Business and Human Rights: a challenge for enterprises?
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The ‘Business and Human Rights’ issue is of increasing importance. The adoption in 2011 of the ‘UN Guiding Principles on Business and Human Rights’ constituted the heart of a process basically leading to the establishment of an international principle of ius cogens related to this sector.

The paper “Business and human rights: a challenge for enterprises?” is the result of an investigation started in 2009 by the AVSI Foundation and a group of researchers and scholars of the University of Rome ‘Tor Vergata’. By providing all stakeholders (in particular the entrepreneurs) with a useful tool, this survey highlights and in-depth illustrates the challenges represented by the protection and the promotion of human rights in their overall perspective.

The public awareness on human rights-related issues constitutes one of the responsibilities of the Interministerial Committee for Human Rights (the so-called CIDU): in particular ‘Business and Human Rights’ was one of the first topics to be included in the programme of outreach activities of the Committee in 2014. CIDU aims at contributing to further developing the debate on the crucial relationship between business and human rights through the presentation and the discussion of this paper - which is at the same time both synthetic and exhaustive - at the Ministry of Foreign Affairs and International Cooperation.

GIANLUCA DE MARTINO
Chair of the Italian Interministerial Committee for Human Rights
The question on the possibility of reconciling business with the respect for human rights has become more and more urgent, especially in the present times, when the economic crisis on the one hand, and the massive growth of some enterprises and countries on the other, have shown contradictions, conflicts and increasing inequality. The cooperation with business is in the AVSI non-profit DNA; its history, indeed, is grounded on experiences of collaboration with main Italian and multinational companies in Africa, Eastern Europe and South America, aimed at educational projects, training courses, community investment, social impact analysis, etc. Therefore, according to AVSI, collaboration is not only possible, but necessary, in order to make global economy inclusive. Without this close proximity between profit and non-profit sectors, the risk of an economy at the same time ‘excluding’ and ‘overwhelming’ becomes really growing.

It is not just about control: common experience creates common and fertile culture for mankind.

As a matter of fact, NGOs assume gradually a ‘watchdog’ role; however, experience shows that, in addition to being an observer and an external controller, they can become even much more relevant. In fact they can ‘contaminate’ the entrepreneurial culture with their own values, and receive in exchange skills and knowledge useful to improve processes and services. We are not dealing with a relationship between strangers, but with a dialogue able to introducing mutual changes: a ‘hybrid’ between different subjects which remain separate, but nonetheless cooperate for the common good.

Recently, the international community has reinforced the idea that the ‘private’ sector (referring to the profit-oriented enterprises) is essential for the development and to the real overcoming of poverty: post-2015 Agenda, the European Commission, development banks, new financial instruments and new actors. Common consensus moves in this direction.

As a consequence the concerns of civil society with regard to human rights respect have been increasing, and finally resulted in pushing the business community and the international bodies to take their action to establish standards and criteria to foster their respect.

Since some literature on many cases of violation of those standards and criteria is already available, the present paper aims at providing an operational tool to translate them into a practical guidance. Environmental impact analysis and even social analysis are contemplated, but AVSI proposes also a method to carry out the necessary check on ‘sensitive activities’, i.e. those activities that can most likely result in violations and abuses against the most vulnerable communities.

A system of rules will never be able to put what Pope Benedict XVI called ‘the innate dignity of the human being’ back to the centre of business; however, we are convinced that defining common languages and practices, through the joint efforts of NGO and enterprise in the framework of international conventions, is now a vital basis of agreement.

The challenge we are facing (profit, non-profit, public institutions, international organizations, research) is therefore to develop a ‘Third Millennium’ enterprise capacity able to extend the horizon of the economic benefits to the environmental, social and cultural aspects of business. Without any distinction between profit and non-profit, the sense of doing business according to the vision of Pope Francis (Evangelii Gaudium, 203) must be stressed: «Business is a vocation, and a noble vocation, provided that those engaged in it see themselves challenged by a greater meaning in life; this will enable them truly to serve the common good by striving to increase the goods of this world and to make them more accessible to all.»

ALBERTO PIATTI
AVSI Foundation President
Abstract

Since 2009, a group of researchers and experts of the University of Rome ‘Tor Vergata’ has been studying the subject ‘Business and Human Rights’. Following the adoption in 2008 of the Special Representative of the UN Secretary General on Business and Human Rights Prof. John Ruggie’s ‘Protect, Respect and Remedy’ Framework, followed in 2011 by the ‘Guiding Principles on Business and Human Rights’, the AVSI Foundation has focused its attention on the subject by creating the ‘Expert Group on Business and Human Rights’. In the light of the two documents approved by the UN Council for Human Rights recognizing the direct responsibility of enterprises as far as the compliance with those rights in business activities is concerned, the Group is committed to contribute to the current debate on the subject, in particular addressing Italian enterprises in view of alerting and helping them throughout the laborious process of human rights compliance. Indeed, it is increasingly urgent and necessary to inform small and large-sized enterprises about the contents of their responsibility and the growing and insidious risks deriving from human rights violations, such as the occurrence of serious economic and reputational damages.

