Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

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MARTA SOSA NAVARRO*

MAKING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS REAL: DEFINITIONAL PRINCIPLES FOR HUMAN RIGHTS RISK IDENTIFICATION IN SUPPLY CHAINS[1]

SUMMARY: 1. Introduction. – 2. From supply chain hoping to supply chain accountability: is Human Rights Due Diligence the tool? – 2.1. Legal developments. – 3. Risk identification. – 3.1. Proposed model. – 4. Conclusion.

1. *Introduction*

International laws on due diligence have been well described to be in their infancy[2]. And infancy, though full of potential, undoubtedly needs some guidance. Against this background, one of the main goals of this article is to identify common principles guiding risk identification in the supply chain in order to correct the inconsistency which defines voluntary standards implementation practice. Why is this structuring effort necessary? The main reason is that post-Ruggie legal scholarship and activism have essentially ignored two paradigm shifts: the global value chain is now a system and the bulk of competition today is no longer between multinational corporations but rather between global value chains[3].

In this new context, stakeholders have failed to take into account the need for common grounds versus proliferation in the scope of Human Rights Due Diligence (HRDD) mechanisms, if the way towards effectiveness is to be paved[4].

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* Phd in International Law, Universidad Carlos III de Madrid.

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[2] G.A. SARFATY, *Shining a light on global supply chains*, in *Harvard International Law Journal 56*, no. 2, 2005 p. 448.

[3] K.B. SOBEL-READ, *Global Value Chains: A Framework for Analysis*, in *Transitional Legal Theory*, vol. 5, no. 3, 2004, p. 7.

[4] For the sake of the interconnectedness that defines the present framework, it must be noted that this effectiveness can also be read in economic terms. For further discussion on the "economic argument" in favour of HRDD, see R. KAPLINSKY and R. MORRIS, *Value Chain Analysis: A tool for Enhancing Export Supply Policies*, in

The present research paper tackles the question of risk identification in the supply chain from a very specific standpoint: that in the current corporation reality, the multi-tiered model has replaced the 1+1 model, this implying that the real context in which corporations act can only be defined by the Global Value Chain[5] (GVC). Value chain analysis, by taking into account not only tangible value-adding activities but also intangible ones[6], sets the basis for the inclusion of a HRDD analysis in the picture[7].

This inclusion amounts to a paradigm shift because it acknowledges for the first time that the human rights impact assessment (HRIA) is an inextricable part of the concept; it is now embedded in the product/service which will consequently receive a more accurate value which takes into account all the "tangible and intangible" elements that define the GVC. However, the non-binding and voluntary nature of the principles that have traditionally guided the businesses' responsibility to respect (R2R) has had important effects on the theory building behind this tool. As a result of the "Ruggie failure" to consolidate itself as a binding instrument, the inconsistencies and lack of common structure governing the methodology behind HRDD have hindered the way towards corporation accountability through transparency.

It is in this context that identifying the principles guiding the steps that a corporation should take to prove its HRDD turns essential. Taking the OECD's 5 steps framework model as a starting point, the present contribution will concentrate on shedding some light over risk identification[8]. To do so, a comparative analysis of the principles inspiring the different HRDD tools both from soft law and hard law instruments will be carried out. For the sake of clarity, the different meanings of "due diligence" relevant for the present article must be explained. Firstly, as a general concept, due diligence has been defined as «such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case[9]». Beyond this general meaning, HRDD is the process established in the UN Guiding Principles on Business and Human Rights (UNGP) whereby a company can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts. Therefore, when referring to HRDD we are pointing at the procedure set forth by the UNGPs, which includes

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Int. J. Technological Learning, Innovation and Dev., 2008, p. 290. The authors describe the importance of process standards as maximizing efficiency in three targeted areas: quality, cost and delivery. Then they offer examples of process methods by which those goals can be reached.

[5] "GVC describes the full range of activities that are required to bring a product or service from conception, through the intermediary phases of production (involving a combination of physical transformation and the input of various producer services), delivery to final consumers, and final disposal after use". R. KAPLINSKY, *Spreading the gains from globalization: what can be learned from value-chain analysis?*, in *Probs of Econo. Transition 47*, 2004 pp. 80-81.

[6] K.B. SOBEL-READ, *Global Value Chains,* cit., p. 18.

[7] In fact, economists are already setting the basis for a theory that incorporates these ideas into the process behind the product: "More recently, global value chains have come to be characterized by **process standards.** The purpose of process standards is typically to achieve enhanced systemic efficiency and also possibly product differentiation. Here, the focus is not only on the attributes of the finished product but also on the vey methods by which those attributes are effected, including with regard to historically extraneous aspects such as conformity with labour and environmental rules". K.B. SOBEL-READ, *Global Value Chains,* cit., p. 53.

[8] For the purpose of this paper, the proposed framework to identify risk according to HRDD standards is understood to be applicable generally to any member of the GVC, that is upstream and downstream companies, from trading to raw materials sourcing.

[9] *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota, 1990), also cited in the Interpretative Guide to the UNGPs.

the HRIA, while due diligence is used in the context of the risk identification duty to refer to how "responsibly" the enterprise is undertaking the tasks to meet such duty.

2. *From supply chain hoping to supply chain accountability: is Human Rights Due Diligence the tool?*

Risk analysis is a familiar concept to business companies. From investors to manufacturers, from small retailers to big multinational corporations, every entrepreneur knows that, before undertaking a project, understanding the possible financial and legal risks (and more recently the environmental and social impacts[10]) is a *sine qua non* step. Risk assessment is therefore an old friend for the business world and John Ruggie knew this when he included the human rights impacts assessment in the UNGPs[11]. While the technique itself is not unknown, the incorporation of a human rights-based approach (HRBA) is significantly less explored.

Some voluntary frameworks developed by international organisations or private alliances that precede the UNGPs have recently been updated to incorporate the UN Guidelines[12]. Thus, they generally refer to HRIA as part of the HRDD process, but without going much further than the text of the UNGPs. Interestingly, corporate HRIAs guidelines or toolkits designed by non-governmental organisations contain more information. There has been a proliferation of tools after the UNGPs, aimed at operationalizing the HRIA duty that the Principles envisage as the first step of the human rights due diligence[13]. Among these guidelines, the present research will take the following into consideration (listed in chronological order): Guide to Human Rights Impacts Assessment and Management

[10] Environmental Impact Assessment (EIA) has been incorporated in more than one hundred States that furthermore share methodology, basic elements and enforcement mechanisms (see J. KNOX, *The myth and reality of Transboundary Environmental Impact Assessment* in *AJIL*, vol. 96, no.2, 2002). It has been also developed in international law (specially concerning transboundary impacts, see Espoo Convention on Environmental Impact Assessment in a Transboundary Context) and is an established norm in EU law (see Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJEU L 26/1, and Directive 2001/42/EC Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJEU L 197/30). EIA is considered a predecessor of HRIA, and it will subject to further study in a future work. Social Impact Assessments (SIA) are not a norm but has been also incorporated to project and policies management systems.

[11] In its commentary to Principle 18 on the Human Rights Risks Assessments, the UNGPs establish that «processes for assessing human rights impacts can be incorporated with other processes such as risk assessments or environmental and social impact assessment».

[12] See for instance the *OECD Guidelines for Multinational Enterprises*, originally published in 1976, which were updated in 2011 to incorporate the UNGPs. They refer to the HRDD in Section IV on Human Rights, para 5 and in Commentary, para 45, *inter alia*. Similarly, the UN Global Compact, from 2000, has incorporated the UNGPs phrasing into its Principle 1: «Business should support and respect the protection of internationally proclaimed human rights». The International Finance Corporation (IFC) Performance Standards, from 2006, incorporated the UNGPs´ framework in 2012, see PF 1, introduction, para. 3. By aligning with the Updated IFC Performance Standards, the Equator Principles III (from 2013), also includes a reference to HRDD and the UNGPs (see Preamble; Principle 2 on Environmental and Social Assessment).

[13] The UNGPs divide the responsibility to respect into three "operational principles", namely the establishment of a policy commitment (defined in Principle 15(a) and described in Principle 16); the development of HRDD procedures (defined in Principle 15(b) and described between Principles 17 and 21,) and processes to provide for remediation of any adverse HR impacts (described in Principle 15(c) and defined in Principle 22).

