

Human Rights: From Poetry to Financial Reports, A Prediction on how the Environmental, Social, and Governance World can Change Everything

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Abstract

This paper argues that the progressive inclusion of human rights criteria in ESG indicators can have an unprecedented impact. Based on a conceptual study of the ESG legal framework and major normative developments in Europe, this paper presents indicative evidence of a new set of incentives and obligations for transnational corporations. The novelties that the ESG movement brings could be extremely useful in advancing the agenda of international human rights law which, for years, has suffered the ravages of having no real enforcement mechanisms at the international level. In Europe, for example, human rights due diligence could soon condition permits in the world of mergers and acquisitions, and the list of potential impacts is long. Based on a systematization of regulatory developments and some projections, this research shows the emergence of a new and potentially transformative relationship between human rights and the financial sustainability of private companies.

Keywords

Human rights, ESG, international law, competition law, sustainability, multinationals.

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Derechos Humanos: de la poesía a los estados financieros, una predicci3n de c3mo el marco ASG, ambiente, social y gobernanza, lo puede cambiar todo

Resumen

Este ensayo argumenta que la progresiva inclusi3n de criterios de derechos humanos en los indicadores ESG puede tener un impacto sin precedentes. A partir de un estudio conceptual del marco legal ESG y los mayores avances normativos en Europa, este documento presenta evidencia indicativa de un nuevo conjunto de incentivos y obligaciones para las empresas transnacionales. Las novedades que trae el movimiento ESG podrían ser extremadamente útiles para avanzar en la agenda del Derecho Internacional de los Derechos Humanos que, por ańos, ha sufrido los estragos de no tener mecanismos de exigibilidad real a nivel internacional. En Europa, por ejemplo, pronto la debida diligencia en derechos humanos podría condicionar permisos en el mundo de las fusiones y adquisiciones, y la lista de los potenciales impactos es larga. A partir de una sistematizaci3n de los avances normativos y de algunas proyecciones, esta investigaci3n muestra el surgimiento de una nueva relaci3n potencialmente transformadora entre los derechos humanos y la sostenibilidad financiera de las compańas privadas.

Palabras clave

Derechos humanos, ESG, derecho internacional, derecho de competencia, sostenibilidad, multinacionales.

INTRODUCTION

Human rights law is surviving amid a paradox. On the one hand, it is the greatest guarantee for human coexistence, and, on the other hand, it is a legal field with the lowest protections, constantly threatened, and lacking the necessary tools to consolidate its practical application.

I studied law from experienced professors trained in the tradition of civil law, who constantly emphasized that the basis of a legal system is to have clear rules that describe specific behaviors and establish consequences for those who fail to comply. The effects of non-compliance should be so negative that it is more efficient to abide by the law. During my years in law school, my professors imparted a critical view of the human rights movement. Treaties in this matter, they said, do not describe clear and specific conducts but rather ethereal aspirations. Above all, they do not establish serious consequences for those who fail to comply, or real reparations for victims. Therefore, they said, human rights are essentially a poem.

After World War II and the Holocaust, humanity realized that, despite technological advances, productivity, incipient globalization, and the development of capitalism, we were still capable of major unimaginable atrocities.¹ Without a global agreement on the basic rights of

1 See Samuel Moyn, *The last utopia: human rights in history* (Cambridge: Belknap Press of Harvard University Press, 2010); J. Samuel Barkin, "The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms," *Millennium: Journal of International Studies* 27, no. 2 (June 1998): 229-52, <https://doi.org/10.1177/03058298980270020401>.

human beings, governments were free to define them within their territory, and therefore, any violation of these rights could occur. After 1945, international treaties on human rights have proliferated.² Societies in different parts of the world have tried to find mechanisms to prevent atrocities against human dignity from happening again.³

Certainly, human rights represent one of the greatest social advances in history, as they have involved an agreement among the vast majority of nations in the world about the rights that every human being has, simply by virtue of being one, and beyond race, nationality, economic or social position, gender or religion.⁴ Simultaneously, the architecture of international human rights law, grounded solely on the will of states to abide by it, in the absence of coercive measures and incentives for compliance, and with general underfunding of global programs, demonstrates that the human rights agenda is still, sadly, a vulnerable hope.⁵

Today, 75 years after the Universal Declaration of Human Rights (UDHR) was adopted, the main criticism of the global human rights system is its ineffectiveness and the absence of real economic incentives for compliance in a globalized world where capital drives will.⁶ However, this could undergo a dramatic change in the coming years. Such a shock could transform the global discourse of human rights advocates.

The ESG framework –standing for Environmental, Social, and Governance– has been designed to aid stakeholders in understanding how an organization manages and addresses its environmental, social, and governance risks and challenges.⁷ Primarily, ESG criteria comprise the environmental impact of a company's operations, its social impact, and corporate governance factors that are considered while investing. The “E” category pertains to business' environmental impact, while the “S” category concerns social impact. The “G” category emphasizes corporate governance, referring to a company's capacity to integrate internal political structures to steer and hasten progress. The “S” category is particularly relevant to human rights