The research work, based on the identification and analysis of more than 300 cases involving human rights violations by enterprises and financial institutions at global level (presently included in a database), led to the elaboration of the first comprehensive document published in Italian on that subject (and thus translating in English). The paper covers the following topics:

- the complex and articulated universal system of human rights protection which includes the Bill of Rights, many other international treaties, and also some standards that - while not legally binding - start nevertheless to become important parameters for the behaviour of companies. Some of these standards are very well-known (such as the OECD Guidelines for Multinational Enterprises, the Global Compact, the Equator Principles, etc.), and they are important because they were promoted by large international organizations such as the UN, the OECD, the World Bank Group, etc.;
- the role of Non-Governmental Organizations (NGOs) dedicated to this subject, which foment large campaigns of denunciation, and that will increasingly impact the enterprises conduct;
- the outreach of national courts, both in the industrialized and the developing countries, which appear more ‘daring’ in judging about abusive companies behaviour, even outside their own national territory;
- national credit guarantee and rating agencies, which have recently adopted human rights standards as business requirements, thus progressively giving them more prominence;
- the new non-judicial mechanisms of control and action against abuses, such as the OECD National Contact Points and the Compliance/Advisor Ombudsman – CAO of the International Finance Corporation (IFC) of the World Bank Group;
- the growing importance of human rights within the framework of national policies and standards of Corporate Social Responsibility (CSR).

The fundamental problem is, therefore, to proactively identify and manage the risk of human rights violations through the due diligence process, which must be carefully applied to this new type of risks. Due diligence should lead to the identification of concrete measures that not only aim at avoiding the occurrence of abuse, but in a more holistic and proactive way can establish a climate of solidarity and cooperation within the human communities. Traditional activities of stakeholder management must therefore devote greater attention to the risk of human rights violations. Local community social and development interventions will then be the most important factors for the prevention and mitigation of those risks, as the part of a corporate culture able to ensure the development of entrepreneurial activity
in parallel with the economic and social growth of the human communities concerned. As a consequence, proactive due diligence currently represents the most concrete and effective tool to give a proper response to the contents of the Ruggie Framework about the direct responsibility of the enterprise to comply with human rights norms.
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While Italian newspapers and media seem to be much less sensitive to human rights violations committed by companies, those of the English-speaking world, instead, grant important spaces to the denunciation campaigns promoted and supported by large Non-Governmental Organizations (NGOs), defenders of the rights of human communities, in particular of the weakest and most vulnerable ones. Articles and case studies are today very frequently met in newspapers and magazines, but also on major TV channels like CNN and the BBC. However, it is Internet today to represent the main communication tool, allowing to freely and quickly reach the greatest number of people around the world. On-line magazines, but also many blogs and social networks such as Facebook and Twitter, are used for this purpose. Very often large NGOs working in this field use documentaries, movies and short films that evoke, better than any other instrument, the most serious violations of human rights by firms and their consequences on specific groups or communities. It is not unusual that consumers and users of goods and services are directly informed about the source of some products: did you know that the particular shirt you are about to buy is stitched by children forced to work for more than 12 hours a day? Do you know that your mobile may contain components made from materials coming from the mines of African countries, mined by underpaid workers - practically slaves? Do you know that the bank where you are depositors may have financed the construction of a large infrastructure that implies the forced relocation of entire communities, sent away from places where they have lived for centuries and from which they usually draw their only sustenance?

A group of British NGOs, for example, has already raised the case of the so-called ‘conflict minerals’, i.e. minerals used to produce some components of mobile phones (which we will discuss in more detail when illustrating the case studies). After the complaint of exploitation of child labour used in illegal mines under the control of the guerrillas in the Democratic Republic of Congo, the British journalist Frank Poulsen has produced a documentary film entitled ‘Blood in the Mobile’, which covers the events and the current situation of the Congolese mining sector, as part of a media campaign against Nokia. Cell phone consumers had the possibility of learning how an important component of that tool - today so helpful and well known for all – is produced through violence and abuse.

