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# DOES THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE PROTECT INDIGENOUS PEOPLES' RIGHT TO FOOD? ASSESSMENT AND FUTURE PROSPECTS

Anna Facchinetti \*

**SUMMARY:** 1. Does the Corporate Sustainability Due Diligence Directive protect indigenous peoples' right to food? – 2. The limited scope *ratione materiae* of the Directive (and its omission of any reference to the Convention on the Elimination of All Forms of Racial Discrimination). – 3. Standard of protection under the International Covenant on Civil and Political Rights. – 3.1. The right to life. – 3.2. The rights to self-determination and to enjoy a minority culture. – 4. Standard of protection under the International Covenant on Economic, Social and Cultural Rights. – 4.1. The right to adequate food. – 4.2. The right to health. – 4.3. The right to self-determination and to the use of natural resources. – 4.4. The steps required from States for the realization of economic, social and cultural rights. – 5. The rights of the child to the highest attainable standard of health and to an adequate standard of living under the Convention on the Rights of the Child. – 6. The protection of indigenous peoples' right to food under the EU Directive: evaluation and future perspectives.

## 1. Does the Corporate Sustainability Due Diligence Directive protect indigenous peoples' right to food?

The recently adopted EU Corporate Sustainability Due Diligence Directive (hereinafter, CSDD)<sup>1</sup> represents a regional attempt to impose binding obligations regarding human rights upon businesses across all sectors<sup>2</sup>, in the light of the

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<sup>1</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, of 13 June 2024, in OJ L, 2024/1760, 5 July 2024, pp. 1-58.

<sup>2</sup> At the EU level, due diligence obligations for businesses had already been imposed in sectorial areas, for instance by Regulation (EU) 2017/821 of the European Parliament and of the Council, *on supply chain due*

insufficiency of self-regulation by enterprises to prevent and address human rights abuses,<sup>3</sup> and in the absence of an international treaty on business and human rights<sup>4</sup>. The present contribution does not address the Directive as a whole, but analyses one specific aspect: it seeks to assess the extent to which the Directive protects indigenous peoples'<sup>5</sup> right to food, in order to clarify the relevant international standard that companies must comply with in their due diligence process.

Including indigenous peoples' rights in corporate due diligence obligations is particularly important, since international case law clearly shows that indigenous peoples very often suffer human rights violations in the context of development projects and extracting activities carried out by private parties<sup>6</sup>. The choice of the right to food as object of the analysis moves from the consideration that "the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights"<sup>7</sup>. The definition of adequate food referred to in the present contribution is the one provided by the Committee on Economic, Social and Cultural Rights (hereinafter, CESCR

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*diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*, of 17 May 2017, in OJ L, 2017/130, 19 May 2017, pp. 1-20.

<sup>3</sup> M. FASCIGLIONE, *Verso un regime europeo uniforme di responsabilità civile delle imprese per violazioni dei diritti umani: riflessioni sulla proposta di direttiva europea sulla corporate sustainability due diligence*, in *Quaderni di SIDiblog*, 2022, vol. 9, pp. 473-511, p. 481.

<sup>4</sup> The drafting process of a binding treaty on business and human rights, albeit ongoing since 2014 within the framework of the United Nations (Human Rights Council, Resolution n. 26/9, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 14 July 2024, A/HRC/RES/26/9), has not yet come to an end, also due to the opposition of the European Union. On the EU position in the negotiation process, see: D. AUGENSTEIN, *Managing Global Interdependencies through Law and Governance: The European Approach to Business and Human Rights*, in A. BONFANTI (ed.), *Business and Human Rights in Europe. International Law Challenges*, New York, 2019, pp. 24-34, in particular pp. 27-28. According to Third World Approaches to International Law, developed States' reluctance to regulate global value chains at the international level reflects the role of international law as enabler of the spoliation of the so-called "Third World" during the colonial era and beyond: C. OMARI LICHUMA, *(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2021, n. 81, pp. 497-532, p. 499.

<sup>5</sup> As there is no internationally agreed definition of indigenous peoples, the present contribution will refer to "indigenous peoples" by taking into account the non-exhaustive criteria identified within the framework of the United Nations with the contribution of representatives of indigenous peoples, namely: priority in time, with respect to the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification, as well as recognition by other groups, or by State authorities, as a distinct group; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist (Economic and Social Council, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"*, 10 June 1996, E/CN.4/Sub.2/AC.4/1996/2, par. 69). On the definition of indigenous peoples, see *ex multis*: R. PISILLO MAZZESCHI, *La normativa internazionale a protezione dei popoli indigeni*, in A. PALMISANO, P. PUSTORINO (a cura di), *Identità dei Popoli Indigeni: aspetti giuridici, antropologici e linguistici*, Roma, 2008, pp. 19-32.

<sup>6</sup> See, *ex multis*: African Commission on Human and Peoples Rights, decision of 27 October 2001, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*; Inter-American Court of Human Rights, judgment of 27 June 2012, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*.

<sup>7</sup> CESCR Committee, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, 12 May 1999, E/C.12/1999/5, par. 4.

Committee), which encompasses the dimensions of food security, food safety as well as the immaterial aspects of food, such as its cultural adequacy<sup>8</sup>. In fact, when coming to the specific situation of indigenous peoples, the fulfilment of the right to food ensures not only the physical, but also the cultural survival of peoples<sup>9</sup>, which, in turn, informs their identity as distinct communities<sup>10</sup>.

The paper will take into account other human rights connected with the right to food. In fact, the latter intersects with other rights belonging to indigenous peoples, such as the right to culture and the right to the land traditionally used and to the natural resources therein. The right to land in particular is a cross-cutting issue<sup>11</sup> which can be conceptualised as a constitutive element of indigenous peoples' right to food, instrumental to its realization<sup>12</sup>. As stated by the CESCR Committee, "land is crucial to guarantee the enjoyment of the right to adequate food, as land is used in rural areas for the purpose of food production"<sup>13</sup>.

## **2. The limited scope *ratione materiae* of the Directive (and its omission of any reference to the Convention on the Elimination of All Forms of Racial Discrimination)**

Several criticisms have been addressed towards the concept of corporate social responsibility as such<sup>14</sup> and its unilateral imposition along value chains through national

<sup>8</sup> *Ibid.* See *infra*, section 4.1 of this paper.

<sup>9</sup> See e.g.: Inter-American Court of Human Rights, judgment of 16 February 2020, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, par. 254, quoting the *amicus curiae* intervention of the former UN Special Rapporteur on the Right to Food, De Schutter: «Many indigenous peoples understand the right to adequate food as a collective right. They often see subsistence activities such as hunting, fishing and gathering as essential not only to their right to food, but to nurturing their cultures, languages, social life and identity». The cultural value of food is recognized – with respect to indigenous peoples in particular – also under art. 27 of the International Covenant on Civil and Political Rights (ICCPR). See *infra*, section 3.2.

<sup>10</sup> In the sense that cultural heritage – including traditional subsistence practices – is essential for the same existence of indigenous peoples, and is more effectively protected under human rights law rather than under international cultural heritage law, see: F. LENZERINI, *Indigenous Peoples' Cultural Heritage and International Law: A Tale of Wrongs and of Struggle for Survival and Renaissance*, in *Michigan State International Law Review*, 2024, n. 1, pp. 57-96. On the culturalization of human rights law, see generally, by the same author: F. LENZERINI, *The Culturalization of Human Rights Law*, Oxford, 2014.

<sup>11</sup> D. SHELTON, F. GUZMÁN DUQUE, *Advanced Introduction to Indigenous Human Rights*, Cheltenham, 2024, p. 94.

<sup>12</sup> M. NINO, "Land grabbing", *sovranità territoriale e diritto alla terra dei popoli indigeni*, in *Diritti umani e diritto internazionale*, 2016, n. 1, pp. 185-208, p. 195.

<sup>13</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, 24 January 2023, E/C.12/GC/26, par. 6.

<sup>14</sup> Corporate social responsibility as embedded in the 2011 UN Guiding Principles on Business and Human Rights (UNGPs) and national laws has been criticised, for instance, because of its focus on obligations of means (i.e., the due diligence process), rather than on obligations of result. In this sense, see e.g.: S. DEVA, *Mandatory human rights due diligence laws in Europe: A mirage for rights holders?*, in *Leiden Journal of International Law*, 2023, n. 36, pp. 389-414, p. 398. According to Bonnitcha and McCorquodale, the concept of businesses' due diligence obligations as enshrined in the UNGPs conflates two different concepts, i.e. States' due diligence under international human rights law and businesses' due diligence

legislations adopted by home States of corporations<sup>15</sup>, although such regulatory approach is in principle in line with States' duty to protect human rights from infringements by third parties, including with extra-territorial reach, based on the most recent pronouncements of supranational human rights bodies<sup>16</sup>. In the same vein, the EU CSDD Directive has been criticised because of its extra-territorial, prescriptive effects on businesses operating in countries which have not been involved in the negotiation and drafting process of the Directive<sup>17</sup>. While addressing all these criticisms is beyond the scope of the present paper, it is worth noting that one consequence of unilateralism is, according to Third World Approaches to International Law (TWAIL), the selectiveness of the human rights to be taken into account by corporations, deemed reflective of a Western standard, rather than of a global standard<sup>18</sup>.

