurisdiction that could produce such damage. Otherwise they fail their protective duty *vis-à-vis* those humans whose rights are violated by business activities under those States’ control.

In the European human rights system, a case relating to human rights and the environment is currently pending before the European Court of Human Rights that will also affect the responsibility of States and businesses with regard to supply chains.³⁰ The application against 33 Convention States (including Germany) which are also signatories to the Paris Agreement on Climate Change³¹ alleges that the respondent States have failed to comply with their legally binding commitments to limit climate change by reducing greenhouse gas emissions. The six Portuguese applicants argue that this failure seriously affects their living conditions and health. The application raises a question that is directly relevant for the supply chain debate: To what extent are States obliged to prevent greenhouse gas emissions by businesses subject to their jurisdiction in order to protect human rights beyond their jurisdiction? The European Court of Human Rights communicated the application to the respondent States in November 2020 with questions relating to the extent of respondent States’ jurisdiction in the sense of Art. 1 ECHR, taking into consideration their commitments under the Paris Agreement, the actual and potential victim status of the applicants and possible violations of Art. 2, 3 and 8 ECHR both as such and read together with Art. 14 ECHR. Replacing the Paris Agreement by one of the ILO Convention protecting workers leads right into the centre of the supply chains debate.

E. Conclusion

To my mind, supply chains laws are not only legal and legitimate from the perspective of international law; they are even required by both international law and EU law. They are in fact long overdue. The European Commission has recognised this in its recent proposal for a Directive on Corporate Sustainability Due Diligence.³² The Explanatory Memorandum refers to the European Green Deal and the UN Sustainable Development Goals and underlines that the behaviour of companies across all sectors of the economy is key to reaching the pertinent human rights- and environment-related objectives that were promised by the EU: “This requires implementing comprehensive mitigation processes for adverse human rights and environmental impacts in their value chains, integrating sustainability into corporate governance and management systems, and framing business decisions in terms of human rights, climate and environmental impact, as well as in terms of the compa-

30 ECtHR, *Duarte Agostinho and others v. Portugal and 32 other States* (appl. no. 39371/20). See also the summary (in French) available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-206535%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206535%22]}) (28/4/2022).

31 Of 12 December 2015, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (28/4/2022).

32 COM(2022) 71 final of 23 February 2022, with Annex.

ny's resilience in the longer term."³³ Otherwise a "democratic and equitable international order" will remain elusive.

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33 Ibid., p. 1.