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- 2 Beth Simmons, *Mobilizing for Human Rights*, 2nd ed. (Cambridge: Cambridge University Press, 2009), <https://doi.org/10.1017/CBO9780511811340>. See Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?” *The Yale Law Journal* 111, no. 8 (June 2002): 1935–2042, <https://doi.org/10.2307/797642>.
 - 3 The Universal Declaration of Human Rights, Paris, December 10th, 1948, one of the most prominent legal documents in this field, was a direct product of the “barbarous acts which [...] outraged the conscience of mankind” during the Second World War, especially, the Holocaust.
 - 4 Universality is implicit in all human rights treaties. For instance, see the American Convention on Human Rights, San Jose, July 18, 1978, whose preamble establishes: “the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”. See John P. Humphrey, “The Universal Declaration of Human Rights,” *International Journal* 4, no. 4 (December 1949): 351–61, <https://doi.org/10.2307/40197502>.
 - 5 Eric Posner, *The Twilight of Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2014).
 - 6 Scholars have been debating for decades the effectiveness of the international architecture of human rights treaties. See Eric Neumayer, “Do International Human Rights Treaties Improve Respect for Human Rights?,” *Journal of Conflict Resolution* 49, no. 6 (December 2005): 925–53, <https://doi.org/10.1177/0022002705281667>; Daniel W. Hill, “Estimating the Effects of Human Rights Treaties on State Behavior,” *The Journal of Politics* 72, no. 4 (October 2010): 1161–174, <https://doi.org/10.1017/s0022381610000599>.
 - 7 Samuel Sibarani, “ESG (Environmental, Social, and Governance) Implementation to Strengthen Business Sustainability Pt. Migas–North Field,” *European Journal of Business and Management Research* 8, no. 1 (January 2023): 147–50, <https://doi.org/10.24018/ejbmr.2023.8.1.1798>.

issues affected by private companies, although the complete integration of international human rights law standards is an ongoing challenge.⁸

ESG is part of an investment agenda with social and environmental awareness starting in the 1970s and seeking to generate financial incentives to improve private companies' behavior.⁹ Responsible investment focused on placing financial assets based on considerations that exceeded the company's performance and focused, for example, on corporate behavior toward social inclusion, respect for workers' rights, care for human dignity, and environmental issues. During the Apartheid in South Africa—which coincided with the development of the civil rights movement in the United States—millions in American assets were divested from South African companies that coexisted with or validated the regime of racial segregation.¹⁰ Since then, the ethical orientation of business as a criterion for the allocation of financial resources has been a trend that has resulted in the ESG framework.¹¹

The ESG world is enormous today. Investors' attention is steadily shifting toward companies with an ESG strategy. Currently, 10% of investment funds are invested in funds labeled as ESG, and by 2025 this could exceed \$50 trillion.¹² The dizzying growth of ESG-oriented investments is a positive sign, although there are many gray areas in the definition of factors, credentials, quantification methodology, and the quality of indicators.

Along with the development of ESG, many governments have made regulatory advances focused on improving the system and making it more transparent for investors, customers, and companies.¹³ In this process, the integration of human rights into the S factor has been prominent, particularly in the European Union. There, the issue of directives and regulations requiring compliance with human rights standards in the operations of large companies could boost an unprecedented global impact.

In this research, I argue that the development of ESG regulations globally—but especially in Europe—can transform the global human rights agenda, bringing it to a powerful, multi-billion-dollar field with an enormous capacity to generate social progress. For decades, the human rights movement was criticized for not offering sufficient incentives for compliance.

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- 8 Elizabeth Pollman, "The Making and Meaning of ESG," *European Corporate Governance Institute - Law Working Paper* no. 659/2022 (October 2022): 1-46, <https://ssrn.com/abstract=4219857>.
 - 9 John G. Ruggie, and Emily K. Middleton, "Money, Millennials and Human Rights: Sustaining 'Sustainable Investing'," *Harvard Kennedy School Working Paper* no. 18-02 (August 2018): 1-10, <https://doi.org/10.2139/ssrn.3206715>.
 - 10 Robert G. Eccles, Linda-Eling Lee, and Judith C. Strohle, "The Social Origins of ESG: An Analysis of Innovest and KLD," *Organization & Environment* 33, no. 4 (November 2019): 575-96, <https://doi.org/10.1177/1086026619888994>.
 - 11 Amir Amel-Zadeh, "Social responsibility in capital markets: A review and framework of theory and empirical evidence," *Saïd Business School, and Newton Centre for Endowment* (February 2015): 1-65, <https://dx.doi.org/10.2139/ssrn.2664547>; Jonathan P. Doh et al., "Does the market respond to an endorsement of social responsibility? The role of institutions, information, and legitimacy," *Journal of Management* 36, no. 6 (2010): 1461-485, <https://doi.org/10.1177/0149206309337896>.
 - 12 "Bloomberg estimates that ESG assets may rise to US\$ 53 trillion by 2025," Bloomberg Professional Services, last modified February 23, 2021, <https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/>; "According to the Price Waterhouse and Cooper 2022 Report, ESG-focused institutional investment has soared 84% to US\$ 33.9 trillion in 2026," PWC, last modified October 10, 2022, <https://www.pwc.com/gx/en/news-room/press-releases/2022/awm-revolution-2022-report.html>.
 - 13 Casey Connor, and Sarah Labowitz, *Putting the "S" in ESG: Measuring Human Rights Performance for Investors* (New York: NYU Sern Center for Business and Human Rights, 2017), 28-30.

I argue that the progressive inclusion of the human rights discourse in the ESG strategy will provide new dimensions to the issue of enforceability and place appropriate financial incentives on companies with ethical orientations toward human rights. In summary, my argument is that we could be facing the greatest transformation of the global architecture of human rights since the 1960s, when regional courts were developed as a strategy to promote the enforceability of human rights.

My research will be organized as follows. Part A will focus on presenting a conceptual framework on human rights, the historical problem of enforceability, and its relationship with private companies. Part B will address the gradual incorporation of human rights standards in the definition of the social criteria for investments, with a focus on the European regulatory advances that will mark a change of course. Finally, Part C will present the prospects of human rights inclusion in the ESG world, explaining how, based on ESG inclusion, human rights could take a leading role in merger and acquisition processes, influence antitrust authorizations, among other regulatory matters. This section will also critically address the methodological challenges and risks that cosmetic and superficial inclusion of human rights discourse in the ESG world would entail.