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processes for risk management, without clarifying whether businesses have obligations of result or only need to abide to a standard of conduct: J. BONNITCHA, R. MCCORQUODALE, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *The European Journal of International Law*, 2017, n. 3, pp. 899-919. In the sense that corporate due diligence under the UNGPs merges businesses' due diligence processes and due diligence under human rights law, and that in both cases due diligence is used as a defence from liability, see also: M. FASCIGLIONE, *The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries*, in *Human Rights & International Legal Discourse*, 2016, n. 1, pp. 94-116. *Contra*, arguing that corporate responsibility under the UNGPs is an autonomous concept, not exhausted by due diligence as a standard of conduct, see: J.G. RUGGIE, J.F. SHERMAN, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *The European Journal of International Law*, 2017, n. 3, pp. 921-928. The focus on obligations of means, however, is apparent also within the EU Directive itself (see e.g. recital n. 19).

<sup>15</sup> Arguing that national corporate due diligence laws potentially breach the principle of consent in international law and the sovereignty of host States, and perpetuate power imbalances of colonial derivation, see e.g.: C. OMARI LICHUMA, *(Laws) Made in the 'First World'*, cit., pp. 517-518; F. DEHBI, O. MARTIN-ORTEGA, *An integrated approach to corporate due diligence from a human rights, environmental, and TWAIL perspective*, in *Regulation & Governance*, 2023, n. 17, pp. 927-943, in particular pp. 932-935. In contrast, affirming that such national legislations are to be regarded as instruments facilitating home States' compliance with their international obligations, rather than as breaches of the host States' sovereignty, see: A. BONFANTI, *Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato*, Milano, 2012, p. 136.

<sup>16</sup> See, e.g.: CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 42, stating that «The extraterritorial obligation to protect requires States parties to establish the necessary regulatory mechanisms to ensure that business entities, including transnational corporations, and other non-State actors that they are in a position to regulate do not impair the enjoyment of rights under the Covenant in land-related contexts in other countries. Thus, States parties shall take the necessary steps to prevent human rights violations abroad in land-related contexts by non-State actors over which they can exercise influence, without infringing on the sovereignty or diminishing the obligations of the host States». See also: Inter-American Commission on Human Rights, Special Rapporteur on Economic, Social, Cultural and Environmental Rights, Soledad García Muñoz, *Business and Human Rights: Inter-American Standards*, 1 November 2019, CIDH/REDESCA/INF.1/19, par. 152-153.

<sup>17</sup> H. CANTÙ RIVERA, *The Corporate Sustainability Due Diligence Directive beyond Europe: Initial Thoughts on its Effects across Global Value Chains*, in *VerfBlog*, 14 June 2024, <https://verfassungsblog.de/the-corporate-sustainability-due-diligence-directive-csddd-beyond-europe/> (last access on 2 January 2025). Authoritative doctrine underlines, in contrast, that the Directive does not truly represent an extra-territorial exercise of home States' jurisdiction to prescribe, but rather displays effects beyond the territory of EU Member States based on the principle of territoriality, in particular the "effects doctrine". See: N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *Diritti umani e diritto internazionale*, 2023, n. 3, pp. 661-705, p. 669.

<sup>18</sup> F. DEHBI, O. MARTIN-ORTEGA, *An integrated approach to corporate due diligence*, cit., pp. 932-933.

The Corporate Sustainability Due Diligence Directive itself is open to such criticism, in light of its narrow scope of application *ratione materiae*<sup>19</sup>. In fact, despite affirming in the Preamble that “all businesses have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated”<sup>20</sup>, the Directive defines “adverse human rights impacts” with reference not to all internationally protected human rights, but only to a set of rights explicitly included in Part I of its Annex<sup>21</sup>. A human right not mentioned in the Annex can fall within the scope of application of the Directive only if – subject to further conditions – the underlying legal interest is protected under one of the treaties listed in the Annex<sup>22</sup>. These include: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and several conventions adopted within the framework of the International Labour Organization (ILO). Although such selective approach might be useful to ensure legal certainty for businesses<sup>23</sup>, it is not in line with the UN Guiding Principles on Business and Human Rights – which acknowledge that “enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights”<sup>24</sup> – and contrasts with the principle of indivisibility of human rights<sup>25</sup>.

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<sup>19</sup> See e.g. the analysis of several civil society organizations, *Corporate Sustainability Due Diligence Directive. A guide to transposition and implementation for civil society organisations*, November 2024, available at <https://www.fidh.org/en/issues/business-human-rights-environment/business-and-human-rights/csddd-transposition-guide> (last access on 2 January 2024), p. 22. See also the authors cited *infra*, footnotes 24-25. As observed by Carella, however, the omission of any reference to regional human rights treaties such as the European Convention on Human Rights in the CSDD Directive is probably aimed at avoiding accusations of normative imperialism: G. CARELLA, *La responsabilità civile dell’impresa transnazionale per violazioni ambientali e di diritti umani: il contributo della proposta di direttiva sulla due diligence societaria a fini di sostenibilità*, in this *Journal*, 2022, n. 2, pp. 10-41, p. 28.

<sup>20</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., recital n. 7.

<sup>21</sup> *Ibid.*, art. 3(c)(i).

<sup>22</sup> *Ibid.*, art. 3(c)(ii).

<sup>23</sup> G. CARELLA, *La responsabilità civile dell’impresa transnazionale per violazioni ambientali e di diritti umani*, cit., p. 26; M. FASCIGLIONE, *Verso un regime europeo uniforme di responsabilità civile delle imprese per violazioni dei diritti umani*, cit., p. 496; A. BONFANTI, *Corporate Sustainability Due Diligence Directive: A Human Rights-based Assessment*, in *Rivista del commercio internazionale*, 2024, n. 4, pp. 857-893, p. 864.

<sup>24</sup> *UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, HR/PUB/11/04, commentary to principle 12. In this sense, see: M. FASCIGLIONE, *Verso un regime europeo uniforme di responsabilità civile delle imprese per violazioni dei diritti umani*, cit., p. 497.

<sup>25</sup> C. METHVEN O’ BRIEN, J. CHRISTOFFERSEN, *The Proposed European Union Corporate Sustainability Due Diligence Directive: Making or breaking European Human Rights Law?*, in *Anales de Derecho*, 2023, pp. 177-201, p. 190; H. CANTÙ RIVERA, *The Corporate Sustainability Due Diligence Directive beyond Europe*, cit.; N. MEYER, C. PATZ, *Dividing the Indivisible: Human Rights under the EU Corporate Sustainability Due Diligence Directive*, in *VerfBlog*, 1 June 2024, <https://verfassungsblog.de/dividing-the-indivisible-human-rights-under-the-eu-corporate-sustainability-due-diligence-directive/> (last access on 2 January 2025). As is well-known, the concept of indivisibility of human rights was recognised in the World Conference on Human Rights in Vienna, *Vienna Declaration and Program of Action*, 25 June 1993, par. 5. The indivisibility of human rights calls for the surpassing of the distinction among generations of rights, as affirmed in F. POCAR, *The Universal Declaration: a dual dimension approach to human rights*, in A.

According to early commentators, the Directive fails to adequately protect indigenous peoples' rights because its Annex does not include any of the relevant, global international legal instruments specifically addressing indigenous peoples' rights<sup>26</sup>, namely the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169 on Indigenous and Tribal Peoples. Both instruments are particularly significant insofar as they protect, albeit to a different extent, indigenous peoples' right to land and natural resources and stress the requirements of consultation and participation<sup>27</sup>.

In particular, UNDRIP affirms that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior* to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources"<sup>28</sup>. Based on UN standards, the term "free" implies the absence of coercion, manipulation or intimidation in the negotiation process; "prior" requires the consent to be obtained before the authorization or beginning of every activity having an impact on the community concerned; whereas "informed" means that the information provided to the indigenous people must be precise about the scope, temporal duration and objective of the activity<sup>29</sup>.

The CSDD Directive does make reference to UNDRIP and ILO Convention No. 169 in the Preamble – when inviting businesses to evaluate with particular care situations of vulnerability such as the one of indigenous peoples, also with regard to the requirement of free, prior and informed consent<sup>30</sup> and the necessity to dialogue with relevant

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LUPONE, C. RICCI, A. SANTINI (eds.), *The right to safe food towards global governance*, Turin, 2013, pp. 3-8.

<sup>26</sup> H. CANTÙ RIVERA, *The Corporate Sustainability Due Diligence Directive beyond Europe*, cit.; N. MEYER, C. PATZ, *Dividing the Indivisible*, cit.; *Corporate Sustainability Due Diligence Directive. A guide to transposition and implementation for civil society organisations*, cit., p. 31.

<sup>27</sup> Both instruments affirm indigenous peoples' collective property of their ancestral land (ILO Convention, art. 14; UNDRIP, art. 26). The right, however, is not absolute, given that indigenous peoples can be relocated: according to ILO Convention, even without the consent of the population (ILO Convention, art. 16), whereas UNDRIP requires the free, prior and informed consent of the indigenous people not only to be sought, but also to be obtained (UNDRIP, art. 10). Therefore, as underlined in literature, ILO Convention does not provide strong protection from forced relocation: F. LENZERINI, *The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford, 2008, pp. 73-116, p. 86. Moreover, with regard to the disposal of natural resources, ILO Convention does not affirm indigenous peoples' property, but only their right of use. In case of disposal by the State, ILO Convention only requires the undertaking of consultations (ILO Convention, Article 15(2)), and not the free, prior and informed consent of indigenous peoples, as instead necessary under art. 32 UNDRIP. ILO Convention No. 169 thus seems to reflect the position of States, more than that of indigenous peoples, as observed in J. GILBERT, C. DOYLE, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*, in S. ALLEN, A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011, pp. 289-328, p. 302.