(HRIAM), developed by the International Business Leaders Forum (ILBF) and the International Finance Corporation (IFC) in association with the UN Global Compact (published in 2010 and updated in September 2011)[14]; the NomoGaia toolkit (2012)[15]; the BSR Guidelines (2013)[16], and the Danish Institute for Human Rights (DIHR) Guidance and Toolbox (Road-testing version in 2016)[17]. Besides, six organisations (including investing companies and research institutes) have joined to create a Corporate Human Rights Benchmark (CHRB) in order to rank the world´s largest listed companies for their human rights performance. A pilot methodology was launched in 2016[18] and has been recently revised and updated[19]. Although it does not provide a complete HRIA methodology, it includes some indicators regarding *inter alia* risk identification which can be useful for the present paper. Similarly, some guidelines for reporting on companies´ impacts and performance, while not providing a comprehensive HRIA procedure, contain indicators on what kind of information an enterprise should disclose as a "general standard" or "good practice". This also reflects the extent to which the company should know its operations, supply chain, business relationships, etc., as well as the associated risks and impacts. This paper will refer to the Global Reporting Initiative (following the Sustainability Reporting Guidelines 4, 2013, referred to as "GRI4"[20]), as the most widespread reporting framework so far. This section shortly presents some common elements identified in the aforementioned tools. The selected aspects reveal how certain basic concepts linked to the company's business relationships are understood and how this interpretation influences the scope and content of the risk identification step.

A) Structure

Most of the corporate HRIA share the same structure, though the phases may have different names or may be differently divided. A detailed review of the existing corporate HRIA shows that initial stages (scoping and data collection/baseline development, using the DIHR classification) are crucial to the correct performance of the overall procedure (impact analysis, mitigation measures and monitoring and reporting). The first stages allow the company to understand both the structure, scope and functioning of its business activity and the general context where its activities take place. In other words, "who" the company is and "how" the world or environment it is going to interact with is. Those steps are essential in order to properly establish the causal links between its activities and the human rights

[14] IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts Assessment and Management (HRIAM),* 2010, updated in September 2011. Available here.
[15] NomoGaia, a Human Rights and Business Initiative, *Human Rights Impacts Assessment: a toolkit for practitioners conducting corporate HRIAs*, August 2012. Available here.
[16] BSR, *Conducting an effective Human Rights Impacts Assessment. Guidelines, steps and examples*, 2013. Available here.
[17] The Danish Institute for Human Rights (DIHR), *Human Rights Impact Assessment, Guidance and Toolbox*, 2016 Road-testing version. Available here.
[18] *Corporate Human Rights Benchmark. Pilot Methodology*, jointly developed by Aviva Investors, the Business and Human Rights Resource Centre (BHRRC), Calvert Investments, Institute for Human Rights and Business, VBDO and Vigeo Eiris, March 2016. Available here.
[19] The 2018 Methodology is a revised version of the 2016 Pilot Methodology. See the full content here. The CHRB's methodology is currently under scrutiny since the organization is conducting a year-long review in parallel to the 2020 assessment.
[20] Global Reporting Initiative (GRI), *G4 Sustainability Reporting Guidelines* and *Implementation Manual*, May 2013, Available here. The organization has recently launched a last version called GRI Standards. Organizations are requested to report following these standards by January 2018.

enjoyment in the affected context (impact analysis), and to design the appropriate preventive or mitigating measures (mitigation or management) with the subsequent communication of actions and outcomes.

Human Rights Due Diligence duties regarding a company's business relationships are included in Principles 17 (defining the scope of the HRDD procedure) and 18 (describing the scope of the HRIA) of the UNGPs. As expected, both principles are mirrored in the different corporate HRIA guidelines. To a greater or lesser extent, these frameworks include references to the company's business relationships in the early stage of the HRIA: the scoping or overview phase. In terms of the DIHR Guidelines, «the purpose of the scoping is to define the parameters for the HRIA, through gathering preliminary information to determine the area of impact of the business project or activity[21]». The document divides the scoping task into three topics: business project or activities, human rights context and relevant stakeholders. The different analysed HRIA frameworks establish the same type of data gathering at this point. In other words, the scoping, overview, preparation or immersion phase (to use the terms of the different guidelines), serve to mark out the total area of the HRIA by identifying the activities and actors covered, the human rights obligations of those actors and the entitlements of the affected rights-holders. It can thus be said that the fact of considering business relationships at this stage has important implications for the risk assessment, as it entails: a) assuming that the impact of the company reaches beyond its direct actions, products and services, b) considering partners and other actors such as direct and indirect suppliers, joint-ventures and other partnerships as relevant duty-bearers, c) accepting that the company has responsibilities regarding those actors and impacts (whilst in a different degree than in respect of its direct impacts) and, thus, is expected to take actions to prevent, mitigate, remediate and account for them. For some frameworks as the HRIAM, business relationships may be a "triggering factor" to the HRIA, insofar they «may represent an additional layer in the responsibility of companies to respect human rights that is usually not covered by other traditional impact assessments or due diligence processes[22]».

B) Basic concepts

We may now analyse what these instruments mean when they talk about "business relationships", "supply chains" and related concepts. An overview of the documents shows that they also incorporate the UNGPs notions:

Business Relationships: The Principles define them as including «relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services[23]». Furthermore, indirect business relationships in its value chain must be understood as reaching «beyond the first tier, and minority as well as majority shareholding positions in joint ventures[24]». The concept has therefore a broad definition, encompassing actors and relationships of different nature. Besides, it is an abstract concept, for, according to the HRIAM[25], a business activity can be a «hybrid relationship involving one of more actors, for example: joint venture partnerships,

[21] The Danish Institute for Human Rights, *Human Rights Impact Assessment, Guidance and Toolkit*, cit., p. 40.
[22] *Guide to Human Rights Impacts Assessment… (HRIAM)*, cit., p. 18.
[23] Commentary to Principle 13. The recently published CHRB uses the exact same definition (together with the addition of the OHCHR, see next footnote).
[24] OHCHR, *The corporate responsibility to respect human rights. An interpretative Guide*, 2012, p. 5.
[25] *Guide to Human Rights Impacts Assessment…(HRIAM)*, cit., p.25.

mergers, acquisitions, private-public partnerships, partnerships with governments, contractors, etc. ». As an example of the ambiguous nature of the notion, the GRI framework refers to "business partner" (which is one element inside the UNGPs´ definition) as a synonym of "business relationships" but with a slightly broader scope as it adds to the aforementioned "lobbyists and other intermediaries", governments, customers and clients[26].

Supply chain or value chain*:* as explained above, the present article focuses on one particular aspect of the "business relationship", namely the supply chain or value chain. The UNGPs noticeably use the value chain notion instead of supply chain (against what, for instance, the OECD Guidelines do[27]). For the UNGPs, value chain encompasses «the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise[28]». Some guidelines offer similar definitions of the concept "supply chain". For instance, according to the GRI, supply chain is a «sequence of activities or parties that provides products or services to the organization[29]», while a supplier can take multiple forms[30].Despite the absence of an agreed and exhaustive list of types of suppliers and other relevant actors in the supply/value chain, one principle that starts to emerge is that a company's responsibility does not finish in the first tier. On the contrary, due diligence also reaches those suppliers with which there is not a direct relationship, such as sub-contracted suppliers lower in the second or third layer of the supply chain[31].

Human Rights Track Record: as part of the scoping or overview and data gathering phases, the company must know its business relationships, including their human rights track records. This is a common feature of the model corporate HRIAs alongside the UNGPs. The good or bad performance of those business actors can be assessed against the human rights benchmarks or frameworks developed by the different guidelines. The "bad record" factor mentioned in the following section must be thus understood as a standard of conduct that is assessed against those frameworks[32].

C) Business relationships as duty-bearers

The criteria a company applies to identify the scope of its business relationships and its stakeholders have crucial implications on the scope of a company´s due diligence obligations. Both the UNGPs and those inspired in it (the DIHR Guidelines being the most

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[26] GRI, *Implementation Manual,* cit.*,* p. 245.
[27] *OECD Guidelines for Multinational,* cit., Commentary on General Policies, para 14 and Commentary on Human Rights, para. 43.
[28] OHCHR, *The corporate responsibility to respect*, cit., p. 8. Exact same definition in the CHRB.
[29] GRI, *Implementation Manual,* cit.*,* p. 253.
[30] See numerous examples in GRI, *Implementation Manual,* cit.*,* p. 253 and, to a lesser extent, *OECD Guidelines for Multinational,* cit., Commentary on General Policies, para. 17.
[31] *Guide to Human Rights Impacts Assessment… (HRIAM)*, cit., p. 28. The CHRB specifies that "supply chain" includes relationships "direct and indirect, tier 1 and beyond". Some responsibilities include the "supplier screening" as defined in the GRI. See section below.
[32] See for instance, NomoGaia, *Human Rights Impacts Assessment,* cit., Annex on Human Rights, p. 26; DIHR, *Human Rights Impact Assessment,* cit.*,* Scoping practitioner supplement, Tables C and D; *Corporate Human Rights Benchmark Pilot Methodology*, cit., Section D, Performance: "Company Human Rights Practices" and E: "Performance, Responses to Serious Allegations".

explicit example) are based on the "sphere of impacts" notion[33], which takes from the "sphere of influence" approach proposed by the UN Global Compact, which allocates responsibility according to criteria such as *proximity* and *control* (leverage)[34]. Ruggie considered this to be an excessively ambiguous and potentially restrictive approach. In his view, presenting "influence", in the sense of "having leverage", must not determine the degree of responsibility. Moreover, companies cannot be held responsible for every human rights impact of entities over which they may have leverage, but only for those which they have contributed or are a causal agent of[35].