HUMAN RIGHTS: BETWEEN POETRY AND LAW

Human rights are the cornerstone of a just and equitable society, providing a crucial safeguard to ensure that people from all walks of life can peacefully coexist. They are the inherent freedoms that all individuals possess by virtue of being human, and they transcend any cultural, linguistic, educational, or religious differences that may otherwise divide us. In essence, human rights are the common thread that binds us all together, reminding us of our shared humanity.

Human rights are a relatively modern concept, and their international application is even more so. Initially, fundamental rights were recognized based on at least two premises. One was that the person had the legal quality of a citizen, and the other was that the state voluntarily decided to protect those rights.¹⁴ The Second World War showed that this protection scheme was weak and susceptible of allowing for the worst atrocities. The essential idea behind human rights is that they are inherent to our nature as human beings, and as such, the State must simply guarantee them beyond any specific consideration.

Formally, human rights were born with the adoption by the United Nations General Assembly of the UDHR in 1948, that is, three years after the war ended. This is the first legal document and the basis for all current and future ones, in establishing the universal protection of these rights.

There are five common factors in human rights: (a) *Universality*: everyone has the same right to enjoy human rights; (b) *Inalienability*: they cannot be suppressed, except in specific situations and according to an appropriate procedure. (c) *Indivisibility*: Human rights have specific content that cannot be denied, meaning that the State cannot respect only one part of the right and not the other. In the same sense, human rights depend on each other, which implies

14 Mark Bossuyt, *International Human Rights Protection: Balanced, Critical, Realistic* (Cambridge: Intersentia, 2018), <https://doi.org/10.1017/9781780687537>.

that they are mutually reinforced, and none is more important than others; (d) *Inalienable*: One cannot disclaim them.¹⁵

As mentioned in the introduction, the main critique of the international human rights movement lies in its lack of effectiveness. Merely looking at the world around us, we can realize that international human rights law is in a permanent crisis. Although the UDHR guarantees the right to life and to food, millions of people die from malnutrition and lack of water every year.¹⁶ Despite the fact that the International Covenant on Civil and Political Rights guarantees that deprivation of liberty should only proceed after a trial marked by due process, in El Salvador, thousands of people are daily incarcerated and humiliated solely on suspicion of being gang members.¹⁷ Although international labor law prohibits child labor, millions of children live in factories where they are forced to work grueling shifts, without rest, without the right to education, and without basic health conditions.¹⁸ Unfortunately, the list can go on, as there are fundamental problems with the enforceability of human rights.

Cultural nuances present a challenge to the universal application of human rights. The interpretation of human rights is subject to cultural and temporal contexts. For instance, in Ecuadorian mestizo culture, individual rights are deemed more significant than collective rights, whereas Andean indigenous groups place collective rights as the basis for individual growth and hence prioritize them over individual rights.¹⁹ The cross-cultural application of human rights is further complicated by the fact that what may be considered valid in one culture could be deemed entirely unacceptable in another. The mandatory use of the burka by Muslim women, for instance, is viewed as a symbol of belonging and adherence to fundamental laws. However, in Western societies, imposing a specific type of clothing on a woman is an infringement of her autonomy and her fundamental rights to self-determination and freedom. Similarly, economic, and social rights are viewed differently in various places. While the European Union and most of Latin America recognize education, culture, and health as fundamental human rights,²⁰ the United States –at the federal level– does not follow this categorization.

15 Linda Hajjar L., “An overview of the characteristics and controversies of human rights”, in *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, ed. Malgosia Fitzmaurice (Netherlands: Brill | Nijhoff, 2020), 41-67, <https://doi.org/10.1163/ej.9789004188648.i-182.13>; Daniel J. Whelan, “Indivisible, Interdependent, and Interrelated Human Rights”, in *Indivisible Human Rights: A History*, ed. Pennsylvania Studies in Human Rights (Philadelphia: University of Pennsylvania Press: 2010), 10-19, <http://www.jstor.org/stable/j.ctt3fh7b2.3>

16 According to a 2022 report from the United Nations, every year, approximately 3.5 million people die due to inadequate water supply, sanitation, and hygiene. See “World Water Day Reminds Us of the Value of a Precious Resource,” Academic Impact – United Nations, accessed November 7, 2023, <https://www.un.org/en/academic-impact/world-water-day-reminds-us-value-precious-resource>

17 Tom Phillips, “El Salvador was accused of ‘massive’ human rights violations with 2% of adults in prison,” *The Guardian*, June 2, 2022, <https://www.theguardian.com/world/2022/jun/02/el-salvador-human-rights-violations-bukele-amnesty>.

18 Josephine Molds, “Child labor in the fashion supply chain,” *The Guardian*, UNICEF, accessed November 7, 2023, <https://labs.theguardian.com/unicef-child-labour/>; Michael E. Nielsen, “The Politics of Corporate Responsibility and Child Labour in the Bangladeshi Garment Industry,” *International Affairs (Royal Institute of International Affairs 1944-)* 81, no. 3 (May 2005): 559–80, <http://www.jstor.org/stable/3569634>.

19 Ramiro Ávila Santamaria, “El constitucionalismo del oprimido,” *Artículo universitario – Universidad Andina Simón Bolívar* (2017): 1-21, <http://hdl.handle.net/10644/5552>.

20 See Articles 12 and 13, International Covenant on Economic, Social, and Cultural Rights, New York, December 16, 1966, General Assembly Resolution 2200A (XXI).