<sup>28</sup> UNDRIP, art. 32(2). Emphasis added.

<sup>29</sup> Economic and Social Council, Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, 17 February 2005, E/C.19/2005/3, par. 46.

<sup>30</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., recital n. 33.

stakeholders –<sup>31</sup>, but does not make them the object of due diligence obligations. In contrast, the original proposal presented in 2022 by the European Commission explicitly included indigenous peoples' right to their ancestral lands, territories and resources with reference to UNDRIP<sup>32</sup>.

Even if regrettable, such omission is, in the view of the present author, understandable. UNDRIP is a non-binding instrument, even though certain of its provisions – such as indigenous peoples' right to land and natural resources – might correspond to customary international law<sup>33</sup>; whereas only five Member States of the European Union ratified ILO Convention No. 169<sup>34</sup>. It makes sense not to oblige companies operating in the EU market to a human rights standard that Member States themselves decided not to be bound to.

In contrast, it is surprising that the Annex to the CSDD Directive does not include any reference to the Convention on the Elimination of All Forms of Racial Discrimination (CERD) – also contained, instead, in the Commission's proposal –<sup>35</sup>, whose supervising Committee can be regarded as a forerunner in the affirmation of indigenous peoples' rights such as the collective right to land<sup>36</sup>, given that all EU Member States are also State parties to CERD<sup>37</sup>.

It is important to highlight, however, that the Annex to the EU CSDD Directive refers to relevant provisions of the ICCPR, the ICESCR and, to a lesser extent, the Convention on the Rights of the Child (CRC) which, as interpreted by the respective monitoring body, cover indigenous peoples' right to food. In particular, the Annex mentions the following substantive rights and prohibitions which are relevant to indigenous peoples' right to food, partly connected with environmental law<sup>38</sup>:

- the right to life, interpreted in line with Article 6(1) ICCPR<sup>39</sup>;

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<sup>31</sup> *Ibid.*, recital n. 65.

<sup>32</sup> European Commission, *Annex to the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, 23 February 2022, COM(2022) 71 final, Part I.1., par. 20.

<sup>33</sup> In this sense, see e.g.: INTERNATIONAL LAW ASSOCIATION (ILA), resolution n. 5/2012, *Rights of Indigenous Peoples*, conclusion n. 2. On the debate surrounding the customary status of UNDRIP, see *ex multis*: S. ESTERLING, *Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples*, in *International Journal on Minority and Group Rights*, 2021, n. 28, pp. 280-305.

<sup>34</sup> Namely Denmark, Germany, Luxembourg, the Netherlands and Spain. See the status of ratifications: [https://normlex.ilo.org/dyn/nrmlx\\_en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314) (last access on 3 January 2025).

<sup>35</sup> European Commission, *Annex to the proposal for a Directive on Corporate Sustainability Due Diligence*, cit., Part I.2.

<sup>36</sup> See e.g.: Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), *General Recommendation No. 23: Indigenous Peoples*, 18 August 1997, A/52/18, par. 5. See further in C. CHARTERS, *Reparations for Indigenous Peoples: Global International Instruments and Institutions*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples*, cit., pp. 163-196, pp. 181-186.

<sup>37</sup> See the ratification status as of 2 January 2025:

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CERD](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CERD).

<sup>38</sup> Besides human rights obligations, the Annex to the CSDD Directive also includes certain environmental provisions: Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., Annex, Part I.2.

<sup>39</sup> *Ibid.*, Annex, Part I.1., par. 1.

- the prohibition of causing any measurable environmental degradation that “(a) substantially impairs the natural bases for the preservation and production of food; ... (d) harms a person’s health, safety, normal use of land or lawfully acquired possessions; (e) substantially adversely affects ecosystem services through which an ecosystem contributes directly or indirectly to human wellbeing”, interpreted in line with Article 6(1) ICCPR and Articles 11 and 12 ICESCR<sup>40</sup>;

- “the right of individuals, groupings and communities to lands and resources and the right not to be deprived of means of subsistence, which entails the prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise using land, forests and waters, including by deforestation, the use of which secures the livelihood of a person”, interpreted in line with Articles 1 and 27 ICCPR and Articles 1, 2 and 11 ICESCR<sup>41</sup>;

- the rights of the child to the highest attainable standard of health (Article 24 CRC) and to an adequate standard of living (Article 27 CRC)<sup>42</sup>.

This list does not include all provisions in the Annex related to the right to food, but only those with a bearing on the particular situation of indigenous peoples. For instance, the paper will not focus on workers’ rights to a living wage and to an adequate standard of living, also mentioned in the Annex, Part I.1 (respectively, at par. 6 and 7), because it takes into account the prevailing scenario of indigenous communities affected by business activities, but whose members are not employed by the responsible company.

Each of the mentioned treaty provisions will be analysed in turn, in order to identify the relevant legal standard on the right to food to be taken into consideration by companies when fulfilling their due diligence obligations. To this purpose, the following sections will rely on the pronouncements of the competent UN treaty bodies, which, albeit not binding, are generally regarded as authoritative interpretations of the respective treaty<sup>43</sup>.

### **3. Standard of protection under the International Covenant on Civil and Political Rights**

#### **3.1. The right to life**

As just mentioned, Article 6(1) ICCPR is recalled under two provisions of the Annex of the CSDD Directive, relevant to indigenous peoples’ right to food: the one directly related to the right to life, and the one establishing the prohibition of any form of environmental degradation, such as “harmful soil change, water or air pollution, harmful

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<sup>40</sup> *Ibid.*, Annex, Part I.1, par. 15.

<sup>41</sup> *Ibid.*, Annex, Part I.1, par. 16.

<sup>42</sup> *Ibid.*, Annex, Part I.1, par. 8.

<sup>43</sup> With reference to the authoritativeness of the pronouncements of the Human Rights Committee, see e.g.: International Court of Justice, *Republic of Guinea v. Democratic Republic of the Congo*, judgment of 30 November 2010, par. 66. See also: ILA, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, 2004, par. 175.

emissions, excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation”, with harmful effects on food systems, human health and ecosystems<sup>44</sup>. It is worth underlining that the right to life is among the non-derogable rights listed at Article 4 ICCPR, meaning that it cannot be suspended also in times of national emergency.

Based on the newest General Comment on the right to life issued by the Human Rights Committee, the right to life is not to be interpreted narrowly: it encompasses not only the prohibition of arbitrary deprivation of life, but also States’ duty to provide adequate conditions of life so that individuals can live in dignity, including through “measures designed to ensure access without delay by individuals to essential goods and services such as food”<sup>45</sup>. The Human Rights Committee thus linked the right to life with economic, social and cultural rights<sup>46</sup>. With respect to infringements from third parties, the Human Rights Committee has clarified that States parties to the ICCPR should address conditions in society that “may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”, such as – importantly for the present analysis – the deprivation of indigenous peoples’ land, territories and resources and the degradation of the environment<sup>47</sup>.

It is noteworthy that the Human Rights Committee lists the dispossession of indigenous peoples from their lands and resources – including at the hands of the private sector – as a direct threat to their right to life, in violation of Article 6 ICCPR. Through such expansive interpretation of the right to life, the Committee seems to recall, even if implicitly, the concept of *vita digna* elaborated by the Inter-American Court of Human Rights, which includes access to food and, in the case of indigenous peoples, access to their ancestral territories and the natural resources therein<sup>48</sup>. Mentioning Article 6 ICCPR in the Annex to the Directive also in the provision regarding dispossession<sup>49</sup> could thus have strengthened the standard of protection for indigenous peoples in that regard.

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<sup>44</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., Annex, Part I.1, par. 15.

<sup>45</sup> Human Rights Committee, *General Comment No. 36, Article 6: right to life*, 3 September 2019, CCPR/C/GC/36, par. 26.

<sup>46</sup> W.A. SCHABAS, *U.N. International Covenant on Civil and Political Rights: Nowak’s Commentary*, 3<sup>rd</sup> edition, 2019, Khel, pp. 126-127.

<sup>47</sup> Human Rights Committee, *General Comment No. 36, Article 6: right to life*, cit., par. 26.

<sup>48</sup> See, *ex multis*: Inter-American Court of Human Rights, advisory opinion OC-23/17 of 15 November 2017, *The Environment and Human Rights*, par. 109-110, 113; judgment of 17 June 2005, *Case of the Yakye Axa Indigenous Community v. Paraguay*, par. 168. In the latter judgment, the Inter-American Court recognised that dispossession can lead to the death of the most vulnerable within indigenous communities, i.e. children and the elderly (par. 173-176). In contrast, Shelton and Guzmán highlight that the African Court on Human and Peoples’ Rights took a different position, denying that situations of extreme poverty caused by dispossession might be in breach of the right to life: D. SHELTON, F. GUZMÁN DUQUE, *Advanced Introduction to Indigenous Human Rights*, cit., pp. 90-91, commenting African Court on Human and Peoples’ Rights, judgment of 26 May 2017, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, par. 153-155.