More recently, the attention of some NGOs focused on the issue of drilling in the Arctic by various oil companies. In July 2014, the Agency ‘Don’t Panic’ created the animated short movie ‘Everything is NOT awesome’, as a part of Greenpeace’s campaign for the protection of the Arctic. The most interesting aspect is the involvement of Lego (the famous toy factory) which, despite having recently renewed its commitment to environmental protection, had concluded an agreement with Shell for the sale of its toys in the service stations of the oil company. According to an approach now commonly used by many NGOs, this behaviour was considered as a support - if not a form of complicity - to the activities of Shell, accused of pollution and other human rights violations.

Another significant case is the one that pitted the indigenous community of Puebla Indigena Kichwa de Sarayaku against the Government of Ecuador. In 2012 the Inter-American Court of Human Rights dealt
with the oil extraction activities carried out by an Argentinian multinational company in the territories inhabited by that indigenous tribe. The court ascertained that the representatives of the tribe had not been consulted before the signing of the agreement between the Argentinian multinational and the Ecuadorian oil company. The Court has also recognized that mining activities polluted and destroyed large areas of the rainforest, creating environmental damage and endangering the survival of indigenous peoples, thus violating their human rights to life, health, physical integrity and human dignity. The Inter-American Court subsequently decided in favour of the indigenous tribe, recognizing the violation of their ancestral right to property of those territories, condemning the Ecuadorian Government to compensate such community, in addition to requiring the establishment of an adequate consultation process of their representatives in the future.

Certainly more complex, but no less significant, is the case of Yahoo! search engine in China. Yahoo! was the first provider to open an office in China in 1999, becoming over the years, the most used engine by Chinese users for their search services as well as for e-mail. In 2005 Yahoo! was accused of complicity with the Chinese Government because the provider had met the latter’s request to censor certain keywords and useful phrases to search on Internet, in order to limit access to information by the Chinese users. In addition, Yahoo!, again at the request of the Chinese Government, had provided the authorities with Internet addresses of some dissidents, thus allowing their detection and subsequent punishment. As a result of the media campaign organized by ‘Reporters Without Borders’, Yahoo! not only apologized for the violation of which it had been an accomplice, but also compensated (through the opening of a trust fund and the settlement of the legal expenses) a Chinese dissident journalist sentenced to 10 years in prison, because he had been accused of having disclosed a private release of the Chinese Communist Party. Yet Yahoo! had only obeyed local authorities!

Many other cases can be found on the net, even if they are the subject of information campaigns very different for importance, intensity and duration. Just a few of the cases of violation were ultimately subject to prosecutions before national or international courts. However in an increasing number of cases, the businesses affected by the accusations were forced to provide embarrassed answers or to adopt concrete measures in order to eliminate or mitigate the damage suffered by the communities concerned, going as far as to scaling or even cancelling activities or projects. It is significant that many of those cases ended with a compensation to victims, even without an official recognition of responsibility by the enterprise involved. The fact remains that the ‘blame and shame’ of public opinion creates a reputational damage that affects the company’s image among consumers or users of its services, and it can also impact negatively on the attitude of its funding bank or its industrial and commercial partners. And what about the potential consequences to the position of the managers involved?

The risk of violation of human rights, then, not only exists, but is often difficult to predict and - more importantly - it is hard to figure out its negative impact on the company involved. Just as it is the case of a snowball, whose size is known only when it begins to roll, but without the possibility of saying how big it will be when finally stopping.
Why does the international human rights system affect business nowadays?

When dealing with the topic of human rights, it is difficult not to recall some fundamental acts of history and politics, which have been the cornerstones of the development of mankind, from the Declaration of the Rights of Man and of the Citizen (the French Revolution) to the Declaration of Independence (which gave origin to the United States of America), up to the Universal Declaration of Human Rights, adopted by the United Nations (UN) in 1948.

It is inevitable that, when mentioned in this way, those steps of human history, although essential, may appear theoretical or even rhetorical exercises; however certainly they are in contrast to the horrors and atrocities often reported by the media, and unfortunately not only in the least developed countries or in those affected by conflicts. It seems - and certainly that is not completely wrong - that we are still far from the assertion and protection of those universal rights that many human communities consider as the basis of civil life, of democratic systems, of equality of human beings in the respect of their dignity.