Human rights are intricate and multifaceted, influenced by culture and should therefore be interpreted as universal but also as culturally contextualized.²¹

Furthermore, human rights are enshrined in international instruments that, even if signed by governments, lack practical mechanisms for their implementation. In contrast to the international investment protection system, which has powerful arbitral tribunals to assess States' behavior, human rights do not have a universal system that evaluates compliance.²² Thus, even States that adhere to international treaties do not face material consequences for failing to fulfill their obligations, as there is no court that can impose sanctions.

Another core concern with human rights enforcement is that it fails to reach private companies. States are primarily responsible for respecting and ensuring human rights. However, they are not the only actors responsible thereof. In the absence of effective tools to pressure governments, the human rights movement has sought to expand obligations in this area to other actors with a significant impact on the promotion of human rights. Among them, private companies have a dominant role. Furthermore, the global economic order is largely defined by the decisions of private companies. Globalization has concentrated power in private companies to such a degree that, in most cases, it exceeds the power of the States themselves.²³

The ways in which private companies can impact human rights are diverse. Some will be explained below.

A. The Labor Impact

Labor conditions are the primary concern in the world of business and human rights, as this is the area where the company may have the greatest impact, while also having the greatest control and capacity for change. One of the companies' main obligations is to conduct their activities by respecting labor rights and the dignity of the people involved in the production process. Both the International Labor Organization (ILO) and the United Nations have defined the minimum labor conditions that all companies must comply with, regardless of the place where they operate. The restriction of all types of work performed by persons under fifteen years of age,²⁴ the prohibition of servitude, forced labor,²⁵ or the right to work in conditions

21 Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6, no. 4 (November 1984): 400-419, <https://doi.org/10.2307/762182>; Shveta Dhaliwal, "Cultural Relativism: Relevance to Universal and Regional Human Rights Monitoring," *The Indian Journal of Political Science* 72, no. 3 (July-September 2011): 635-40, <http://www.jstor.org/stable/41858839>.

22 Bruno Simma, "Foreign investment arbitration: A place for human rights?," *International and Comparative Law Quarterly* 60, no. 3 (August 2011): 573-96, <https://doi.org/10.1017/S0020589311000224>; Lorenzo Cotula, "Rethinking investment treaties to advance human rights," *International Institute for Environment and Development* (September 2016): 1-4, <http://www.jstor.org/stable/resrep02612>.

23 Mike Geppert, and Christoph Dörrenbächer, "Politics and Power within Multinational Corporations: Mainstream Studies, Emerging Critical Approaches, and Suggestions for Future Research," *International Journal of Management Reviews* 16, no. 2 (June 2013): 226-44, <https://doi.org/10.1111/ijmr.12018>; Thomas J. Biersteker, *Distortion or development? Contending perspectives on the multinational corporations* (Cambridge: The MIT Press, 1981); John D. Bishop, "The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations," *Business Ethics Quarterly* 22, no.1 (January 2012): 119-44, <http://www.jstor.org/stable/23223701>.

24 C138 – Minimum Age Convention, Geneva, June 6, 1973, International Labor Organization.

25 C105 – Abolition of Forced Labor Convention, Geneva, June 5, 1957, International Labor Organization.

that ensure the health and well-being of workers are among the major labor guidelines that must be complied with transnationally. International standards also guarantee the right to create unions²⁶ and respect for the special working conditions of pregnant women and people with disabilities.

Although these labor principles seem intuitive and basic, businesses are incapable of complying with them. The negative impact of businesses on human rights globally is enormous. According to the ILO:

“160 million children – 63 million girls and 97 million boys – were in child labor globally at the beginning of 2020, accounting for almost 1 in 10 of all children worldwide. Seventy-nine million children – nearly half of all those in child labor – were in hazardous work that directly endangers their health, safety, and moral development.”²⁷

Similarly, the United Nations Special Rapporteur on Human Rights and hazardous substances and waste has warned that “although safe and healthy working conditions is a globally recognized human right, the International Labor Organization (ILO) estimates indicate that 2.7 million workers die from unsafe working conditions and exposure each year.”²⁸ Labor freedom is also a huge challenge for global businesses. Although slavery is illegal in all countries today, modern forms of slavery have emerged. ILO data indicate that around 49.6 million people were living in modern slavery conditions in 2021, of which 27.6 million were in forced labor –meaning that they were deprived from their right to freely choose where to work and under which conditions.²⁹

Achieving human rights-compliant conditions is an ongoing challenge for the private sector. Today, there is no doubt that this basic normative framework must not only be observed by companies in their own operations. There is an important normative global trend aiming to extend that duty over supply chains, where the greatest likelihood of abuses is currently concentrated.³⁰

Large multinational corporations tend to exhibit adherence to legal requirements in their own operations. Nonetheless, they encounter a strong inclination to engage with other companies –typically from underdeveloped nations– with lesser or non-compliance human rights

26 C087 – Freedom of Association and Protection of the Right to Organise Convention, San Francisco, June 17, 1948, International Labor Organization; C098 – Right to Organise and Collective Bargaining Convention, Geneva, June 8, 1949, International Labor Organization.

27 International Labor Office and United Nations Children’s Fund, *Child Labor: Global estimates 2020, trends and the road forward* (New York: ILO and UNICEF, 2021), 8.

28 “The human right to safe and healthy working conditions,” Office of the High Commissioner for Human Rights, last modified October 23rd, 2019, <https://www.ohchr.org/en/stories/2019/10/human-right-safe-and-healthy-working-conditions>

29 International Labor Organization, Walk Free, and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labor and Forced Marriage* (Geneva: International Labor Organization, 2022), 22.