<sup>49</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., Annex, Part I.1, par. 16.

Nonetheless, companies must be aware that dispossession of indigenous lands might amount also to a violation of the right to life under Article 6(1) ICCPR.

With respect to the degradation of the environment as a threat to the right to life, the Human Rights Committee has stressed that Article 6 ICCPR is connected to international environmental law, which informs the content of the right to life<sup>50</sup>. Unfortunately, unlike the Inter-American Court of Human Rights<sup>51</sup>, the Committee has not made any specific reference to indigenous peoples' right to life and to the harmful effects of pollution on the maintenance of traditional food systems. The reference to Article 6 ICCPR in the provision of the Annex of the Directive on environmental degradation, therefore, recalls a general standard of protection, with no special consideration for the situation of indigenous peoples.

### **3.2. The rights to self-determination and to enjoy a minority culture**

The Annex to the Directive refers to Articles 1, enshrining the right to self-determination, and 27 ICCPR, protecting the right to enjoy a minority culture, in relation to the right of individuals and communities to freely dispose of their land and natural resources and not to be deprived of their means of subsistence. Both provisions of the ICCPR as interpreted by the Human Rights Committee – often in combined reading – provide significant protection to indigenous peoples' access to food and traditional means of subsistence.

According to the Human Rights Committee, the realization of peoples' right to self-determination is an essential condition for the effective guarantee of other human rights.<sup>52</sup> The right to self-determination as enshrined in the ICCPR encompasses the economic aspect of self-determination<sup>53</sup>, as Article 1(2) establishes that "all peoples may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence".

Although the Covenant does not mention indigenous peoples, the Human Rights Committee has referred to indigenous peoples' right to self-determination in relation to their use of natural resources. In a number of country situations, the Committee relied on Article 1, often in conjunction with Article 27 ICCPR, to affirm that States parties to the Covenant must recognise indigenous peoples' collective ownership of their ancestral

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<sup>50</sup> Human Rights Committee, *General comment No. 36*, cit., par. 62.

<sup>51</sup> The Inter-American Court has widely elaborated on environmental harm and indigenous peoples' right to life, for instance in the aforementioned advisory opinion OC-23/17 of 15 November 2017.

<sup>52</sup> Human Rights Committee, *General comment No. 12: Article 1 (Right to self-determination)*, 13 March 1984, par. 1.

<sup>53</sup> *Ibid.*, par. 5. In contrast, according to some authors, economic self-determination in relation to land claims finds a more appropriate legal basis in the right to development: A. XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge, 2007, pp. 238-239. It is true that, without development, there is hardly true self-determination: W.A. SCHABAS, *U.N. International Covenant on Civil and Political Rights: Nowak's Commentary*, cit., p. 11.

land, as well as to consult with them before starting activities or granting licences which might impair indigenous peoples' rights to land and to the use of their natural resources<sup>54</sup>.

There is, instead, no case law on individual procedures under Article 1 ICCPR, because the right to self-determination is a collective right deemed by the Committee to be non-justiciable under Article 1 of the Optional Protocol, which refers only to "individual communications"<sup>55</sup>. In contrast, according to the Human Rights Committee, the right to enjoy a minority culture enshrined under Article 27 ICCPR is conferred upon individuals belonging to a group, and not a collective right. However, it is based on the group's ability to maintain its own culture<sup>56</sup> and can be interpreted in the light of the right to self-determination<sup>57</sup>. It goes beyond the mere prohibition of discrimination, in that "it contains elements of *de facto* equality, i.e., positive protection against discrimination"<sup>58</sup>.

In the case of indigenous peoples, the Human Rights Committee has stressed in its General Comment on Article 27, dating back to 1984, that their right to enjoy their own culture is based on the control over their ancestral territories and resources, which are fundamental for maintaining traditional economic activities such as hunting and fishing<sup>59</sup>. Notwithstanding such affirmation, in its earlier case law on individual communications the Human Rights Committee has shown a certain reluctance to decide over indigenous peoples' property of their ancestral land in relation to their traditional subsistence activities under Article 27, for instance with respect to the legitimacy of treaties between first nations and occupying powers<sup>60</sup>. More recently, however, the Committee has unequivocally affirmed, quoting the CERD and CESCR Committees, that Article 27 ICCPR, "interpreted in the light of the United Nations Declaration on the Rights of

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<sup>54</sup> Human Rights Committee, *concluding Observations on Chile*, 18 May 2007, CCPR/C/CHL/CO/5; *concluding Observations on Panama*, 17 April 2008, CCPR/C/PAN/CO/3.

<sup>55</sup> Human Rights Committee, *General comment No. 23(50) (art. 27)*, 26 April 1994, CCPR/C/21/Rev.1/Add.5, par. 3.1. In the case law, see: Human Rights Committee, adoption of views of 26 March 1990, *Ominayak (Lubicon Lake Band) v. Canada*, CCPR/C/38/D/167/1984, par. 13.3; adoption of views of 24 April 2009, *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, par. 6.3.

<sup>56</sup> Human Rights Committee, *General comment No. 23(50) (art. 27)*, cit., par. 6.2.

<sup>57</sup> Human Rights Committee, adoption of views of 27 October 2000, *Apirana Mahuika et al. v. New Zealand*, CCPR/C/70/D/547/1993, par. 9.2.; adoption of views of 16 October 2018, *Tiina v. Finland*, CCPR/C/119/D/2668/2015, par. 8.6.; adoption of views of 13 March 2024, *Ailsa Roy v. Australia*, CCPR/C/137/D/3585/2019, par. 7.3.

<sup>58</sup> W.A. SCHABAS, *U.N. International Covenant on Civil and Political Rights: Nowak's Commentary*, cit., p. 817.

<sup>59</sup> Human Rights Committee, *General comment No. 23(50) (art. 27)*, cit., paras. 3.2, 7.

<sup>60</sup> See e.g.: Human Rights Committee, adoption of views of 4 August 2005, *Howard v. Canada*, CCPR/C/84/D/879/1999, par. 12.3, where the Committee refused to state on the legitimacy of the treaty that extinguished indigenous peoples' right to fish on the ancestral territory outside their reserve. In contrast, when dealing with country communications, the Human Rights Committee has affirmed that the practice of abolishing native titles is contrary to the right to self-determination under Article 1 ICCPR: Human Rights Committee, *concluding observations on the fourth periodic report of Canada*, 6 April 1999, CCPR/C/79/Add.105, par. 8. On the reliance on the right to self-determination to contest land agreements (a practice used in countries such as Canada, the United States and Australia) extinguishing indigenous peoples' right to land and natural resources, see: B. KINGSBURY, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, in *New York University Journal of International Law and Politics*, 2001, n. 34, pp. 189-250, in particular pp. 227-228; A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., pp. 246-248.

Indigenous Peoples, enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity”<sup>61</sup>. It has thus ruled that indigenous peoples’ dispossession of their ancestral territory is contrary to Article 27 ICCPR<sup>62</sup>.

In connection with the use of the natural resources on indigenous ancestral lands, Article 27 ICCPR requires States parties to consult effectively with indigenous populations before undertaking activities that might impair over those resources and have a negative impact over traditional subsistence activities<sup>63</sup>. In particular, the Human Rights Committee has recommended to the State parties to acquire the informed consent of indigenous peoples prior to the exploitation of natural resources in their territory<sup>64</sup> more or less explicitly referring to the requirement of “free, prior and informed consent” embedded in UNDRIP.

It is worth noting that Article 27 ICCPR, read in conjunction with Article 1, is a relevant protection not only from dispossession, but also in relation to environmental degradation by States or third parties which might impair the maintenance of indigenous traditional food systems. In fact, the Human Rights Committee has declared as violations of the right to enjoy a minority culture situations of environmental degradation such as those caused by water diversion by the State in the context of development projects<sup>65</sup>, or by proximate intensive agricultural activities involving the use of pesticides, not sufficiently regulated by the State<sup>66</sup>. In the famous case *Billy and others v. Australia*, the Committee even ruled that environmental degradation caused by climate change – of which the State was deemed responsible due to the failure to reduce emissions and to take adaptation measures – amounted to a breach of the indigenous peoples’ right to enjoy their minority culture, *inter alia* for the reduction of traditional crops and maritime species at the basis of their traditional food system<sup>67</sup>. Explicitly mentioning Articles 1 and 27 ICCPR also in the provision of the Annex of the EU Directive dealing with environmental degradation<sup>68</sup> could have thus clarified the relevant standard and better protected indigenous peoples from environmental threats.

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<sup>61</sup> Human Rights Committee, adoption of views of 21 September 2022, *Ava Guarani People v. Paraguay*, CCPR/C/132/D/2552/2015, par. 8.5.

<sup>62</sup> Human Rights Committee, adoption of views of 13 March 2024, *Ailsa Roy v. Australia*, cit., par. 8.3.

<sup>63</sup> *Ibid.*, par. 7. See also the following case law: Human Rights Committee, adoption of views of 27 October 2000, *Apirana Mahuika et al. v. New Zealand*, cit., par. 9.5; adoption of views of 12 September 2024, *Jovsset v. Norway*, CCPR/C/141/D/3588/2019, par. 10.4.

<sup>64</sup> See e.g.: Human Rights Committee, adoption of views of 24 April 2009, *Poma Poma v. Peru*, cit., par. 7.6; *concluding observations on Sweden*, 28 April 2016, CCPR/C/SWE/CO/7, par. 39.