Not every framework specifies what approach it is following, if either[36]. Notwithstanding the general lack of precision in these tools, duty bearers beyond the company itself include business suppliers and contractors, joint-ventures and other business partners, government actors, government departments and agencies[37]. The GRI considers that the company should have a comprehensive knowledge of its structure and supply chain, including possible changes taking place during the reporting time[38]. In some specific sectors (such as Information Technologies) or in some specific-focused HRIA (such as the product-level HRIA of the BSR), customers are a relevant actor in the supply chain, as they may entail complicity risks[39]. The business and duty-bearers' scoping influences the identification of rights-holders (the wider a company considers it scope, the more rights-holders affected by that business there will be). While direct rights-holders are easily to identify, indirect rights-holders need a close examination throughout the entire supply chain, as NomoGaia details[40]. Another remarkable common feature, which meets the UNGPs approach, is that the legal framework applicable to those different actors is considered relevant information for the purposes of the scoping and assessment. This sort of information is normally included in what is named the enterprise's "operational context"[41].

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[33] See DIHR, *Human Rights Impact Assessment,* cit., pp. 41-2, and United Nations Human Rights Council (HRC), *Clarifying the concepts of "sphere of influence" and "complicity": report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, A/HRC/8/16, 2008.

[34] HRC, *Clarifying the concepts of "sphere of influence",* cit., paras. 7-9 and 15.

[35] *Id.*, paras. 12-3.

[36] The HRIAM refers to the technique of "impact zoning" to identify stakeholders, but it resembles more the "sphere of influence". It begins by delineating the project´s geographic sphere of influence, as a way to determine who might be affected and in which way. Furthermore, it seems to focus on a "geographic" connection, though it includes «not only primary site(s), but also related facilities, including associated facilities, transport routes, areas potentially affected by cumulative impacts or unplanned but predictable developments». Impacts of business relationships are only referred in the impacts related to socio-economic effects of job creation through supply chains. See *Guide to Human Rights Impacts Assessment… (HRIAM)*, cit., p. 36 and IFC, *Stakeholder engagement, a Good Practice handbook for companies doing business in emerging markets*, 2007, pp. 14-5.

[37] DIHR, *Human Rights Impact Assessment,* cit., p. 44, *Guide to Human Rights Impacts Assessment… (HRIAM)*, cit., 25.

[38] GRI General Standard of Disclosure nº 12 says that the company should «describe the organization´s supply chain» and, furthermore, «report any significant change during its reporting period regarding the organizations´ (…) supply chain, including (…) changes in the location of suppliers, the structure of the supply chain, or in relationships with suppliers, including selection and termination» (General Standard nº 13) For more information on what kind of questions this step requires see section 3.

[39] BSR, *Conducting an effective Human Rights,* cit., pp. 20-21.

[40] NomoGaia, *Human Rights Impacts Assessment,* cit., p. 6.

[41] More information in the third section of this work. But see DIHR, *Human Rights Impact Assessment,* cit., p. 43, *Guide to Human Rights Impacts Assessment… (HRIAM)*, cit., pp. 29-32, BSR, *Conducting an effective Human Rights,* cit., p. 19 on the "Country level HRIA".

D) Data gathering

The HRIA scope tailors the type and extent of information that the company will need to gather when entering the second stage, commonly named data collection, data gathering, risk identification or mapping or also human rights topic cataloguing.
A detailed review of this stage will be the object of the third section of this article, as some of these tools provide useful information to build the indicators for measuring the company's due diligence in this step. As a quick snapshot, some basic requisites that most guidelines have incorporated may be listed: the need to know your supply chain or business environment (including the human rights performance and record of suppliers), the required flexibility on the degree of responsibility (different regarding first-tier suppliers and in low-tier suppliers), the consequent need to prioritize, or the relevance of the company´s leverage both in data gathering and measures´ design.

2.1. *Legal developments*

It has been asserted here that human rights due diligence duties start to appear enshrined in the law. Nevertheless, and though this is quickly changing[42], for the sake of honesty, it must be admitted that they appear essentially in the scope of disclosure requirements, or in other words, when reporting on transparency. In general terms, this type of rules requires companies to disclose information regarding their risks of environmental, social or human rights impacts and on what measures, if any, they have in place in order to identify, prevent, mitigate and account for those impacts. It must be clear that such norms do not establish any statutory obligations to conduct human rights due diligence but only to report on what, shall it be the case, they are doing[43]. The idea behind this approach is that by being required to inform consumers, authorities and the public about their behaviour, companies will feel encouraged to take some due diligence steps. The effectiveness of this strategy has nevertheless been questioned on account of its capacity to influence consumer behaviour and of the challenges presented by the nature of human rights issues[44]. Another reason explaining the expansion of this disclosure approach is that many legal frameworks already contain mandatory reporting schemes for big or listed companies. These existing rules have been generally limited to financial and other "material" information in the same sense (EU Accounting Directive 2013[45], UK 2006 Companies Act or the French Code of Commerce, for instance). Upon this background, the EU Non-Financial Reporting Directive

[42] Being the 2017 French *Devoir du Vigilance* Bill the greatest exponent of this trend.
[43] The German Draft Law on Due Diligence is an exception that may, if entering into force, represent a standpoint with European HRDD regulation in so far it establishes a mandatory HRDD for German companies and their supply chains. Other governments including Switzerland, Luxembourg and Austria are considering legislative proposals to examine the introduction of such legislation as well.
[44] A. CHILTON, G. SARFATY, *The Limitations of Supply Chain Disclosure Regimes*, in *Stanford Journal of International Law*, Vol. 53, p. 1, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 766, Public Law Working Paper No. 586, 2017.
[45] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJEU L 182/19.

(2014)[46] marked a milestone. It requires affected companies (listed companies or public interest companies reaching a threshold) to report on the risks (including environmental and human rights risks) linked to the company or group´s operations, including, *where relevant and proportionate*, its business relationships, products or services. A positive point is that "materiality" is no longer limited to financial or similar risks. On the other hand, shortcomings are that the Directive does not set criteria for measuring "relevant and proportionate" nor does it specify what "business relationships" means. Companies must also describe the due diligence mechanisms that the company implements or alternatively include an explanation of why there is no such policy. The European Commission published some Guidelines on Non-Financial Reporting in 2017, which businesses can follow.

Transparency rules have also widely focused on specific problems, such as conflict minerals and modern slavery. On the latter, the California Transparency in Supply Chains Act (2010) introduces in consumer law a requirement to disclose companies´ efforts to ensure that their supply chains are free from slavery and human trafficking. Reporting requirements only affect direct suppliers but the company must provide minimum information on five categories, including verification, supplier audits and certification. The more recent UK Modern Slavery Act includes a Transparency in Supply Chain provision (2015). The law affects mostly criminal law but the provision modifies company law. It is more ambitious than the Californian one, since it requires diligence efforts to prevent human trafficking "in any of its supply chains" or its business. Besides it also affects non-UK companies "doing business" in the UK. Nevertheless, there is no minimum information required. In the same line, the Australian Modern Slavery Bill (2018), applicable both to Australian companies and to foreign entities carrying on a business in Australia, establishes a series of mandatory reporting criteria on corporate structure, operations and supply chains, potential modern slavery risks, actions taken to assess and address risks and information on how they assess the effectiveness of their actions. On May 2019, the Dutch Senate passed a Child Labour Due Diligence law for companies. Its scope is more limited than the UK Act; for instance, it only requires one declaration without yearly reporting obligations[47].

On the other hand, the series of conflict minerals laws present some interesting features. The Dodd-Frank Act section 1502 (2010)[48] is the first binding, national legislation in this area and has been tagged by some authors of having an "interventionist approach with extraterritorial implications[49]". It requires listed US companies which use the so called "conflict minerals" (3TsG[50]) to file a report with the Security Exchange Commission (SEC) disclosing their due diligence procedures[51]. Firstly, companies must conduct what is called "due diligence regarding the supply chain determination", i.e., to determine the origin and

[46] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJEU L 330/1.

[47] See *"*Dutch take the lead on child labour with new due diligence law*"*, Ergon, 17th of May 2019, available here. Full text of the law and amendments (in Dutch) available here.

[48] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No.111-203, $ 1502, 124 Stat. 1376, 2213-18 (codifies as amended at 15 U.S. C $78m (2012).

[49] D.M. FIRGER, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, in *41 Geo. J. Int'l L. 1043*, 2010, pp. 1087-90.

[50] These minerals are Tin, Tungsten, Tantalum and Gold.