30 See OECD, *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011) <http://dx.doi.org/10.1787/9789264115415-en>; OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (Paris: OECD Publishing, 2018); International Labor Organization et al., *Ending child labor, forced labor and human trafficking in global supply chains* (Geneva: International Labor Organization, 2019).

respect.³¹ This circumstance poses a high probability of abuse due to the complex structure of suppliers, subcontractors, and companies involved in the production of goods. The monitoring of the behavior of each actor within this framework is highly intricate. Furthermore, each of these entities aims at maximizing profits. Cutting labor costs is often the most effective strategy to achieve financial objectives, but, in turn, such labor reductions frequently result in precarious employment conditions.³² Ultimately, this complex web of supply chain interactions operates across multiple jurisdictions, frequently from nations with weak institutions and rule of law. In such contexts, workers are less likely to access legal remedies or government protection for their rights.

This is a critical issue, as the human rights and business approach is comprehensive, not only focusing on how the company performs internally, but also at the impact it generates in the supply chain.³³

B. The Impact on the Community

Businesses are social actors that operate in environments where they exert enormous influence. Besides labor considerations, private companies can impact the human rights of the communities in multiple ways. Therefore, one of the focuses of the business and human rights movement is to intervene in that relation. There are several potential impacts. First, the environmental damage caused by pollution, deforestation, and other activities that negatively impact the health and life quality of community members. *La Oroya* case is an iconic example of this issue. La Oroya is a town in the central Andean region of Peru. In 1922, an American company started operations on a metallurgical complex that has caused severe water pollution and the emission of high levels of heavy metals.³⁴ As a consequence, the health and life of more than thirty thousand members of the community have been severely impacted. 97% of children aged 6 months to 6 years, and 98% of infants aged 7 to 12 years, still have elevated levels of lead in their blood.³⁵ This case shows that environmental and community harm are tied.

31 Justine Nolan, "Business and human rights: The challenge of putting principles into practice and regulating global supply chains," *Alternative Law Journal* 42, no. 1 (June 2017): 42-46, <http://dx.doi.org/10.2139/ssrn.2981494>.

32 "Human Rights in Supply Chains: A call for a binding global standard on due diligence," Human Rights Watch, last modified May 30th, 2016, <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence>.

33 Susan Aaronson, and Ian Higham, "Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms," *Human Rights Quarterly* 35, no. 2 (May 2013): 333-64, <https://doi.org/10.1353/hrq.2013.0032>; Jeffrey Collins, "The Corporate Responsibility to Respect Human Rights," *Proceedings of the ASIL Annual Meeting* 108, (2014): 8-11, <https://doi.org/10.5305/procanmeetasil.108.0008>; Dorothee Baumann-Pauly, and Justine Nolan, *Business and Human Rights: From Principles to Practice*, 1st ed. (New York: Routledge – Taylor & Francis Group, 2016).

34 Informe No. 330/20. Caso 12.718, Comunidad de La Oroya c. República del Perú, Comisión Interamericana de Derechos Humanos, 19 de noviembre de 2020.

35 "Informe sobre la Situación de La Oroya: cuando la protección de los inversores amenaza los derechos humanos," Federación Internacional por los Derechos Humanos, last modified May 7th, 2023, <https://www.fidh.org/es/region/americas/peru/informe-sobre-la-situacion-de-la-oroya-cuando-la-proteccion-de-los-13239>.

In addition, businesses may be responsible for human rights violations resulting from excessive policing, as illustrated by the case of a coal company in Colombia accused of hiring paramilitary agents to murder union leaders and prevent collective bargaining.³⁶ Additionally, private companies may contribute to economic inequality by making decisions about resource allocation, such as setting wages or prices for local services, which may indirectly lead to poverty, unemployment, or social unrest. These examples underscore the intricate relationship between business and human rights and call for a concerted effort to address this issue.

HUMAN RIGHTS AND ESG: NEW ALLIES?

The inclusion of human rights in the ESG world has been progressive. Essentially, it has been related to labor, inclusion, and diversity criteria within companies. However, full and conscious inclusion is still far from happening.

In June 2021, the United Nations Working Group on Business and Human Rights found that, despite investors progress in recognizing their obligations regarding human rights and engaging in related discussions, knowledge about what human rights are and how they relate to ESG factors is still limited.³⁷ Generally, human rights are finding a space for development in the ESG world through (a) the implementation of mandatory non-financial reports that include human rights issues for investments labeled as ESG and (b) the application of mandatory due diligence on human rights.

A. Reports

In 2014, the European Union introduced the Non-Financial Reports Directive to better inform investors about companies' performance on social issues. To this end, the Directive includes the OECD Guidelines for Multinational Enterprises, which includes standards on corporate behavior regarding human rights. Likewise, under the Sustainable Finance Disclosure Regulation (SFDR), European investors must report adverse aspects of the company for the planet and for people:

"[...] including with respect to human rights. Regulation (EU) 2020/852, also known as the "EU Taxonomy" introduces a classification scheme for environmentally sustainable economic activities. To be "taxonomy aligned", companies must also have in place minimum social safeguards, meaning due diligence processes that are aligned with

36 See *Baloco v. Drummond* (Case No. 7:09-CV-00557-RDP), 2012 U.S. District Court for the Northern District of Alabama, September 12th, 2012, p. 6.

37 UN Working Group on Business and Human Rights, *Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights (A/HRC/47/39/Add.2)* (Geneva: United Nations Human Rights Special Procedures, 2021), 22.

the UN Guiding Principles for Business and Human Rights and the OECD Guidelines for Multinational Enterprise.”³⁸

The obligation to report on business and human rights issues is growing and is emerging as an entry point to spark an internal conversation and raise awareness on the relevance of this matter in the ESG.

Reporting could initiate meaningful conversations among the high leadership of a corporation. The mere fact that human rights concerns appear on the to-do list of a CEO is powerful as it could be the beginning of corporate awareness. Social change can be strongly influenced by internal and external light pressures such as simple conversations and simple business duties.³⁹ The power of modest responsibilities –such as reporting or discussing a topic at a board meeting– should not be underestimated.