<sup>65</sup> Human Rights Committee, adoption of views of 24 April 2009, *Poma Poma v. Peru*, cit., par. 7.5-7.6.

<sup>66</sup> Human Rights Committee, adoption of views of 21 September 2022, *Ava Guarani People v. Paraguay*, cit., par. 8.5-8.7.

<sup>67</sup> Human Rights Committee, adoption of views of 18 September 2023, *Billy and others v. Australia*, CCPR/C/135/D/3624/2019, par. 8.14.

<sup>68</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., Annex, Part I.1, par. 15.

## **4. Standard of protection under the International Covenant on Economic, Social and Cultural Rights**

In this section, Articles 11 (adequate standard of living), 12 (right to health), 1 (right to self-determination) and 2 (realization of rights under the Covenant and principle of non-discrimination) ICESCR are treated separately with the purpose of better fleshing out their normative content related to the right to food. Nonetheless, it is important to stress that these rights are interconnected, in accordance with the principle of indivisibility of human rights.

As there is not yet relevant litigation on the right to food under the individual communications procedure sets forth in the Optional Protocol, this section relies mainly on the General Comments and the concluding observations on country situations issued by the CESCR Committee.

### **4.1. The right to adequate food**

Article 11 ICESCR is mentioned in the Annex to the CSDD Directive in both the prohibition of environmental degradation and in the prohibition of any form of dispossession and encroachment upon land<sup>69</sup>. As underlined by the CESCR Committee, Article 11 ICESCR is the provision in human rights law which deals more comprehensively with the right to food<sup>70</sup>. Article 11(1) sets forth the right to an adequate standard of living to the inclusion of housing, clothing and, importantly for the purposes of this paper, adequate food; whereas Article 11(2) establishes the right of everyone to be free from hunger<sup>71</sup>.

An authoritative interpretation of the right to food under Article 11 ICESCR is to be found in General Comment No. 12 on the right to adequate food. According to the CESCR Committee, the right to food must not be interpreted narrowly, i.e. as a minimum package of calories, but “is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement”<sup>72</sup>. The right to adequate food as interpreted by the CESCR Committee thus presents many facets, which will be only hinted at in this section.

The adequacy of food encompasses not only its quantity, which must be sufficient for the dietary needs of individuals<sup>73</sup>, but also its safety, meaning that food must be “free

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<sup>69</sup> *Ibid.*, par. 15-16.

<sup>70</sup> CESCR Committee, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, cit., par. 1.

<sup>71</sup> Based on the wording of art. 11, the right to adequate food enshrined in art. 11(1) seems to impose upon States a relative obligation of progressive realization, whereas from the right to be free from hunger (art. 11(2)) seem to stem absolute obligations, of immediate realization. See: A. VIVIANI, *Land grabbing e diritti umani*, in *Diritti umani e diritto internazionale*, 2016, n. 1, pp. 209-232, p. 218.; J. BOURKE-MARTIGNONI, *The Right to Food*, in J. DUGARD, B. PORTER, D. IKAWA, L. CHENWIP (eds.), *Research handbook on economic, social and cultural rights as human rights*, Cheltenham, 2020, pp. 138-158, p. 141.

<sup>72</sup> CESCR Committee, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, cit., par. 6.

<sup>73</sup> *Ibid.*, par. 9.

from adverse substances”, therefore not intoxicated nor adulterated<sup>74</sup>. Moreover, the adequacy of food includes its cultural acceptability<sup>75</sup>. In its General Comment on the right to adequate food the Committee has not further elaborated on the issue, but, based on the immaterial dimension of food under Article 11 ICESCR, indigenous peoples’ right to maintain their traditional food systems seems to be protected under that provision. This interpretation is supported by the inclusion of food in the notion of culture protected in the right to take part in cultural life, enshrined in Article 15(1)(a) ICESCR<sup>76</sup>.

Besides adequacy, the definition of the right to food includes the dimensions of availability and accessibility. According to the CESCR Committee, the right to food is realised when food is available for individuals at all times, either through direct production from land and natural resources, or through systems of market distribution<sup>77</sup>. Accessibility refers, instead, to both the economic and the physical accessibility of food. Economic accessibility implies that individuals must have the financial means to acquire food for an adequate diet without compromising the satisfaction of other basic needs, whereas physical accessibility means that food must be accessible to everyone, including physically vulnerable individuals such as infants, persons who are terminally ill and persons with disabilities, as well as to disadvantaged groups<sup>78</sup>. The only direct reference to indigenous peoples in the General Comment on the right to adequate food is precisely about physical accessibility, where the CESCR Committee stated that a “particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened”<sup>79</sup>.

The CESCR Committee has further clarified the essential, instrumental link between land and the right to food. In its more recent General Comment on land, it affirmed that “if land users are deprived of the land they use for their productive purposes, their right to adequate food might be endangered”<sup>80</sup>. Furthermore, commenting on country situations, the Committee found that land expropriation, also at the request of businesses, and expulsion from ancestral land are in contrast with the right to an adequate standard of living under Article 11, to the inclusion of the right to adequate food<sup>81</sup>. Likewise, it stressed the negative impact that the expansion of monocultures, land grabbing and land distribution by the State, with no consideration for traditional occupation, have over

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<sup>74</sup> *Ibid.*, par. 10.

<sup>75</sup> *Ibid.*, par. 11.

<sup>76</sup> CESCR Committee, *General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, par. 13.

<sup>77</sup> CESCR Committee, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, cit., par. 12.

<sup>78</sup> *Ibid.*, par. 13.

<sup>79</sup> *Ivi.*

<sup>80</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 6.

<sup>81</sup> CESCR Committee, *concluding observations: report on the technical assistance mission: Panama*, 20 June 1995, E/C.12/1995/8, par. 79; *concluding observations on Tanzania*, 30 November 2012, E/C.12/TZA/CO/1-3, par. 22; *concluding observations on the Russian Federation*, 16 October 2017, E/C.12/RUS/CO/6, par. 48.

indigenous peoples' access to land, reducing their ability to grow their own food in breach of Article 11<sup>82</sup>, often in conjunction with Articles 1 and 2 ICESCR<sup>83</sup>.

The CESCR Committee mentioned Article 11 also with reference to environmental degradation, affirming that failure to contrast and to adapt to climate change<sup>84</sup>, deforestation<sup>85</sup>, as well as development projects causing environmental damage<sup>86</sup> amount to breaches of indigenous peoples' right to an adequate standard of living and food security. The Committee also held that development projects undertaken without appropriate procedural guarantees for indigenous peoples – such as consultations and human rights and environmental impact assessments – might have an adverse impact on indigenous peoples' land, adequate standard of living and food supplies, protected under Article 11 in conjunction with Articles 1 and 12 ICESCR<sup>87</sup>.

Article 11 ICESCR thus provides protection to indigenous peoples against the threats represented by land dispossession and degradation. It must be noted, however, that the CESCR Committee has only rarely referred to States' obligation to acquire the free, prior and informed consent of indigenous peoples with respect to activities that might encroach upon the enjoyment of their right to an adequate standard of living, and in particular their right to adequate food<sup>88</sup>. It is, instead, in the context of self-determination that the Committee has elaborated upon such standard, as will be highlighted in section 4.3.

## **4.2. The right to health**

The right to health enshrined in Article 12 ICESCR is listed, together with Article 11 ICESCR on the right to an adequate standard of living, in the provision of the Annex to the CSDD Directive dealing with the prohibition of any environmental degradation impairing food production and conservation, health, the normal use of land and ecosystems<sup>89</sup>.

The right to health and the right to food have been traditionally linked, as the right to food – before its recognition in the Universal Declaration on Human Rights and the ICESCR – was regarded not as an autonomous right, but as stemming from the right to

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<sup>82</sup> CESCR Committee, *concluding observations on Cameroon*, 23 January 2012, E/C.12/CMR/CO/3, par. 24; *concluding observations on Guatemala*, 9 December 2014, E/C.12/GTM/CO/3, par. 21.

<sup>83</sup> CESCR Committee, *concluding observations on Indonesia*, 19 June 2014, E/C.12/IDN/CO/1, par. 29.

<sup>84</sup> CESCR Committee, *concluding observations on Australia*, 22 May 2009, E/C.12/AUS/CO/4, par. 26; *concluding observations on the Russian Federation*, 16 October 2017, cit., par. 42-43.

<sup>85</sup> CESCR Committee, *concluding observations on Cameroon*, 8 December 1999, E/C.12/1/Add.40, par. 23; *concluding observations on Brazil*, 22 May 2009, E/C.12/BRA/CO/2, par. 26.

<sup>86</sup> CESCR Committee, *concluding observations on Ethiopia*, 31 May 2012, E/C.12/ETH/CO/1-3, par. 24.

<sup>87</sup> CESCR Committee, *concluding observations on Cameroon*, 25 March 2019, E/C.12/CMR/CO/4, par. 16.

<sup>88</sup> CESCR Committee, *concluding observations on Tanzania*, 30 November 2012, cit., par. 22.

<sup>89</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., Annex, Part I.1, par. 15.

health<sup>90</sup>. The interrelatedness between the two rights has been confirmed by the CESCR Committee in its General Comment on the right to the highest attainable standard of health, whereby the right to health also includes the dimension of nutrition: “the Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, *an adequate supply of safe food, nutrition and housing*”<sup>91</sup>.