[51] By the time of the revision of this article, the US Congress had approved to repeal some of the norms created by the Obama administration to regulate the financial market, including some provisions of the Dodd-Frank Act.

chain of custody of the minerals they use in order to report if these are "conflict-free" (meaning that they do not originate in the Democratic Republic of Congo and adjoining countries)[52]. If a company cannot determine that minerals have a conflict-free origin, it must carry out due diligence efforts over its supply chain to determine whether its minerals purchases have funded armed groups in those areas. Due diligence here reaches the full supply chain. However, companies are not liable for fuelling conflict with their operations; they can be held responsible only for misleading information. The rule refers to the OECD Due Diligence Guidance for Conflict Minerals as one of the applicable international standards. Two years later, in the framework of the International Conference of the Great Lakes Region (ICGLR) initiative for a regional certification regime[53], the Democratic Republic of Congo issued its own certification system. It thus passed a law that requires mining and mineral trading companies operating in the country to undertake due diligence on all levels of their supply chain according to the OECD Due Diligence Guidance[54]. The impact that these developments are having on Europe are well reflected by the EU's on-going discussion that have led to the adoption of the Conflict Minerals Regulation[55], that will enter into force in 2021, laying down supply chain due diligence obligations for the responsible sourcing of conflict minerals from conflict-affected and high-risk areas. Nevertheless, the resulting text agreed in trilogue (the European Council, the European Parliament and the Commission) presents important limitations for guaranteeing that EU companies' supply chains are conflict-free. Firstly, it only imposes big importers of the raw materials (tin, tantalum, tungsten and gold) mandatory due diligence obligations. Small importers such as jewellers are exempted. What is more important, downstream companies (i.e. retailers and manufacturers which import products containing these minerals) are free from mandatory due diligence requirements[56]. It is more protective than the initial EC Regulation proposal but still falls behind the expectations of the European Parliament and civil society[57].

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[52] This "due diligence regarding the supply chain determination" was defined in the SEC Rules (2012) as: an issuer's «determination regarding the source and chain of custody of its conflict minerals, the facilities used to process those minerals, the country of origin of those minerals, and the efforts to determine the location of origin with the greatest possible specificity». SEC Final Rules on Section 1502 Dodd-Frank Act, August 2012, p. 199, fn 589. More information in the next section.

[53] In November 2006, the countries of the Great Lakes region signed a Protocol against the Illegal Exploitation of Natural Resources as part of a Pact on Security, Stability and Development. In 2008, the organization launched the Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) as a means of implementing the Protocol, which consisted in 6 tools. The first one is the regional mineral tracking and certification scheme for conflict minerals.

[54] RDC, Ministère des mines de la République Démocratique du Congo, Arrête Ministériel nº. 0057.CAB.MIN/MINES/01/2012: Portant mise en oeuvre du mécanisme régional de certification de la conférence international sur la région des Grands Lacs.

[55] Regulation (EU) 2017/821 of the European Parliament and the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas", OJEU L 130 (EU Conflict Minerals Regulation).

[56] *Id.*

[57] See respective sources in Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas (European Commission, COM/2014/0111 final - 2014/0059 (COD)) and Amendments adopted by the European Parliament on 20 May 2015 on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten,

Finally, there are some ongoing developments which go beyond the transparency approach. France has recently passed its *devoir du vigilance* Bill[58] that requires the largest French companies to put in place duty of care measures in order to identify and prevent risks of HR impacts for parent and subcontracting companies. The law demands those companies to publish annual public vigilance plans on impacts linked to their own activities, those of companies under their control, and those of suppliers and contractors, with whom they have an established business relationship. Failure to comply with this obligation may derive in fines of up to 10 million euros or 30 million euros if it results in damages that could have been prevented. The Bill does not detail due diligence duties, and though it represents an important step forward, its main drawbacks are its limited scope, the fact that the burden of proof is carried by the victims and the absence of liability for damages caused if the company had implemented an adequate vigilance plan. At EU level, in 2016, the European Parliament passed a resolution on corporate liability for serious human rights abuses in third countries[59]. Among other interesting aspects, the document calls on «companies, whether European or not, to carry out human rights due diligence and to integrate their findings into internal policies and procedures[60]». An invitation which might soon become a binding requirement upon adoption of EU mandatory due diligence legislation[61].

At an international level, upon initiative of Ecuador and South Africa, a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, is currently being discussed at the United Nations[62]. The latest version of this draft treaty was released earlier this year and, according to scholarly opinion, it does not include substantial changes to the 2019 draft (First Revised Draft). Though more coherent and better organized, the draft currently under consideration still reveals inconsistencies and flaws that have been rightly pointed out by the doctrine. In this sense, López highlights the «slow progress to gather a critical mass of interested States behind the initiative[63]» or the introduction of the requirement that the relevant State needs to be a party to the international instruments in order for the Treaty to

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their ores, and gold originating in conflict-affected and high-risk areas (COM(2014)0111 – C7-0092/2014 – 2014/0059(COD))

[58] Loi relative au devoir de vigilance des sociétés méres et des enterprises donneuses d'ordre (French National Assembly, Law nº 2017-399, 27th March 2017).

[59] European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI), OJEU C215/125.

[60] *Id.*, para. 5.

[61] The exact content of the draft law has not been revealed, and it will not be made public until the public consultation closes in February. For a full-fledged, multi-stakeholder analysis of this initiative see Business & Human Rights Resource Centre, *Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society*, November 2020, available here.

[62] The Second Revised Draft of the Proposed Binding Treaty was released on the 6th of August 2020 and it represents the third version of the document. The first version, *Draft Zero Treaty* was presented by Ecuador and was discussed during the fourth round of negotiations held in Geneva. The second version, *Draft One Treaty*, was presented on the 16th of July 2019 during the fifth session of the working group, during which it received a series of concrete textual suggestions. For a full account of the content of the debates, see Human Rights Council, *Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,* A/HRC/40/48 (2nd January 2019) and Human Rights Council, *Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, A/HRC/43/55 (9th January 2020), available here.

[63] C. LÓPEZ, *Symposium: The 2nd Revised Treaty on Business and Human Rights – Moving (Slowly) in the Right Direction,* in *Opinio Iuris,* [blog] , 7th September 2020*,* available here.

cover the human right at stake[64]. On the other hand, the introduction of mandatory business human rights due diligence in Article 6[65] is consolidated, reflecting more accurately the standard set by the United Nations Guiding Principles on Business and Human Rights (UNGP) adopted in 2011 and is in line with current trends at the EU level. Nevertheless, some scholars consider the inclusion of HRDD provisions to be redundant in the light of the already existing UN Framework provided by the Guiding Principles, and go as far as calling for «an alternative approach, namely a framework convention based on the UN Guiding Principles on Business and Human Rights, as more desirable, feasible, effective and relevant to the challenges described above than the OEIGWG's current approach and text[66]».

But, as López rightly puts it, «Legal accountability together with provisions on the right to a remedy and reparation constitute the core of the proposed treaty and its distinct contribution to the international legal framework[67]». In the specific scope of Human Rights Risk Identification in supply chains, the proposed text of Article 8.7[68], which, building on the UNGPs, concerns the responsibility of the parent company in a business relationship for the abuses committed by its business associates or subsidiaries, shines the light over a crucial issue for the purpose of this paper. By recognizing the "foreseeability of risks" and the failure to take measures to prevent those risks from materializing as a ground for attribution of civil responsibility, «the general thrust of this provision is to be welcome as it attempts to establish a rule of legal responsibility in supply chains' lower tiers where businesses do not necessarily have a direct relationship with the main buyer up in the chain[69]». The establishment of this foreseeability, and hence, liability, is to be carried out through a human rights impact assessment, and, in particular, through the examination of the human rights due diligence measures adopted by the given business, which are now expected not only in relation to the business' own activity but also in the scope of its business relationships (articles 6.2-6.3).

However, HRDD requires further definition for it to be effectively applied in this context. Nolan has analyzed the wording of the Second Draft Treaty and has raised extremely

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64 Article 3.1. This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law).

65 Article 6.2: For the purpose of Article 6.1, State Parties shall require business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows: (…). Mandatory human rights due diligence was already included in the First Revised Draft, but the latest version adds gender perspective and prior and informed consent by Indigenous Peoples to the elements that must be considered. Moreover, Article 6.6 introduces a new enforcement provision which requires «commensurate sanctions, including corrective action where applicable» for failure to conduct adequate due diligence.

66 C. METHVEN O'BRIEN, *BHR Symposium: The 2020 Draft Business and Human Rights Treaty – Steady Progress Towards Historic Failure,* in *Opinio Iuris,* [blog] , 7th September 2020*,* available here. The full text of the proposed alternative Treaty is available here.

67 C. LÓPEZ, *Symposium: The 2nd Revised Treaty*…cit.

68 Second Revised Draft of the Proposed Binding Treaty, article 8.7: States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse.