B. Due Diligence

One of the best tools in advancing the human rights agenda within companies is the periodic performance of due diligence and audits that detect risky points and repair them. According to Amnesty International,⁴⁰ among the fifty largest venture capital firms, only one, Atomico implements human rights due diligence reports in their investment processes. This demonstrates a huge challenge for integrating human rights into the ESG world since due diligence processes in this matter are the best way to generate awareness and structural impact in companies.

Due diligence⁴¹ must be implemented based on a specialized methodology designed for each company and ensuring that it includes on-site investigation, not focusing exclusively on the information provided by the company.

Under these circumstances, I argue that due diligence is a powerful instrument for safeguarding human rights in the business sphere for three primary reasons. First, due diligence serves as a mechanism for assessing risks and determining appropriate courses of action.

38 Emil Sirén Gualinga, “ESG Ratings and Human Rights Due Diligence: How Can ESG Ratings be Used to Assess the Human Rights Due Diligence Practices of Companies?” *SSRN Working Papers* (2023):5, <https://doi.org/10.2139/ssrn.4317372>.

39 On this issue, see Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Co., 2011). The book illustrates this point. Using quantitative and qualitative data, the author shows how apparently little actions done systematically by prosecutors, human rights activists, and NGO’s shaped and transformed the global political agenda on human rights.

40 “Risky business: Top 10 leading venture capital firms failing in their responsibility to respect human rights,” Amnesty International, last modified July 30th, 2021, <https://www.amnestyusa.org/reports/risky-business-top-10-leading-venture-capital-firms-failing-in-their-responsibility-to-respect-human-rights/>

41 United Nations Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (New York: United Nations, 2012), 6, has defined it as follows: “[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.” In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise must undertake, considering its circumstances (including sector, operating context, size, and similar factors) to meet its responsibility to respect human rights.

By providing a means for balancing hazards, due diligence can be an impactful tool, allowing to identify existing or potential human rights violations and facilitating the implementation of measures to mitigate these risks. Furthermore, having due diligence processes puts pressure on all departments of the company to align with standards that, otherwise, will remain unseen.⁴²

Second, due diligence has long been an established institution in the corporate world, particularly in the domains of corporate law, mergers, and acquisitions. It has evolved to provide a comprehensive assessment of a company's exposure to risks across various areas such as tax, labor, corporate governance, fiduciary obligations, and others. With the development of sophisticated methodologies, specialized software, and accumulated experience, importing this framework into the realm of human rights is valuable, especially since it has been deemed as 'a luxury that is too costly' for the human rights world.

Finally, a due diligence report can serve as an early warning system for current or potential human rights violations, thereby catalyzing corporate responsibility. In the event of a legal claim, failure to take remedial action following the detection of risks may exacerbate the liability for damages. The obligation to undertake due diligence, therefore, creates a liability that could act as a deterrent and influence corporate behavior toward human rights.

In conclusion, due diligence reports represent a valuable and powerful mechanism for promoting human rights in a business context. The importance of due diligence on this matter has led some States to implement it as a first step in a broader process to make human rights relevant in ESG investments.

C. National Trends

In 2022, Germany surprised many by enacting strong regulations on mandatory due diligence for human rights much earlier than expected.⁴³ The Law on Supply Chain Due Diligence Law was approved and will be enacted in January 2023.⁴⁴

It requires the largest German companies to identify, assess, prevent, and remedy environmental and human rights risks in their supply chains and in their own operations. They must also ensure that they provide ways for the supplier's employees to report violations of human or environmental rights to the company. This standard will feed and inform social indicators of ESG investments and, in the short term, represents one of the greatest advances in the business

42 Robert McCorquodale et al., "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises," *Business and Human Rights Journal* 2, no. 2 (May 2017): 195-224. <https://doi.org/10.1017/bhj.2017.2>.

43 The German government has also been working on a National Action Plan on Business and Human Rights, which implements the UN Guiding Principles on Business and Human Rights in Germany. The plan includes measures such as mandatory due diligence, strengthening the legal framework for holding companies accountable for human rights violations, and promoting transparency and disclosure of the companies' human rights practices.

44 Markus Krajewski, Kristel Tonstad, and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?" *Business and Human Rights Journal* 6, no. 3 (September 2021): 550-58, <https://doi.org/10.1017/bhj.2021.43>.

and human rights agenda. The fact that it is starting in Germany –a key player in the global economy and especially important in the automotive, chemical, manufacturing, and textile industries– could generate a cascade effect in all countries where German companies operate.⁴⁵

Evidence indicates that the inclusion of mandatory due diligence in large companies with transnational operations will only continue, as it is already a trend in Europe. The same year the German law was adopted, Norway approved the Transparency Act requiring decent work and human rights due diligence. Similar provisions exist or are being enacted in France –*Loi de Vigilance*, and the Dutch Labor Diligence Law.

D. Regional Trends

In February 2022, the European Commission issued a proposal for a directive on corporate sustainability and due diligence at the heart of which is human rights due diligence.⁴⁶ The Directive will require all European Union members to implement national standards to identify, prevent, and eliminate risks of environmental damage and adverse effects on human rights. When the Directive⁴⁷ is applied and the European States issue cross-cutting human rights control standards for private companies, we will observe a turning point for the business and human rights movement and for the ESG world, in general. The directive is primarily based on the need for better information on the social performance of ESG -labeled funds or companies.