As a consequence, in order to comply with the obligation to fulfil the right to the highest attainable standard of health, States must “ensure equal access for all to the underlying determinants of health, such as nutritiously safe food”<sup>92</sup>. Within their core obligations under Article 12 ICESCR, States are also required to “ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone”.<sup>93</sup> Moreover, Article 12.2(b) – which lists the improvement of environmental and industrial conditions among the measures required to the States parties to the ICESCR for the full realization of the right to health – has been interpreted by the Committee as encompassing an adequate supply of safe food and proper nutrition<sup>94</sup>. As understandable, the perspective of health focuses on the quantity, nutritional quality and freedom from adverse substances of food. There is instead no mention to the cultural acceptability of food, protected under Article 11 ICESCR.

The Committee has also elaborated upon environmental degradation caused by extracting activities<sup>95</sup> and unsustainable agricultural practices<sup>96</sup>, holding that they affect the enjoyment of the highest attainable standard of health under Article 12. In particular, it has recommended the conduct of environmental impact assessments by the State prior to the concession of mining licenses to corporations<sup>97</sup>. The CESCR Committee, however, has not developed a specific standard of protection under Article 12 that takes into account the peculiarities of indigenous peoples. By making reference to the right to health, the CSDD Directive thus grants to indigenous peoples the same protection as to the general population.

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<sup>90</sup> C. RICCI, *Contenuti normativi del diritto a un “cibo adeguato” nel diritto internazionale*, in C. RICCI (a cura di), *La tutela multilivello del diritto alla sicurezza e qualità degli alimenti*, Milano, 2012, pp. 33-59, in particular p. 34.

<sup>91</sup> CESCR Committee, *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, E/C.12/2000/4, par. 11. Emphasis added.

<sup>92</sup> *Ibid.*, par. 36.

<sup>93</sup> *Ibid.*, par. 43.

<sup>94</sup> *Ibid.*, par. 15.

<sup>95</sup> CESCR Committee, *concluding observations on Peru*, 30 May 2012, E/C.12/PER/CO/2-4, par. 22.

<sup>96</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 9.

<sup>97</sup> CESCR Committee, *concluding observations on Peru*, 30 May 2012, cit., par. 22.

#### **4.3. The right to self-determination and to the use of natural resources**

Just like its twin provision under the ICCPR, Article 1 ICESCR sets forth peoples' right to self-determination. The right encompasses not only the freedom to determine their political status and to pursue their economic, social and cultural development (Article 1(1)), but also their right to freely dispose of their wealth and natural resources and not to be deprived of their means of subsistence (Article 1(2)). Quoting the Human Rights Committee, the CESCR Committee has affirmed that the right to self-determination is a precondition for the enjoyment of all other individual human rights<sup>98</sup>. In the case of indigenous peoples, it is to be exercised in the form of internal self-determination, in accordance with international law and the principle of territorial integrity<sup>99</sup>.

According to the CESCR Committee, it is from the right to self-determination, which includes peoples' right to freely dispose of their wealth, that stems indigenous peoples' collective ownership of their ancestral lands and natural resources: "according to their right to internal self-determination, the collective ownership of lands, territories and resources of Indigenous Peoples shall be respected, which implies that these lands and territories shall be demarcated and protected by States parties"<sup>100</sup>. In a high number of country situations, the Committee has urged States parties to put in place legal mechanisms to recognise indigenous peoples' collective property of their ancestral land through demarcation and titling<sup>101</sup>. Moreover, the Committee considers dispossession and forced evictions from the lands that indigenous peoples traditionally occupy, causing loss of livelihood, as violations of Article 1(2) ICESCR<sup>102</sup>. This does not mean that the Committee regards the prohibition of relocation of indigenous peoples as absolute<sup>103</sup>.

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<sup>98</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 11.

<sup>99</sup> *Ivi*. While part of the global indigenous movement firstly considered political independence as an option, the prevailing approach (also reflected in UNDRIP, art. 46) is nowadays that of self-determination within the boundaries of the territorial State. See e.g.: B. KINGSBURY, *Reconciling Five Competing Conceptual Structures*, cit., p. 218 ss.; E.I. DAES, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, in S. ALLEN, A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, cit., pp. 11-40, in particular pp. 14, 26-27. In the sense that the creation of a nation State of their own would represent a change in indigenous peoples' political, economic and cultural way of life, therefore in what characterises them as indigenous, see: A. DI BLASE, *The Self-Determination of Indigenous Peoples*, in A. DI BLASE, V. VADI (eds.), *The Inherent Rights of Indigenous Peoples in International Law*, Rome, 2020, pp. 47-90, p. 53 ss.

<sup>100</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 11.

<sup>101</sup> CESCR Committee, *concluding observations on the Russian Federation*, 12 December 2003, E/C.12/1/Add.94, par. 11; *concluding observations on Nicaragua*, 28 November 2008, E/C.12/NIC/CO/4, par. 11; *concluding observations on Cambodia*, 22 May 2009, E/C.12/KHM/CO/1, par. 16; *concluding observations on El Salvador*, 19 June 2014, E/C.12/SLV/CO/3-5, par. 27; *concluding observations on Guatemala*, 9 December 2014, E/C.12/GTM/CO/3, par. 6; *concluding observations on Paraguay*, 20 March 2015, E/C.12/PRY/CO/4, par. 6; *concluding observations on Chile*, 7 July 2015, E/C.12/CHL/CO/4, par. 8; *concluding observations on Cameroon*, 25 March 2019, cit., par. 12.

<sup>102</sup> CESCR Committee, *concluding observations on Brazil*, 23 May 2003, E/C.12/1/Add.87, par. 58.

<sup>103</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 16.

However, relocation must occur with just compensation and an option of resettlement<sup>104</sup>, and requires the free, prior and informed consent of the affected indigenous people, as established in UNDRIP<sup>105</sup>.

A very important legal corollary of indigenous peoples' right to their land and natural resources, enshrined in the right to self-determination, is that they need to maintain control over those resources. Article 1(2) ICESCR thus requires States parties to consult with indigenous peoples to obtain their free, prior and informed consent before undertaking any development project – notably, extracting activities – and, in more general terms, any exploitation of natural resources or public policy that may affect indigenous peoples' lands and resources<sup>106</sup>, i.e. their means of subsistence instrumental to the right to food. It is noteworthy that the ICESCR Committee has generally referred to the requirement of free, prior and informed consent without distinguishing between the States parties to ILO Convention No. 169 – albeit occasionally recalling the Convention –<sup>107</sup> and those which have not ratified it.

The obligation to conduct consultations to seek indigenous peoples' free, prior and informed consent might also require the provision of legal assistance to the indigenous people concerned, for the decision to be truly informed<sup>108</sup>. Moreover, the right to land and natural resources protected under Article 1(2) ICESCR implies that, if any development activity is conducted on indigenous land, either by the State directly or by a private party, the affected population must share the benefits of it<sup>109</sup>.

When recommending States to seek indigenous peoples' free, prior and informed consent before granting licenses to companies, the CESCR Committee has often urged States parties to put in place environmental and human rights impact assessments to ensure that the indigenous population is fully aware of the consequences of the activity in question<sup>110</sup>. This obligation, which the Committee derives from Article 1(2) ICESCR, is in line with international environmental law<sup>111</sup> and offers protection to indigenous

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<sup>104</sup> CESCR Committee, *concluding observations on Cambodia*, 22 May 2009, cit., par. 15.

<sup>105</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 16, quoting art. 10 UNDRIP.

<sup>106</sup> CESCR Committee, *concluding observations on Colombia*, 30 November 2001, E/C.12/1/Add.74, par. 33; *concluding observations on Brazil*, 23 May 2003, cit., par. 58; *concluding observations on Ecuador*, 7 June 2004, E/C.12/1/Add.100, par. 35; *concluding observations on Nicaragua*, 28 November 2008, cit., par. 11; *concluding observations on New Zealand*, 31 May 2012, E/C.12/NZL/CO/3, par. 11; *concluding observations on El Salvador*, 19 June 2014, cit., par. 27; *concluding observations on Guatemala*, 9 December 2014, cit., par. 7; *concluding observations on Paraguay*, 20 March 2015, cit., par. 6; *concluding observations on Chile*, 7 July 2015, cit., par. 8; *concluding observations on Australia*, 11 July 2017, E/C.12/AUS/CO/5, par. 15; *concluding observations on the Russian Federation*, 16 October 2017, E/C.12/RUS/CO/6, par. 14-15; *concluding observations on Cameroon*, 25 March 2019, cit., par. 12-13.

<sup>107</sup> See e.g.: CESCR Committee, *concluding observations on Colombia*, 30 November 2001, cit., par. 33; *concluding observations on Brazil*, 23 May 2003, cit., par. 58; *concluding observations on Ecuador*, 7 June 2004, cit., par. 35.

<sup>108</sup> CESCR Committee, *concluding observations on El Salvador*, 19 June 2014, cit., par. 28.

<sup>109</sup> *Ivi*; CESCR Committee, *concluding observations on New Zealand*, 31 May 2012, cit., par. 11.

<sup>110</sup> CESCR Committee, *concluding observations on Cambodia*, 22 May 2009, cit., par. 15; *concluding observations on the Russian Federation*, 16 October 2017, cit., par. 15.