69 C. LÓPEZ, *Symposium: The 2nd Revised Treaty*…cit.

relevant points that might need rethinking for the sake of legal certainty and effective application of the Treaty. Among them, the author reflects on the content of the newly introduced Article 8.8, which states that «Human rights due diligence shall not automatically absolve' a business from liability. Rather, a court (or competent authority) will decide on liability 'after an examination of compliance with applicable human rights due diligence standards». It is hard not to agree with the author when she stresses the importance of answering the following questions: «What does this mean? That a business whose HRDD complies with applicable standards has an automatic defense? Or not? And what are those applicable HRDD standards[70]?».

Further reflection is undoubtedly needed, and as Methven O'Brien has rightly highlighted, this effort should specially watch out for inclusion, bearing in mind at all times that «Only a treaty that is signed, ratified and implemented by both the world's major capital exporting economies (a group no longer confined to North America and Europe), and host states for foreign investments, can truly promise justice for rights-holders as well as effective corporate and government accountability[71]».

3. *Risk identification*

Risk identification, though being one of the main phases in any HRIA, is far from being defined. The main obstacle hampering its definition has been the uncoordinated proliferation of HRIA instruments, which results from the *soft law* and abstract nature of the tool of reference in this context: the UNGPs. Recent developments both in the scope of international *soft law* instruments and domestic hard law regulating supply chain disclosure regimes may have shed some light over the principles and standards that can be considered common denominators in HRDD respectful risk identification practices.

In this context, the lacuna that this paper aims to fulfil becomes clear: when can a corporation prove beyond reasonable doubt that it has carried out its risk identification in accordance to the standards set by HRDD?

For the sake of methodological precision, two previous clarifications should be made. On one side, it must be noted that the scope of the present analysis is limited to the corporations' risk identification within a very specific part of its business relations: its supply chain. And on the other side, it should be highlighted that, after thorough revision of the state of art, the OECD's "Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain" has been identified as the most comprehensive theoretical framework to use as the basis for the present analysis[72]. Thus, section 3 carries out an in-depth examination of risk identification indicators following the framework designed by the aforementioned OECD's instrument. In an attempt to tackle the traditional critical voices against legal

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[70] J. NOLAN, *BHR Symposium: Global Supply Chains-Where Art Thou in the BHR Treaty?,* in *Opinio Iuris,* [blog] , 7th September 2020*,* available here.

[71] C. METHVEN O'BRIEN, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty,* in *Business and Human Rights Journal 5(1*), 2020, p. 6.

[72] The OECD Guidelines of 2011 are considered as the international framework on HRDD with global scope because the signatory States are the home States of the world's biggest multinational companies. Plus, the OECD's work in this scope has the UN's Security Council. See United Nations, Security Council's Resolution 1952, 2010.

scholars regarding their late arrival to multi-focused research[73] when giving content and defining these indicators, the author of this paper has resorted to the following sources: international *soft law* instruments, European resolutions and proposals, domestic regulations on HRDD and case-law.

What does risk identification in observance of HRDD standards mean within supply chain relationships[74]? We are here before a concept that has been given multiple names within the scope of corporations' responsibility to respect (R2R). In fact, risk identification has long been an essential phase of HRIA models[75]. In its introduction, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas acknowledges that its main goal is "to serve as a common reference for all suppliers and other stakeholders in the mineral supply chain and any industry-driven schemes which may be developed, in order to clarify expectations concerning the nature of responsible supply chain management (….)[76]". This framework[77] concentrates in particular on the corporation decision-making in the scope of supplier choice and sourcing decisions.
When it comes to listing the steps that a corporation must take if it wants to guarantee that it is acting in respect of HRDD standards, the OECD proposes the following framework:

1. Establishment of strong management systems
2. *Identify* and assess *risk in the supply chain*
3. Design and implement a strategy to respond to identified risks
4. Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain
5. Report on supply chain due diligence

The ultimate goal of this paper is to clarify as much as possible what the exact content of the first part of step 2 is: how can a corporation prove beyond reasonable doubt[78] that it has

[73] K.B. SOBEL-READ, *Global Value Chains,* cit., p. 4.
[74] To avoid repetition, it is assumed here that the content and scope of business relationships has been defined in section 2.
[75] IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., pp.24-44. For more revision of the state of the art, see section 2.
[76] OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2016, p. 12.
[77] The Guidance considers "supply chain" concept in a broad way that can be seen closer to the Value Chain concept: «The term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers». OECD, *Due Diligence Guidance for Responsible,* cit., p. 14.
[78] We are here before a standard of proof. International criminal case-law has established that, when a finding is based on circumstantial evidence, this standard implies that the given conclusion must be the *only* reasonable conclusion available. In fact, the ICTY goes further in applying the principles of legal certainty and presumption of innocence by specifying that «If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted». ICTY, Prosecutor v Rasim Delić, Trial judgment, Case no IT-04-83-T, 15 September 2008, para. 28; ICTY, *Prosecutor v. Zejnil*

taken all the reasonable measures to identify HR risk in its supply chain? Though extremely useful in terms of structure, the OECD's Five-Steps Framework does not give further guidance on how to interpret this "identification" duty[79]. So, what specific model are we going to resort to, to complete and compare with the sources previously cited?

3.1. *Proposed model*

The model here proposed is essentially inspired by the OECD's Tin, Tantalum and Tungsten Supplement (TTT). More specifically, after thorough examination of the particular requisites for downstream[80] and upstream[81] companies presented in this Guideline, the upstream companies' requirements have been considered to encompass more comprehensively the general steps applying to any company at any point of the supply chain[82]. Indeed, it offers a more flexible skeleton that can eventually be tailored to satisfy the specific demands of suppliers or contexts.
It should be however highlighted that, in designing the steps comprised in this model, the present paper takes a completely different stand in respect of the triggering nature of what is referred to as the "red flag system[83]". Contrary to what some due diligence guidelines propose[84], here, the red flag screening is not considered to be an activator of a further HRDD assessment, but an essential element of the risk identification phase. This decision responds to the belief that complete HRDD analysis should not be trigger-conditioned but should be mandatory for all businesses who intend to operate within the boundaries of international law[85]. Hence, the operational context and bad reputation screening that make up the red flag system are not considered to be filters in our model, but essential parts of risk identification's step 1.

Delalić et al., Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement), para. 458; ICTY, *Prosecutor v. Enver Hadžihasanovi and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović* Appeal Judgement"), para. 286 (emphasis in the original). When the finding has not been established through circumstantial evidence, but through other types of probative evidence, the standard is lowered, being sufficient that it is a reasonable conclusion available. It is a proposed standard imported from criminal law with which to examine the indicators proving that the corporation has taken all the reasonable measures to identify HR risks in its business relationships.

[79] OECD, *Due Diligence Guidance for Responsible,* cit., p. 18. In this point, the general Five-Step Framework directs the reader to the specific Supplements in the Guide that have developed these steps by topics/areas, including the Gold Supplement and the Tin, Tantalum and Tungsten Supplement.

[80] Meaning, according to the OECD's Due Diligence Guide, «he minerals supply chain from smelters/refiners to retailers», OECD, *Due Diligence Guidance for Responsible,* cit., p. 33.

[81] Meaning, according to the OECD's Due Diligence Guide, "the mineral supply chain from the mine to smelters/refiners", OECD, *Due Diligence Guidance for Responsible,* cit., p. 32.

[82] It goes without saying that the defining elements of conflict minerals supply chains requisites have been discarded when assessing this supplement as the model in which to inspire the present proposal.

[83] The OECD Minerals' guidance is based on a set of criteria which, if identified by companies, triggers the application of the due diligence standards and processes contained therein. See OECD, *Due Diligence Guidance for Responsible,* cit., pp. 33-4.

[84] IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p.18. This Guide, however, identifies two main factors that may trigger a HRIA for a specific business activity: the context within which the business activity will take place and the specific nature of human rights risks and impacts.

[85] Notwithstanding the UNGPs' Principle 17 indicates for these cases, identification of key areas where the risks of human rights' impacts is most significant, «whether due to certain suppliers or clients´ operating context, the particular operations, products or services involved, or other relevant considerations» and prioritize this for due diligence.

STEP 1: RED FLAG SCREENING

The red flag system proposed by the TTT[86] represents an effective first step that evidences in a visual way whether the corporation has taken all the necessary steps to identify the extent to which the *A.* the selected location and *B.* the selected supplier may encompass a human rights violation risk. As we dive into the specifics of the model, we will notice that it fully fledges out three of the measures listed within the reasonable vigilance measures to identify risks and prevent human rights violations and environmental harm enshrined in the French *Devoir du Vigilance* law, a finding that ultimately confirms the feasibility of imposing supply chain human rights due diligence through hard law[87].