E. Industry Trends

A trend that will grow is due diligence in the financial sector.⁴⁸ Today, most banks have included respect for human rights and auditing in this area as a prerequisite for accessing banking

45 Sam Eastwood et al., “Business and Human Rights – Germany passes Mandatory Human Rights Due Diligence Law,” last modified June 11th, 2021, <https://www.mayerbrown.com/en/perspectives-events/blogs/2021/06/business-and-human-rights--germany-passes-mandatory-human-rights-due-diligence-law>

46 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, February 23th, 2022, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF

47 The Proposal for a Directive requires companies operating in the EU to conduct due diligence in relation to their own operations, as well as those of their suppliers and business partners, with respect to the following areas: (a) Human rights: Companies must identify and assess the risks of adverse impacts on human rights, including labor rights, of their own operations and those of their supply chains, and take measures to prevent or mitigate such impacts; (b) Environment: Companies must identify and assess the risks of adverse impacts on the environment of their own operations and those of their supply chains, and take measures to prevent or mitigate such impacts; (c) Governance: Companies must identify and assess the risks of adverse impacts on good governance, including corruption and bribery, of their own operations and those of their supply chains, and take measures to prevent or mitigate such impacts. It also includes provisions for companies to establish and implement an effective due diligence process, to monitor and report on the effectiveness of their due diligence, and to provide access to remedy for victims of adverse impacts.

48 David Schreuders, “Human rights due diligence as part of ‘Social’ in ESG,” *Tijdschrift Financieel Recht in de Praktijk* no. 7, (December 2020): 45-52, https://assets.contentstack.io/v3/assets/blt3de4d56151f717f2/blt93af43893d579581/60bf5149ff4b120facb604d9/TFIP_Artivcle_human_rights_due_diligence_in_ESG.pdf

products. Therefore, if an automobile assembler wants to access a bank loan in France or Germany today, the chances of closing the transaction if their supply chain uses child labor are low. There, we find an effective financial incentive for human rights. Companies move to the beat of their economic interests, and conditioning financing on human rights issues appears to be one of the most effective measures.

PERSPECTIVES AND CHALLENGES

Everything indicates that the synergies between the ESG world and human rights will continue. Reports and due diligence are an important step in better informing investors about the social aspects of ESG-labeled funds. Additionally, the intensity and complexity of due diligence open a broader discussion and could put human rights at the center of transactional interests with enormous financial relevance, thus increasing pressure for business leaders to take a serious stance on human rights.

These three trends could catalyze the human rights agenda in the near future (a) mergers and acquisitions; (b) authorizations in the M&A world, and (c) antitrust intervention.

A. Mergers and Acquisitions

A banana company in Ecuador has engaged in anti-union actions for years and has intimidated any leader who could occupy the position of the union's secretary general. As a result, the company has benefited from low wages, long working hours without overtime, and extreme working conditions that increase productivity. A Dutch company acquires the Ecuadorian company. As it becomes part of its value chain, the Dutch company conducts due diligence on human rights. The acquisition process makes the Ecuadorian company subject to European standards and pressures shareholders to improve the company's performance if they want to be part of the market. This sequence of events is valuable in terms of companies and human rights and could soon occur.

Due diligence and reports on human rights performance could easily lead investors to make decisions about acquiring a company or merging based on the results presented in these reports. This is monumental in a globalized world where businesses tend to merge, and M&A transactions are a trend.

Implementing mandatory human rights due diligence can be the biggest catalyst for conscious decision-making in the market and could limit the multi-billion dollar and dynamic M&A market in Europe. This already happens in the financial markets, where most European banks condition access to credit on the company's due diligence on human rights. The incursion of human rights into the M&A world is promising because in a world of global capital and companies, mergers and acquisitions are, for many companies, their final goal. Therefore, just as they take care to ensure that their finances are in order and their tax and legal obligations are up to date, companies will begin applying the same caution to human rights.

Another trend in this area is the increasing use of contractual provisions that require companies to conduct human rights due diligence as a condition of the deal. For example, some M&A agreements now include representations and warranties that the target company has conducted a human rights impact assessment and has implemented measures to mitigate any identified risks.

Finally, M&A processes are implemented using sophisticated methodologies developed over the years that include a phase of exhaustive evaluation of the state of the company. Placing human rights on a level equivalent to taxes, accounting, or finance—in terms of seriousness and materiality—is something like a dream come true for a human rights activist.

B. Authorizations in the M&A world

Even if private actors do not make decisions to merge or acquire a company based on their human rights performance results, regulatory entities will have valuable information at their disposal with which they can intervene in transactions. For example, competition authorities could authorize or deny a pre-approval request for a merger or acquisition based on the results of human rights due diligence. The same could happen with corporate or environmental authorities.

The inclusion of human rights in the universe of permits and regulations in the M&A world could be highly effective in advancing the agenda of companies and human rights while increasing pressure on companies to improve information about their social performance.

C. Antitrust Intervention

Due diligence reports on human rights can have far-reaching effects on important legal and financial areas, including antitrust. The harm caused by human rights violations is often linked to reducing production costs. For instance, an apparel company that opts for cheaper wool from a supplier with human rights concerns engages in unfair competition with a company that sources wool from a supplier who meets labor standards.⁴⁹ Although monetizing human rights is a complex and challenging endeavor, publicly disclosing the cost savings from engaging with questionable suppliers can promote social change. Antitrust authorities are responsible for regulating the firms' behavior to safeguard market competition and protect consumers. Human rights due diligence can serve as a valuable tool for identifying firms that engage in competitive practices that are based on partnering with potential human rights offenders.