Several intellectuals, politicians, public and private institutions, CSOs and even small groups of men and women around the world, are however increasingly raising their voices to condemn the activities of the States, but also of groups, individuals, or enterprises; they protest against racial, gender or religious discrimination, against the inefficiency of systems of justice, against the use of torture or other degrading treatment, against all kinds of violence, especially towards the most defenceless members of society such as women, children and indigenous communities. Those claims are circulating today with increasing strength thanks to the accessibility and the wide coverage of the large information systems such as newspapers and television networks (CNN, BCC or Al Jazeera are the best known, but certainly not the only ones). And what about Internet, which allows a small Sichuan countrywoman to denounce the death of her chickens, perhaps allowing to prevent the outbreak of a major epidemic? The most important examples certainly include: the media campaign against the banks financing the production of nuclear weapons (‘Armed Banks’), the boycott of the garments produced by child labour with Uzbekistan’s cotton, or by workers subjected to degrading conditions in textile companies, as evidenced by the case...
of the accident occurred in April 2013 to the Rana Plaza companies in Bangladesh (inter alia, in the latter case a very effective action to inform the consumers was conducted through labels put on the product of a well-known brand by an unknown hand reporting the inscription ‘forced to work exhausting hours’. One can imagine the reaction of consumers!).

It is therefore difficult to deny that human rights, far from remaining abstract principles, have instead become - and will become more and more - the simplest and most immediate means of protection against any form of abuse also, and especially, when national systems are short-sighted, deaf or ineffective.

Moreover, such rights, such great principles also have some key advantages for the user: they are as simple as the right to life or to equality; they are easy to understand and are so large that can cover many different forms of unlawful conduct. Although we cannot say they are absolutely universal yet, it is certain that most of the human communities of different races, ethnicities and religions presently consider them as culturally acquired, though with some exceptions. It is also a fact that no Government, no judge, no police authorities and no one can presently feel sheltered from the ‘blame and shame’ of the public opinion following the breach or the simple allegation of violation of those rights. And nowadays hitting the image, the reputation of a person, a Government or a business, can generate a chain of consequences with a result of damage - including material – which is difficult to predict.

But there is more. In recent decades a massive expansion of the scope of human rights has been verify. Certainly born to protect the individual from the behaviour of the State and its bodies, the respect of those rights is now required also in the performance of economic activity and, more directly, it is considered as due by the enterprises, that are its key players. Who ignores the media campaign against Nike for its soccer balls manufactured through the labour of exploited children? Less known, but certainly no less serious (as already shown above), the consequences suffered by Yahoo! for having revealed the Chinese Government the names of dissidents who expressed their political opposition through Internet.

The world before and after Ruggie

If until a few years ago the obligation to defend and protect human rights pertained to States, it is presently clear instead that the vast majority of human rights may relate directly to the economic activities and therefore to the conduct of enterprises.

In 2005, the then Secretary-General of the United Nations appointed a Special Representative - professor John Ruggie - with the task of evaluating the relationship between business and human rights. After three years work, the Special Representative drafted the now famous ‘Protect, Respect and Remedy’ Framework. Later on, in 2011, in order to facilitate its understanding and create a common platform for achieving what it expected, Ruggie drafted the Guiding Principles on Business and Human Rights (Guiding Principles), which constitute the operating tool for the implementation of the Framework. Both those instruments are addressed to States as well as to all types of enterprises, from the multinational ones to the State-Owned Enterprises (SOEs), to small and medium-sized companies. The structure of the Framework and the Guiding Principles is substantially identical: it is divided into three pillars containing the fundamental principles relating to the obligations of States and the responsibility of enterprises with regard to human rights violations. The three pillars are: i) State duty to protect human rights; ii) corporate responsibility to respect human rights; iii) the need to ensure access to remedies for victims of abuse, or the possibility to have one’s rights guaranteed by judicial and not-judicial bodies, both nationally and internationally (access to remedy). The three pillars, which are to be treated as interdependent with one another, define the obligations of the involved entities as well as the policy that must be necessarily pursued by States and companies (such as the policy of Corporate Social Responsibility-CSR, the protection of workers, etc.). Such tools - and in particular the Guiding Principles - represent a revolution of indisputable scope for two main reasons: i) they constitute the first standard instrument at international level that definitely establishes the enterprises responsibility to comply with
human rights; ii) through them it is clearly outlined that while States have the obligation (duty) to protect human rights (abiding by the international law sources that are binding for them), according to Ruggie the enterprises - although not legally bound - have a «responsibility to respect» them that is not «grounded in hard law» but «instead on societal expectations»\(^2\). In this way, the Special Representative avoids taking on the difficult terrain of the distinction between hard and soft law, on which international law scholars have poured rivers of ink, affirming instead that the respect of human rights by the enterprises remains on them, since presently it derives from a 'universal' expectation of the international community. Through those two acts, adopted by the UN Human Rights Council with Resolutions 8/7 of 2008 and 17/4 of 2011\(^3\), the international community has made an incredible step forward, though little known in Italy at present. The Ruggie Framework definitively establishes that the universal human rights system applies directly to business activities and that, if it remains with the States the obligation to protect them, enterprises presently bear the responsibility to independently and directly respect them. In every corner of the world - at least in principle - administrative authorities, and judges could then even charge a company with the violation of any of such rights. Therefore civil society’s power to resort to all competent authorities, besides of protesting and denouncing, results incredibly enhanced, and that is true for all its diverse articulations, institutions and associations. As a consequence, the direct application of the human rights system to enterprises exponentially increases the risk of human rights violations, with subsequent economic and/or reputational damage – which can be even worse for many of them.