A) Red flag *context* screening

aa. Geographical indicator for conflict-affected and high-risk areas[88]

It is no secret that war and conflict zones go usually hand in hand with weak governance and poor (if any) human rights implementation systems. If a given company sets off the geographic "alarm" because it operates directly or indirectly in a conflict or high-risk area, it should take extra care to set it off. From the analysis of the existing state of art in can be inferred that, in order to complete this step satisfactorily, a corporation must, at least, provide an evidence-based answer for the following questions:

Do you know the context of the conflict-affected and high-risk area where you operate? a. Do you have a 360º picture of the country (from government and non-governmental sources, UN reports, industry literature)? b. Are there international entities capable of intervention and investigation, such as peacekeeping units, based in or near the area? Can these systems be used to identify actors in the supply chain? c. Are there local means for recourse to address concerns related to the presence of armed groups or other elements of conflicts?[89]

bb. Industry sector indicator[90]

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[86] The original wording and structure has been modified so as to encompass any kind of corporation in any industry sector that operates within the GVC, hence eliminating specific TTT indicators from the list.

[87] The three cited measures listed by the French law are: a mapping that identifies, analyses and ranks risks; procedures assessing the situation of certain subsidiaries, subcontractors or suppliers. S. COSSART, J. CHAPLIER, T. BEAU DE LOMENIE, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All* in *Business and Human Rights Journal, 2*(2), 2017, p. 320.

[88] In words of the OECD Due Diligence Guidance for Responsible Supply Chain, «conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence». OECD, *Due Diligence Guidance for Responsible,* cit., p. 13.

[89] These questions have essentially been taken from the OECD, *Due Diligence Guidance for Responsible,* cit., p. 57-58.

[90] Though the questions here formulated are original of the authors, the identification of the industry sector indicator results from the in-depth analysis of the HRIAM "triggering" factors that have been identified by the IFC's Guide to Human Rights Impact Assessment and Management, IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p. 18.

The footprint that the different industry sectors may leave both on the environment and on the livelihood of local communities may vary. The potential impact on human rights is thus subjected to this variation as well. The corporation must acknowledge this reality and assess the human rights track record and distinctive features of the industry sector in which it develops its activity. Hence, fully justified answers for the following questions should be produced:

Are you aware of the specific human rights risks and challenges of the industry sector in which you operate? A.. Do you know if your industry has a track record of human rights violations? B. Do you know if specific HRDD guidelines/standards have been implemented to minimize this risk?[91]

A. Human Rights legal framework indicator

The applicable legal framework in the country where a corporation conducting the HR risk identification is based represents an indicator of utmost importance. Though the risk of HR violations may be associated to locations in which supply chain activities take place, the norms applying to the corporation undertaking its HRDD obligations are not to be overlooked. A corporation that wants to prove it has taken all the necessary steps to identify HR risks within its activity must demonstrate that it is aware of what the potential impact of the legal context it is bound by may have on HR. Due to time and space limitations, this analysis will not include consideration to extraterritorial obligations that are starting to be understood as part of the States' human rights obligations[92].

Hence, to complete this phase, corporations should carry out a screening and in-depth analysis in order to be able to provide answers, at least to the following questions:

Do you know what your operational context is? **a**a. Do you know what international conventions have been signed and ratified by your home country? bb. Do you know if your home country has incorporated these international conventions into national laws? cc. Do you know what Bilateral Investment Treaties, Multilateral Agreements and Free Trade Agreements are in force in your home country? d. Are you aware of the potential human rights risks that derive from specific clauses in these instruments? e. Do you know if your corporation acts in an Export Processing Zone? If so, do you know what the risks deriving from legal exceptions applying to those areas are?

a. Identification of potentially affected stakeholders indicator

In its Stakeholder Engagement Guide, the International Finance Corporation, defines the stakeholders as «persons or groups who are directly or indirectly affected by a project, as well as those who may have interests in a project and/or the ability to influence its outcome, either positively or negatively». It goes further by specifying that they «may

[91] The IFC's Guide provides specific examples of initiatives that address corporate related human rights risks, classified by scope, IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p. 29: - Global (e.g. UN Global Compact) - Regional (e.g. CSR Europe) - National (e.g. Instituto Ethos or Business in the Community) - Sectoral (e.g. International Council of Mining and Metals or the Global Network Initiative)- Multi-stakeholder (e.g. Ethical Trading Initiative)- Issue specific (e.g. Fair Labour Association or the Voluntary Principles on Security and Human Rights).

[92] See *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 2011.

include locally affected communities or individuals and their formal and informal representatives, national or local government authorities, politicians, religious leaders, civil society organizations and groups with special interests, the academic community, or other businesses[93]».

Establishing reliable communication channels with those people whose human rights are at risk of being violated by the corporation's direct or indirect activity is a mandatory step. The effective accomplishment of this requisite has a twofold dimension: first, key business relationships (suppliers, for the purpose of this paper) connected to the business activity that may impact the human rights of stakeholders must be identified[94]. Secondly, stakeholders must be identified in a holistic way. This comprises detecting their interests, rights and obligations regarding the project or activities. Their "level of influence and if/how they may be impacted by the business project or activities[95]" should also be a part of this screening.

According to the Danish Institute of Human Rights, stakeholders can be classified in three different groups: duty-bearers which include, besides company itself, business suppliers and contractors, joint-ventures and other business partners, government actors, regional and national government departments and agencies; rights-holders "both within the geographic vicinity of operations but also impacted downstream, trans-boundary or neighbouring communities" and "other relevant parties[96]". The extension of the rights-holder position to those people who can potentially be affected through the supply chain activities confirms that in identifying the human rights risk according to HRDD standards, the object of analysis should be the whole supply chain. Interestingly, the British Government's practical guide to interpret disclosure obligations for corporations in application of the Modern Slavery Act also includes among the information to consider as part of the due diligence standard in this context, the presentation of evidence of stakeholder engagement[97]. Against this background, the IFC's Stakeholder Engagement Guideline has been identified as the most complete instrument to help corporations conduct this part of their risk identification analysis[98]. Thus, for the purpose of this section, the full and evidence-based answering of these questions is required:

Have you identified the potentially affected stakeholders of your activity? **a**a. Have you delineated the project's geographic sphere of influence? bb. Do you have the information to prioritize stakeholders according to who they are and the interests they may have[99]? cc. Have

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93 IFC, *Stakeholder Engagement*, cit., p. 10.

94 IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p. 25.

95 DIHR, *Human Rights Impact Assessment*, cit., p. 44.

96 Including Intergovernmental organisations; local and international NGOs and CSOs; UN and regional human rights mechanisms; national human rights institutions; subject matter experts; academia; rights-holder representatives or representative organisations, such as trade unions, *Id.* p. 44.

97UK Government, *Transparency in Supply Chains etc. A practical guide*, 2015, p. 33. Available here.

98 The questions here proposed have been inspired in the findings presented in its Part 1, "Stakeholder Identification and Analysis", IFC, *Stakeholder Engagement*, cit., pp. 13-27. Thus, for further detail as to how to understand the questions, see this instrument.

99 This guide proposes a series of helpful questions to obtain this information: What type of stakeholder engagement is mandated by law or other requirements? Who will be adversely affected by potential environmental and social impacts in the project's area of influence? Who are the most vulnerable among the potentially impacted, and are special engagement efforts necessary? At which stage of project development will stakeholders be most affected (e.g. procurement, construction, operations, decommissioning)? What are the various interests of project stakeholders and what influence might this have on the project? Which stakeholders might help to enhance the project design or reduce project costs? Which stakeholders can best assist with the

you examined past stakeholder information and consultation? d. Have you developed socio-economic fact sheets with a focus on vulnerable groups? e. Have you verified stakeholders' representatives?

b. Presence of monitoring from civil society indicator

Lastly, showing awareness of the existence of independent third-party monitoring of the human rights risks of a given activity undoubtedly suggests a higher commitment with risk identification according to HRDD standards. Questions to be answered by corporations in this respect, include but are not limited to:

Are you aware of the views on your business activity held by key third party organisations? Do you know of any reports published by civil society organisations or NGOs on human rights risks linked to your suppliers or with your industry sector?

Red flag *supplier* screening

c. The supplier has a bad record[100] *in human rights violations (bad reputation indicator).*

Undertaking a comprehensive HRDD on suppliers is an essential part of identifying HR risks within this particular type of business relationship. This duty has been summarised by some HRIA guides as follows: «In particular, companies should specifically identify if the partner organisation has allegedly violated or been complicit in any human rights abuses in the past[101]». The French *Devoir du Vigilance* Bill may also serve as an example of an in-force regulation that grants legal certainty as to what suppliers and business relationships should fall within the scope of this law. The law refers specifically to the concept of supply chain, but limiting it to subcontractors and direct suppliers. As noted by Guamán Hernández, the legal certainty derives from the fact that the cited notions refer, in any case, to «categorías bien definidas en las distintas ramas del derecho francés por lo que caben pocas dudas de su itnerpretación[102]». The definition, under French law, of an established commercial relationship as a regular commercial relationship taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last[103], amounts to an illustrative example of the latter. From the analysis of the existing state of art in can be inferred that, in order to complete this step satisfactorily, the corporation must, at least, provide an evidence-supported answer for the following questions:

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early scoping of issues and impacts? Who strongly supports or opposes the changes that the Project will bring and why? Whose opposition could be detrimental to the success of the project? Who is it critical to engage with first, and why? What is the optimal sequence of engagement?