D. Challenges and Concerns

The biggest challenge for advancing the ESG agenda lies in optimizing measurement processes and standardizing expectations for each indicator. The "S" (Social) aspect is especially difficult to measure as it requires ongoing evaluation, fieldwork, verification of supply chains, and, above all, standardization of what it means for a company to meet human rights standards:

"[T]he ESG industry must improve measurement of social performance. The abundance of ESG measurement and products belies the limited basis on which companies

49 Eric Posner, "The Rise of the Labor-Antitrust Movement," *Competition Policy International*, last modified November 29th, 2021, <https://www.competitionpolicyinternational.com/the-rise-of-the-labor-antitrust-movement/>.

are currently assessed on their social performance, while imposing significant costs on companies and other stakeholders. To date, investors have been too willing to accept data that does little to actually assess the social performance of the companies in which they invest. Many still view “S” as a check-the-box exercise in which investors and companies can appear to comply with rising consumer expectations around sustainability, while avoiding the actual costs of improving performance.”⁵⁰

For these and other reasons, ESG ratings have received a significant amount of criticism as they focus not on companies’ social and environmental impacts, but rather on how social and environmental matters may financially affect a company.⁵¹ The challenge of standardization and scoring entails achieving another major challenge of the ESG world: transparency and ensuring that promises are reflected in corporate behavior and are not merely a form of marketing or superficial commitments.

There are other set of concerns surrounding the incorporation of human rights into the ESG framework. The concept of human rights is grounded on the idea that they are inherent, autonomous, valuable in themselves, and not tied to profit. Thus, introducing human rights into financial statements risks oversimplifying a complex issue and reducing a set of rights essential to human dignity to a mere business concern. Linking governance performance with human rights performance could lead to the problematic capitalization of human rights.

In addition to these conceptual concerns, there are practical challenges to consider. As mentioned before, measuring human rights is already difficult, and there are additional nuances to navigate. For example, due to political and cultural reasons, Chinese or Iranian companies may reject using human rights terminology during due diligence. Thus, even the claim of having a global human rights integration into ESG could be debatable due to cultural and political differences.

Furthermore, poor performance in human rights may not necessarily detract from an overall good ESG rating. As ESG is a holistic framework, a company could perform well in environmental and governance factors, as well as some social factors, while having a poor human rights performance and still receive an overall positive rating. The attention of some ESG ratings on financially material ESG factors means that companies may be highly ranked on ESG ratings, despite contributing to human rights violations.⁵²

E. What about the United States?

The question arises about whether an effective human rights agenda can be implemented without the involvement of the United States. The U.S. is a prominent ESG actor, boasting a robust

50 Casey O’Connor, and Sarah Labowitz, *Putting the “S” in ESG: Measuring Human Rights Performance for Investors* (New York: NYU Stern Center for Business and Human Rights, 2017), 11.

51 Dunstan Allison-Hope, and Paloma Muñoz, “Human Rights Are Not Just an ‘ESG Factor’,” Business for Social Responsibility (BSR), last modified September 23th, 2021, <https://www.bsr.org/en/blog/human-rights-are-not-just-an-esg-factor>.

52 Gualinga, “ESG Ratings and Human Rights.”

investment sphere and housing specialized consulting firms, academia, and think tanks that shape the global ESG debate. Although the enactment of a law mandating human rights due diligence for firms is currently unlikely, global trends will inevitably affect the U.S.

Given that the U.S. invests at least \$3.98 trillion in Europe,⁵³ the EU regulatory framework is relevant for American multinationals and will impact their behavior. For example, a merger or acquisition involving an American and a German firm will most likely require business and human rights due diligence. The same applies if a U.S. retirement fund invests in a European company or if a Texas-based firm requests a loan from a French bank.

It can be argued that one positive consequence of globalization is that the regulatory framework of a region as significant as Europe has worldwide consequences and will be indirectly exported to virtually all States where European firms conduct business, with the U.S. being the most significant. Thus, even without direct intervention from the U.S., the EU's human rights regulatory framework will inevitably affect American multinationals and their behavior, making it imperative to consider human rights concerns within the larger ESG framework.

CONCLUSIONS

Will these make a difference? This paper argues that the integration of human rights into the ESG framework can be a powerful tool for generating social change. While the lack of effective tools for enforcing human rights has been a long-standing concern, the rise of ESG provides a promising opportunity to influence the behavior of businesses. This research highlights that the growing importance of ESG performance can positively impact human rights by persuading companies to improve their human rights involvement to meet the expectations of ESG investors.

Furthermore, the incorporation of mandatory human rights due diligence into the ESG framework can have far-reaching consequences. Let's say a Brazilian technology firm purchases coal derivatives from a supplier in Mozambique that has no human rights policy in place and that relies in forced and child labor in the mining process. Today, there is little the human rights movement could do to impact the Brazilian firm's behavior. However, if tomorrow this company wants to dive into the ESG world, it will have to start disclosing not only its human rights performance, but that of its suppliers. The risk of having an ESG investor's eyes on it, could positively reshape the company's behavior toward human rights. The same thing could happen if, for instance, a German tech company wants to purchase the Brazilian firm as it will have to disclose human rights due diligence and show improvement to advance in the transaction.

All these trends share a common advantage: shifting power to the human rights agenda. By imposing mandatory human rights due diligence, a firm shall not only detect its risks but also start conversations inside and eventually change its behavior. Due diligence is also an effective tool for conditioning permissions from regulatory authorities, module antitrust intervention, and ultimately it is a powerful litigation tool for victims of human rights offenses.

Although the potential of ESG to positively impact human rights should not be overstated, this paper emphasizes that initiating this discussion in academia, bringing it to boardrooms,

53 "Foreign direct investment position of the United States in Europe from 2000 to 2022," *Statista*, last modified November 3rd, 2023.

and making it a political agenda can trigger social change in unpredictable ways. By exploring the benefits and limitations of incorporating human rights into the ESG framework, this paper starts a conversation about a novel and potent strategy to advance human rights protection.

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