<sup>111</sup> See e.g.: United Nations Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991. In international case law, see e.g.: International Court of Justice, *Pulp Mills on the River*

peoples also from environmental degradation. For this reason, it would have been desirable to include Article 1 ICESCR also in the provision of the Annex, Part I.1 of the CSDD Directive dealing with human rights and the degradation of the environment<sup>112</sup>.

#### **4.4. The steps required from States for the realization of economic, social and cultural rights**

Article 1(2) ICESCR has been invoked by the CESCR Committee – and by the Annex to the CSDD Directive itself, with regard to the prohibition of dispossession<sup>113</sup> – in conjunction with Article 2 of the Covenant, in particular paragraphs 1 and 2. Article 2(1) affirms States parties' obligation to take steps to achieve the full realization of the rights recognised in the Covenant by all appropriate means, including the adoption of legislative measures. Article 2(2) sets forth the principle of non-discrimination. The latter is a very important issue with regard to indigenous peoples, as the CESCR Committee "has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others"<sup>114</sup>.

Although every positive measure recalled so far in the context of the right to self-determination – titling and demarcation of land, consultations, etc. – falls within the steps that States must take under Article 2(1) ICESCR for the realization of economic, social and cultural rights, the CESCR Committee has made explicit reference to Article 2 of the Covenant in two main contexts related to indigenous peoples: racial discrimination in the allocation and protection of land, and the regulation of the private sector.

With regard to the prohibition of racial discrimination, the CESCR Committee has recommended States to address unequal access to land among ethnic groups, in particular indigenous peoples, through the establishment of land inspectorates to monitor the allocation of land<sup>115</sup> and through the demarcation and titling of indigenous land<sup>116</sup>. Moreover, importantly from the perspective of the present paper, the Committee has frequently affirmed States' obligations to protect economic, social and cultural rights by taking positive measures to regulate and control the activities of third parties –

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*Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010, par. 203 ss.; and, with express reference to indigenous peoples: Inter-American Court of Human Rights, advisory opinion OC-23/17 of 15 November 2017, cit., par. 156. However, in the sense that the obligation to conduct environmental impact assessments in transboundary contexts belongs to customary international law, but less certainly so with respect to pure domestic cases or when areas beyond national jurisdiction are at stake, see: P.-M. DUPUY, J.E. VIÑUALES, *International Environmental Law*, 2<sup>nd</sup> edition, Cambridge, 2018, p. 79.

<sup>112</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., Annex, Part I.1, par. 15.

<sup>113</sup> *Ibid.*, par. 16.

<sup>114</sup> CESCR Committee, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, par. 18.

<sup>115</sup> CESCR Committee, *concluding observations on Kenya*, 1 December 2008, E/C.12/KEN/CO/1, par. 12.

<sup>116</sup> CESCR Committee, *concluding observations on Nicaragua*, 28 November 2008, cit., par. 11.

businesses<sup>117</sup>, but also illegal settlers<sup>118</sup> – in indigenous lands. In this respect, it is important to underline that the CESCR Committee has adopted a more expansive view than the Human Rights Committee as far as States parties' obligation to protect human rights from the interference of third parties is concerned.

In its General Comment No. 31 on the nature of legal obligations under the ICCPR, the Human Rights Committee had clarified that violations of the Covenant may occur when it is a third party that impairs the exercise of rights, if the State fails to take appropriate measures and/or to exercise due diligence with respect to the actions and/or omissions of third parties<sup>119</sup>. The CESCR Committee further specified the obligation to protect in relation to economic, social and cultural rights by affirming that States must impose regulatory frameworks on the private sector, requiring, *inter alia*, “business entities to exercise human rights due diligence in order to identify, prevent and mitigate the negative impact on rights enshrined in the Covenant caused by their decisions and operations”<sup>120</sup>. By invoking Article 2 ICESCR, the CESCR Committee stressed the extra-territorial nature of such obligation, entailing home States’ duty to regulate the conduct not only of the businesses operating under their jurisdiction, but also of the companies acting abroad<sup>121</sup>.

Furthermore, differently from the Human Rights Committee, already since its General Comment on the right to adequate food the CESCR Committee has highlighted the responsibility of the business sector in the realization of the right to adequate food<sup>122</sup>. In its more recent General Comment on States’ obligations in the context of business activities, the Committee explicitly stated that not only States, but also enterprises are expected, under international standards, “to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice”<sup>123</sup>.

The Committee has even stated that both States parties to the Covenant and businesses “should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used

<sup>117</sup> CESCR Committee, *concluding observations on Ecuador*, 7 June 2004, cit., par. 35; *concluding observations on Chile*, 7 July 2015, cit., par. 11.

<sup>118</sup> CESCR Committee, *concluding observations on Nicaragua*, 28 November 2008, cit., par. 11.

<sup>119</sup> Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, par. 8.

<sup>120</sup> CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 30 (footnotes dropped). See also: CESCR Committee, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, par. 16; and, with specific reference to art. 1 and 11 ICESCR: CESCR Committee, *concluding observations on Guatemala*, 11 November 2022, E/C.12/GTM/CO/4, par. 12.

<sup>121</sup> CESCR Committee, *concluding observations on Finland*, 28 November 2014, E/C.12/FIN/CO/6, par. 10. On the extra-territorial nature of the obligation to protect economic, social and cultural rights, see, in relation to land use: CESCR Committee, *General comment No. 26 (2022) on land and economic, social and cultural rights*, cit., par. 42.

<sup>122</sup> CESCR Committee, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, cit., par. 20.

<sup>123</sup> CESCR Committee, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, cit., par. 5.

or acquired".<sup>124</sup> This means that under the ICESCR not only States, but also corporations must engage in consultations with indigenous peoples with a view to obtain their free, prior and informed consent before undertaking any activity on their territory<sup>125</sup>. Businesses' requirement to undertake consultations with indigenous peoples, however, does not relieve States from their obligation to seek the free, prior and informed consent of indigenous peoples in independent manner<sup>126</sup>.

## **5. The rights of the child to the highest attainable standard of health and to an adequate standard of living under the Convention on the Rights of the Child**

Among the rights of the child listed in the Annex to the CSDD Directive, those embedded in Articles 24 and 27 CRC are the most relevant ones with regard to the right to food. Article 24 protects children's right to the highest attainable standard of health, *inter alia* by requiring States to combat malnutrition<sup>127</sup>. According to the CRC Committee, "access to nutritionally adequate and safe food" is one of the fundamental conditions that children need to enjoy a healthy life, and therefore falls within health protection<sup>128</sup>. Likewise, as under Article 11 ICESCR, Article 27 CRC – in particular, at paragraph 3 – encompasses adequate nutrition among the components of the right to an adequate standard of living, necessary for the child's development. With respect to the particular situation of indigenous children, the CRC Committee has affirmed that they are among those children "who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children", including in the areas of health and nutrition<sup>129</sup>. Such measures need to be culturally appropriate<sup>130</sup>.

According to the CRC Committee, the protection of indigenous land is necessary to grant indigenous children's right to an adequate standard of living (read in combination with the right to life protected under Article 6 CRC), to the inclusion of the cultural dimension of food: "in the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture"<sup>131</sup>. Therefore, to ensure children's right to an

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<sup>124</sup> *Ibid.*, par. 12.

<sup>125</sup> *Ibid.*, par. 17.

<sup>126</sup> In this sense, see: Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, James Anaya, 6 July 2012, A/HRC/21/47, par. 69. See also the position of several NGOs: *Corporate Sustainability Due Diligence Directive. A guide to transposition and implementation for civil society organisations*, cit., p. 31.

<sup>127</sup> CRC, art. 24(2)(c).

<sup>128</sup> Committee on the Rights of the Child (CRC Committee), *General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, 28 August 2023, CRC/C/GC/26, par. 43.

<sup>129</sup> CRC Committee, *General Comment No. 11 (2009): Indigenous children and their rights under the Convention*, 12 February 2009, CRC/C/GC/11, par. 25.

<sup>130</sup> *Ibid.*, par. 25, 34.

<sup>131</sup> *Ibid.*, par. 35.

adequate standard of living, States must formally recognise indigenous peoples' property over their ancestral land<sup>132</sup> and prevent land-grabbing and forced evictions<sup>133</sup>. When displacement of indigenous peoples is required – for instance, in the context of a development project –, relocation must comply with international standards, to the inclusion of prior consultations<sup>134</sup>. It is important to note that, in a number of country situations, the CRC Committee has recommended States parties – albeit not necessarily specifying the underlying rights – to consult in good faith with indigenous peoples, including indigenous children, in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that could affect them<sup>135</sup>.

Moreover, in order to comply with Article 27 CRC, States must pay attention to the preservation of indigenous ancestral land, especially to the quality of the natural environment<sup>136</sup>. In this respect, it is worth noting that the CRC has elaborated upon the relevant environmental standard required under the Convention, albeit with no further reference to indigenous children. In particular, the CRC Committee has underlined that environmental protection is required by States both under the right to health<sup>137</sup> and the right to an adequate standard of living<sup>138</sup>, with the right to a healthy environment – deemed by Committee as implied under the Convention – being a fundamental prerequisite for the enjoyment of the right to an adequate standard of living, encompassing food security<sup>139</sup>. Therefore, according to the CRC Committee, States have a general due diligence duty to protect children from foreseeable environmental harm under the CRC, including through the conduct of environmental impact assessments before undertaking policies and projects<sup>140</sup>.