[100] IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p. 27. For the full definition and scope of bad reputation for the purpose of this paper, see the previous section.

[101] *Id.*

[102] A. GUAMÁN HERNÁNDEZ, *Diligencia debida en derechos humanos y empresas transnacionales: de la ley francesa a un instrumento internacional jurídicamente vinculante sobre empresas y derechos humanos* in *Lex Social. Revista Jurídica de los Derechos Sociales* 8(2*), 2018,* p. 242.

[103] French Commercial Code, art L. 442-6-I-5 and *Cour de cassation, Chambre Commerciale*, 18 December 2007, cited in S.. COSSART, JJ. CHAPLIER, T. BEAU DE LOMENIE, *The French Law on Duty of Care: A Historic Step*… cit. p. 320.

Do you know your suppliers? a. Do you know who your suppliers all along the GVC are [104]? b. Do you know who the significant actors in your supply chain are? This question includes collecting information on ownership (including beneficial ownership), corporate structure, names of corporate officers in other organisations, the business, government, political or military affiliations of the company and officers; c. What procurement and due diligence systems do these suppliers have in place? What supply chain policies have suppliers adopted and how have they integrated them into their management processes? How do they enforce policies and conditions on their suppliers[105]?; d. Do you know if your suppliers have a bad record in human rights violations[106]?

The state of art section has rightly evidenced that the scope of the few domestic laws which have incorporated HRDD mechanisms is still very limited[107]. However, some of the supply chain-specific disclosure obligations they contain represent an important precedent insofar they amount to the first examples of the crystallization of multiple guiding documents aspirations into domestic hard law. For the purpose of this paper, only risk identification related duties found in these laws will be reproduced here. Starting with the California Transparency in Supply Chains Act (CTSCA), a consumer-focused law which requires companies to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking, the disclosure obligations of the corporations meeting the requirements include, at least, disclosing to what extent, if any, the corporation does each of the following:
«1. Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.

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[104] The Global Reporting Initiative attempts to answer this question in more detail by including the following indicators in the elements that may define the structure and characteristics of an organization's supply chain: total number suppliers engaged by the organization and estimated number of suppliers in the supply chain, location of suppliers by country or region, types of suppliers (such as contractors, brokers, wholesalers, licensees) and estimated monetary value of payments made to suppliers (G4-12), and the changes that these variables may suffer (G4-13). Global Reporting Initiative (GRI), *G4 Sustainability Reporting Guidelines* and *Implementation,* cit., p. 27. Available here.

[105] The general framework of these questions has essentially been taken from the OECD, *Due Diligence Guidance for Responsible,* cit., p. 58. At the same time, the questions here proposed have been inspired by other previous but very important guiding tools: Financial Action Task Force, *Guidance on the risk-based approach to combating money laundering and terrorist financing,* June 2007, Section 3.10. (Step 2) and Chapter VI of *Guidelines on reputational due diligence, International Association of Oil and Gas Producers* (Report No. 356, 2004). See also Chapter 5 "Knowing Clients and Business Partners" of the *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 2006.

[106] For instance, the GRI Guidelines include the assessment of suppliers' performances, also for screening purposes. These include general human rights assessment and screening (G4-HR10 and G4-HR11) and specific assessment on environmental performance (G4-EN32 and G4-EN33) or labour practices. Both entail the implementation of procedures such as due diligence to identify and assess the actual or potential relevant impacts on the supply chain. Indicators of the organization performance regarding assessment of suppliers' labour practices include the percentage of suppliers screened (G4-LA14), identified actual or potential impacts and actions taken (G4-LA15), specific assessments on freedom of association and collective bargaining (G4-HR4), child labour (G4-HR5) or forced or compulsory labour (G4-HR6). Detailed information is provided in GRI, *G4 Sustainability Reporting Guidelines* and *Implementation,* cit.

[107] On the limitations of supply chain disclosure regimes in general, and on the CTSCA's limitations specifically see CHILTON and G. SARFATY, *The Limitations of Supply Chain,* cit.

2. Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
3. Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding human slavery and human trafficking of the country or countries in which they are doing business (…)[108]».

Still in the US, the Dodd-Frank Act's section 1502[109] requires companies to report to the US Securities and Exchange Commission on their suppliers' use of conflict minerals. Again, for the purpose of the risk identification standards in respect of suppliers, this sector-specific law makes an interesting contribution: it mentions that due diligence shall include an independent private audit that must be publicly available at the company's website[110]. More recently, the US Congress has introduced indicators in the scope of risk identification HRDD standards through the Business Supply Chain Transparency on Trafficking and Slavery Act[111]. This law follows the Dodd-Frank's in highlighting the importance of independent third party evaluation («disclosure shall (ii) specify whether the evaluation was or was not conducted by a third party;») and goes a step further in acknowledging the crucial role that stakeholders should play in the risk identification process («disclosure shall (iii) specify whether the process includes consultation with the independent labour organizations (as such term is defined in section 2 of the National Labour Relations Act (29 U.S.C. 152)), workers' associations, or workers within workplaces and incorporates the resulting input or written comments from such independent labour organizations, workers' associations, or workers and if so, the disclosure shall describe the entities consulted and specify the method of such consultation»). The scope of action seems to be exhaustive in the sense that information disclosure in respect of HRDD risk identifying and addressing efforts is required «(iv) (…) within the supply chain, including entities upstream in the product supply chain and entities across lines of products or services». This law introduces some interesting details in respect of the content that the corporation's evaluation of its suppliers' audit efforts should include[112].

Moving onto Europe, despite the open and non-binding terms in which it has been drafted, it can be inferred from the UK's Modern Slavery Act enacted in 2015 to pursue transparency in supply chains, that information about suppliers, both general and risk-oriented, as well as information on due diligence processes are considered to be an essential part of human rights risk identification:
« (5) An organisation's slavery and human trafficking statement may include information about—

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[108] California Transparency in Supply Chains Act, Cal. Civ. Code $ 1714.43 (a)(1) (West 2012).
[109] This law is essentially based on the "reasonable country of origin inquiry" standard (satisfied if it seeks and obtains reasonably reliable representations indicating the facility at which the conflict minerals were processed) which is consistent with the supplier engagement approach of the OECD. In fact, the US Securities and Exchange Commission (that is the organism in charge of implementing this law) has stated that OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas satisfies its criteria under the final rules and may therefore be used as a framework for purposes of satisfying the final rules' due diligence requirement.
[110] See Section 13(p)(1)(A)(1) Exchange Act. The certification takes the form of a statement in the Conflict Minerals Report that the issuer obtained an independent private sector audit.
[111] Business Supply Chain Transparency on Trafficking and Slavery Act of 2014, H.R.4842, 113th Congress (2013-2014).
[112] *Id.*, Sec. 3,1 (D).

(a) the organisation's structure, its business and its supply chains;
(…)
(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (…) ».

This law offers no further detail as to how to identify, in practice, this risk in the supply chain. Nothing is either said about the standards according to which theses due diligence processes should be carried out. The British Government has published a practical guide which sheds some light as to how to interpret the law[113]. Its annex E proposes some indicators as to how conduct supplier-related risk identification according to due diligence standards. The scope of the analysis is understood to go beyond first-tier suppliers («they should also engage their lower suppliers where possible[114]».) and the "red flag screening" is considered to be ideally conducted through «expert independent, third parties and civil society stakeholders» rather than through «audits and compliance-driven approaches» which are «unlikely to identify or uncover hidden cases of slavery or trafficking[115]».
Finally, it is worth highlighting that the EU Conflict Mineral Regulation establishes a detailed list of risk management obligations which refers directly to the OECD Due Diligence Guidance[116].

The context in which your supplier operates does not offer human right protection mechanisms (supplier context indicator)

The laws in force in the supplier's home country play an essential role in preventing human rights violations. Hence, its content is to be examined by the business conducting the risk assessment as a very significant indicator. Some of the questions to be fully and answered by the corporation in this respect include:

Do you know what the operational context of your suppliers is? a. Do you know what international conventions have been signed and ratified by your supplier's host country? b. Do you know if your supplier's host country has incorporated these international conventions into national laws? c. Have you taken all the reasonable measures to identify gaps in the protection of human rights in national laws and their application? d. Have you conducted a gap analysis exercise on the supplier's conduct in relation to human rights issues addressed in the host country's legal framework[117]? e. Weak governance: have you conducted research in order to verify whether the supplier's operating territory/country is a weak governance zone?

STEP 2: BUSINESS RELATIONSHIPS AND LEVERAGE

If it intends to provide effective answers, information obtained through the HR risk

[113] «This document provides guidance on how the Government expects organisations to develop a credible and accurate slavery and human trafficking statement each year and sets out what must be included in a statement», UK Government, *Transparency in Supply Chains*, cit., p. 4. Available here.
[114] *Id.*, p. 32.
[115] *Id.*, p. 33.
[116] Regulation (EU) 2017/821 of the European Parliament… (EU Conflict Minerals Regulation), cit., art 5.1.
[117] IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p. 25.

identification should also allow the company to foresee its response to potential problems or situations. In this respect, the leverage the entity has over suppliers that have negative impacts is of utmost importance. If a company has no capacity to influence a supplier's behaviour, it should ultimately revise its relationship. The key question that a corporation needs to answer in step 2 is: have I taken all the reasonable measures to assert that I have identified exactly what my leverage situation in respect of my suppliers is, both in terms of information access and in terms of level of leverage (understood here as the capacity to influence behaviour in case of human rights violations)? The answer to this question will not only have an impact on the subsequent phases of the HRIA which include mitigation measures and hence, their effective implementation, but will also strongly condition the corporation's decision-making process in the scope of new and existing business relationships.

So, how can we categorise the different typologies of business relationships that result from factors including information access and economic power that one corporation has over its supplier? There is no consensus on how to answer this question, but this paper has identified some interesting proposals which might be useful to set the basis for the theory-building that this topic is calling for. From a value chain perspective, scholars have identified four different contract-based governance structures[118], any of which may apply to each linkage in the supply chain: Market, Modular, Relational and Captive[119]. As Sobel indicates, «the relevant typology depends on the relative degrees of legal and economic power that one firm has over the other, as well as on the kind and quantities of information and capabilities that will need to flow between the two. Further, the factors affecting the choice of linkage are dynamic. (…) the existence of regulatory standards regarding quality, labour relations, and/or environmental concerns might influence the parties to link in different ways[120]». A fifth category based on vertical integration, as opposed to contract, has also been identified by GVC scholars[121]. At this stage, it is also interesting to bring in the approach adopted by the French *devoir du vigilance* Bill. When defining the businesses that are abided by the obligation to draft a *Plan de Vigilance,* the Bill refers, on one side, to the concept of direct and indirect corporate control and on the other, to a list of business relationships that would fall within the scope of the Plan. Thus, as noted by Guamán Hernández, in this law «el concepto de control no se define, sino que se realiza un reenvío al propio código de comercio, donde se indica que el control empresarial se delimita por la tenencia, directa o indirecta de la mayoría de los derechos de voto en otra empresa; por la designación, durante dos períodos consecutivos, de la mayoría de miembros en el órgano de dirección o por, como cláusula de cierre, el ejercicio de una influencia dominante sobre otras empresas, derivada de un contrato o de cláusulas estatutarias[122]». Taking a more effective-control approach, the International Finance Corporation proposes a list of key questions that are directed to help the company ascertain what level of influence they may exert (over the relevant supplier) regarding human rights issues**.** These questions include:

- What is the nature of the business relationships within and throughout the business

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[118] In essence, GVC divide business relationships in 2 big categories: contract-based and vertical integration.

[119] For further information about these categories see O. CATTANEO, G. GEREFFI, S. MIROUDOT, D. TAGLIONI, *Joining, upgrading and being competitive in global value chains: a strategic framework*, World bank group, Policy Research Working Paper 4, 2013, p. 34. Available here.

[120] K.B. SOBEL-READ, *Global Value Chains,* cit., p. 42-43.

[121] O. CATTANEO, G. GEREFFI, S. MIROUDOT, D. TAGLIONI, *Joining, upgrading*, cit., p. 87.

[122] A. GUAMÁN HERNÁNDEZ, *Diligencia debida en derechos humanos y empresas transnacionales*…cit., p. 241.

activity?

- Does the company retain the majority ownership or overall control of the business activity?
- If the company has a minority interest, where does the control lie and how are minority interests protected?
- What provisions within the project documentation address the exercise and control of business standards by all participating organisations?
- What mechanisms enable the partners to respond effectively to human rights and other challenges?
- Will the company's brand be at risk if human rights challenges arise in the business activity?[123]

This instrument refers as well to more supplier-specific questions to be answered by corporations which intend to identify in an accurate way what the HR risk deriving from their relationship with a given supplier is:

- Have your standards and expectations been communicated to all your suppliers?
- Does your supply chain management and engagement system include minimum, sufficient monitoring oversight mechanisms, and carefully constructed mitigation or improvement action plans should human rights risks materialise along the supply chain?
- Do you have any training programs for suppliers on the company's approach to human rights?[124]

The question on the provisions within the project documentation introduces a novel and potentially ground-breaking initiative in this area: certification. The emergence of independent certification as a precondition to engage in business relationships insofar it is considered an objective indicator of risk identification might amount to a significant change of the current scenario. Of course, the implementation of this requirement would have to tackle two main hindrances: legitimacy and funding. As far as legitimacy is concerned, it should be noted that at the moment, despite the important contributions made by civil society and academia in the scope of HRIA, there is no globally recognised institution that certifies the level of international human right standards observation by businesses (including suppliers). There are some initiatives that, though exhaustive, remain however in the area of "corporate social responsibility[125]". Within the EU, however, some interesting developments can start to be identified: in May 2015, the European Parliament voted to overturn the Commission's proposal to establish a system of self-certification in the scope of conflict minerals. MEPs have thus gone beyond the self-certification approach by requesting mandatory compliance and a "a compulsory, independent, third-party audit to check their "due-diligence" practices[126]". A position which has ultimately resulted in the adoption of the examined EU Conflict Minerals Regulation. As Sobel rightly points out «the question of the bargaining power of one firm to impose conditions on a lower-tier firm becomes that much more significant when standards and certification enter the picture. This is true because

[123] IFC and IBLF in association with UN Global Compact, *Guide to Human Rights Impacts,* cit., p. 27-28.
[124] *Id.*, pp. 28-29.
[125] See, for instance, the Global Reporting Initiative, the ISO 26000 or the Social Accountability 8000. For a critical analysis of CSR instruments as tools to establish supply chain responsibility see R. MARES, *The limits of supply chain responsibility: a critical analysis of corporate responsibility instruments*, in *Nordic Journal of International Law*, Vol. 79, no. 2, 2010, pp. 193-244.
[126] See Press Release, European Parliament News, *Conflict Minerals: MEPS ask for mandatory certification of EU importers,* (May 20, 2015) available here.

compliance with standards and certification is often expensive for suppliers[127]». Thus, by introducing the linkage decision as the second element of our risk identification model, the present paper has tried to drive the stakeholders' attention to what has been identified as a potentially high risk: that the corporation establishes a relationship with a supplier over which it has no leverage whatsoever, with the human rights implications this may entangle.

4. *Conclusion*

It is not hard to conclude from the observation of latest developments that corporate responsibility to respect human rights is moving from the *soft law* realm to hard law[128]. It is not so clear though whether this transformation, as it is taking place, will lead to an effective legal framework governed by the principle of legal certainty (transparency rules, as mentioned, are short of fulfilling their objectives). Besides, this process evidences too many important lacunas that need to be filled. Firstly, the current framework of corporate R2R and HRDD is at present a patchwork of national and international law, *soft law* and corporate-driven initiatives. There is an urgent need for harmonization, at least in respect of the minimum core principles applicable. Secondly, accountability mechanisms to establish corporate liability for non-compliance with agreed HRDD standards need to be clear, solid and structured. This includes the clarification of concepts aimed at measuring companies´ performances, such as "reasonability", or "necessary measures", among others.

The same can be said about the *sine qua non* "flexibility" factor that marks the DNA of HRDD. A fair balance needs to be struck between this realism/flexibility and the paramount principle of human rights protection. In short, this paper has intended to make a modest contribution to the need of clarification in this area, with a revision of the state of the art in order to identify the common standards and principles applicable to risk identification duty, which is the very first step of the company HRDD and hence, core to the corporate responsibility to respect human rights. As former Special Representative John Ruggie himself predicted, the UNGPs just mark the end of the beginning[129].

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127 K.B. SOBEL-READ, *Global Value Chains,* cit., p. 54.

128 In this sense, the recent official commitment by EU Commissioner for Justice, Didier Reynders, to an EU initiative on mandatory Human Rights and Environmental Due Diligence following the publication of the European Commission study on due diligence requirements through the supply chain stands out as the latest confirmation of this tendency. ECCJ, *Commissioner Reynders announces EU corporate due diligence legislation*, 30 April 2020. Available here.

129 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UNGP, "Protect, Respect and Remedy" Framework, HRC Resolution A/HRC/17/3, para. 13.