States are also under the general obligation – stemming from the Convention as a whole, therefore also from Articles 24 and 27 – to protect children from environmental damage caused by third parties, such as enterprises<sup>141</sup>. To this purpose, States parties to the Convention should “require businesses to undertake child rights due diligence procedures to identify, prevent, mitigate and account for their impact on the environment

<sup>132</sup> CRC Committee, *concluding observations on Kenya*, 21 March 2016, CRC/C/KEN/CO/3-5, par. 68.

<sup>133</sup> *Ivi*; CRC Committee, *concluding observations on Cambodia*, 27 June 2022, CRC/C/KHM/CO/4-6, par. 40; *concluding observations on Vietnam*, 21 October 2022, CRC/C/VNM/CO/5-6, par. 42.

<sup>134</sup> CRC Committee, *concluding observations on Panama*, 21 December 2011, CRC/C/PAN/CO/3-4, par. 28; *concluding observations on Panama*, 28 February 2018, CRC/C/PAN/CO/5-6, par. 14.

<sup>135</sup> CRC Committee, *concluding observations on Kenya*, 21 March 2016, cit., par. 68; *concluding observations on Nepal*, 8 July 2016, CRC/C/NPL/CO/3-5, par. 65; *concluding observations on Guatemala*, 28 February 2018, CRC/C/GTM/CO/5-6, par. 42-43; *concluding observations on Costa Rica*, 4 March 2020, CRC/C/CRI/CO/5-6, par. 44.

<sup>136</sup> CRC Committee, *General comment No. 26 (2023) on children's rights and the environment*, cit., par. 49.

<sup>137</sup> *Ibid.*, par. 40.

<sup>138</sup> *Ibid.*, par. 45.

<sup>139</sup> *Ivi*.

<sup>140</sup> *Ibid.*, par. 69. On the obligation to conduct prior environmental impact assessments, see also: CRC Committee, *concluding observations on Panama*, 21 December 2011, cit., par. 28.

<sup>141</sup> CRC Committee, *General comment No. 26 (2023) on children's rights and the environment*, cit., par. 68.

and children's rights”<sup>142</sup>. With reference to several country situations, the CRC Committee has also recommended States to adopt adequate regulatory frameworks encompassing not only the quality of the environment, but, in more general terms, all children's rights, therefore to the inclusion of the rights to health and to an adequate standard of living<sup>143</sup>.

In line with the position of the CESCR Committee, in addition to States' duty to regulate the private sector – also with extra-territorial effect<sup>144</sup> – the Committee stated that businesses themselves “must meet their responsibilities regarding children's rights”, even in absence of a binding international treaty on business and human rights<sup>145</sup>. In its General Comment on children's rights and the environment, the CRC Committee highlighted a number of ways whereby enterprises might encroach upon children's right to life – but, it is hereby argued, also on the interconnected rights to health and to an adequate standard of living –, namely: environmental degradation, which can compromise children's rights to health and food security; land-grabbing, depriving indigenous peoples of access to natural resources linked to their subsistence; and – importantly with regard to the right to adequate food – the marketing to children of products such as “foods and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives”, which can have a long-term impact on their health<sup>146</sup>.

All in all, Article 24 and 27 CRC have been interpreted, at least to a certain extent, as protecting indigenous children's right to adequate food and nutrition, for instance through protection of their ancestral land from environmental degradation and interference from businesses, thus recalling the relevant international standard specifically dealing with indigenous peoples. At the same time, however, other provisions of the CRC offer protection to indigenous children in terms of nutrition and preservation of traditional food systems, such as Article 6 CRC on the right to life<sup>147</sup> and Article 30 CRC, which sets forth

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<sup>142</sup> *Ibid.*, par. 80.

<sup>143</sup> CRC Committee, *concluding observations on New Zealand*, 11 April 2011, CRC/C/NZL/CO/3-4, par. 23; *concluding observations on Myanmar/Burma*, 14 March 2012, CRC/C/MMR/CO/3-4, par. 22; *concluding observations on Namibia*, 16 October 2012, CRC/C/NAM/CO/2-3, par. 27; *concluding observations on Guyana*, 5 February 2013, CRC/C/GUY/CO/2-4, par. 23-24; *concluding observations on the Russian Federation*, 25 February 2014, CRC/C/RUS/CO/4-5, par. 21; *concluding observations on India*, 7 July 2014, CRC/C/IND/CO/3-4, par. 30; *concluding observations on Peru*, 2 March 2016, CRC/C/PER/CO/4-5, par. 24; *concluding observations on Argentina*, 1 October 2018, CRC/C/ARG/CO/5-6, par. 34.

<sup>144</sup> CRC Committee, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, p. 6. In this sense, see also: CRC Committee, *concluding observations on Australia*, 28 August 2012, CRC/C/AUS/CO/4, par. 27-28; *concluding observations on Canada*, 5 October 2012, CRC/C/CAN/CO/3-4, par. 29; *concluding observations on Panama*, 28 February 2018, cit., par. 14.

<sup>145</sup> CRC Committee, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, cit., p. 2.

<sup>146</sup> *Ibid.*, p. 3.

<sup>147</sup> See e.g.: CRC Committee, *General comment No. 26 (2023) on children's rights and the environment*, cit., par. 20.

the right to enjoy a minority culture<sup>148</sup>. It is therefore regrettable that the Annex to the CSDD Directive does not mention them.

## **6. The protection of indigenous peoples' right to food under the EU Directive: evaluation and future perspectives**

Although the CSDD Directive defines “adverse human rights impacts” only on the basis of the rights and instruments listed in its Annex, to the exclusion of international instruments specifically setting forth indigenous peoples’ rights, its reference to relevant rights enshrined in the ICCPR, ICESCR and CRC sets quite a comprehensive standard of protection for indigenous peoples. As illustrated in the previous sections, the three competent treaty bodies have interpreted the respective treaty as encompassing indigenous peoples’ right to land and to natural resources – instrumental to the realization of their right to food –, as well as the requirement to seek indigenous peoples’ free, prior and informed consent before undertaking any activity which might affect them. The CESCR and CRC Committees have also specified State’s duty to regulate the private sector and businesses’ responsibility to respect human rights under international law, thus providing strong justification for imposing a binding corporate due diligence norm such as the CSDD Directive itself.

At the same time, many rights listed in the Annex to the Directive actually offer wider protection to indigenous peoples than the one which is explicitly recalled. For instance, Articles 1 and 27 ICCPR, as well as Articles 1 and 2 ICESCR are mentioned only in the provision of the Annex prohibiting land-grabbing and forced evictions, but are actually relevant also in relation to environmental degradation and climate change. Likewise, some provisions of the listed treaties, relevant for indigenous peoples’ right to food (such as Articles 6 and 30 CRC), are not included in the Annex. Such selectiveness in the human rights to be taken into account by enterprises excessively narrows the standard of protection. Therefore, even though indigenous peoples’ rights are already extensively covered in the Directive, a more comprehensive approach is warranted: the more human rights are encompassed, the more the due diligence process will be effective<sup>149</sup>.

Given that the Directive itself does not set out a maximum harmonization requirement in relation to the rights included in the Annex, but allows Member States to adopt a more stringent human rights standard in the national transposition of the Directive<sup>150</sup>, it is advisable that States expand the list of human rights that businesses must take into account in their due diligence process. To this purpose, Member States of the EU could adapt to the Directive either specifying that the Annex is not comprehensive, thus making

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<sup>148</sup> *Ibid.*, par. 58.

<sup>149</sup> S. DEVA, *Mandatory human rights due diligence laws in Europe*, cit., p. 404.

<sup>150</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council, *on corporate sustainability due diligence*, cit., art. 4.

reference to all human rights, or including further instruments in the Annex<sup>151</sup>. If the second approach is preferred, it is very important and, at the same time, feasible that CERD – ratified by all Member States and offering quite a strong protection to indigenous peoples – is included in the Annex.

**ABSTRACT:** The paper seeks to assess whether, and to what extent, indigenous peoples' rights – in particular, their right to adequate food – are protected by the EU Corporate Sustainability Due Diligence Directive 2024/1760, which identifies adverse human rights impacts with reference to a closed set of human rights provisions listed in its Annex. To this end, the paper discusses a number of relevant treaty provisions included in the Annex – in particular, of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child – in light of the position of the competent UN treaty bodies. It concludes that the Directive already provides a high standard of protection for indigenous peoples, even though it does not make binding references to international instruments specifically enshrining indigenous peoples' rights. This notwithstanding, it is advisable that EU Member States enlarge the scope *ratione materiae* of the Directive in the adaptation process, either by specifying that the human rights provisions listed in the Annex are not exhaustive, or by including further human rights instruments in it.

**KEYWORDS:** Corporate Due Diligence Obligations – Indigenous Peoples' Rights – Right to Adequate Food – Traditional Subsistence Activities – Right to Ancestral Land and Natural Resources.

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<sup>151</sup> *Corporate Sustainability Due Diligence Directive. A guide to transposition and implementation for civil society organisations*, cit., p. 24. In favour of the first option, see also: M. FASCIGLIONE, *Verso un regime europeo uniforme di responsabilità civile delle imprese per violazioni dei diritti umani*, cit., p. 497.