Notes


The concepts of Business Sustainability or Sustainable Development (SD) and Corporate Social Responsibility (CSR) are closely connected with the theme of human rights applied to the exercise of economic activity. The two conceptual dimensions have often been treated indistinctly and after the advent of the Guiding Principles their contours are even more blurred. The origin and evolution of the two concepts are, however, profoundly different.

The concept of sustainable development (or sustainability) began to emerge with the goal of pursuing economic, social and technological development able to meet the present generations’ needs without compromising those of the future generations. Sustainable development is then a leading principle that should direct the economic activity in the broadest sense of the term toward a strategy of conservation of natural resources, preservation of biological diversity and environmental protection (that implies that ‘economic activity’ is not to be referred only to the enterprises, but also to other entities such as the same States, and all human communities). Hence the development of the concept of corporate sustainability, understood as the responsibility of enterprises to handle (both internally and externally) natural resources/energy and, thus, their own impact on the ecosystem of a long-term economic development.

Corporate social responsibility has developed, instead, since the 50’s of the last century, as a new way of operating of the enterprise when compared to the traditional approach, guided only by the principles of maximisation of the economic and financial performance. With the emergence of the stakeholder theory, when establishing its economic and trade strategies the enterprise should no longer consider exclusively the economic interests of its stakeholders, but it has to account for its own decisions to other bearers of interests (consumers, employees, suppliers, etc.). New CSR practices have developed, and the companies have voluntarily adopted codes of conduct or standards of conduct, over and above the legal norms already in force. CSR programmes are therefore developed, aimed at the welfare of employees (workers’ rights, attention towards creating healthier and safer workplaces); at the consumer protection (processing of annual reports characterized by greater transparency); at the protection of the most vulnerable groups (through the donation or devolution of part of the company’s profit to non-profit organisations); etc.

While CSR focuses mainly on social components that are affected by business activities (external stakeholders, workers, consumers, suppliers, public opinion), SD is centred on the management of the environmental factor, with reference to the potential impact that the company can generate internally and on the environment as well.

Over the last decade, the proliferation of regulatory mechanisms, voluntary standards and policies of ‘social sustainability’ - together with the increasing attention towards development models that provide not only economic prosperity, but also the improvement of the living conditions of the most disadvantaged countries - have led to a growing interest in the themes of sustainable development, also considered in its social dimension. The European Union has defined the SD as one of its long-term global
objectives: in the framework of its policies it has moved toward a more efficient use of natural and energy resources (especially with regard to climate change and to the goal of reducing carbon emissions) and integrated the sustainable dimension in the strategy on corporate social responsibility.

The increasing demand for social sustainability has thus progressively produced a ‘mutual contagion’ and CSR started to evolve according to the ‘Triple P Approach’ or ‘Triple Bottom Line’ (people, planet, profit), to include the topics traditionally related to SD, according to a holistic approach to economic and social progress.

More recently, the central role assumed by the human rights and the absence of an unambiguous definition of ‘social responsibility’ have placed CSR within a much broader framework (just think of the continuous references to norms and standards for the protection of human rights, such as the *Universal Declaration of Human Rights*, the *ILO Conventions* on workers’ rights, the *OECD Guidelines for multinational enterprises*, etc. that now increasingly integrated within corporate policies).

This implies that human rights compliance policies, although voluntary, are often included in the corporate strategy of CSR albeit with different degrees of intensity.

**Notes**

The value of those principles and rights that presently constitute the universal system of human rights protection is the result of a long historical, political, social and ideological path that has allowed to develop and establish a core of fundamental rules to defend the human being and his dignity, from ancient Greece to today.

On the one hand, retracing that path allows to fully understand the current situation and, on the other hand, to assess how human rights are really rooted in the consciousness of the human communities: not just those of the Western world, but also many others, scattered worldwide. Whether those rights are actually ingrained in human nature (‘natural rights’ as conceived by Grotius), or are considered - like many other rights - as established by political institutions, it remains hardly deniable that a huge number of people around the world will insist on their respect, and will feel outraged and offended when learning of violations perpetrated against groups or communities even geographically and culturally distant.

Although presently it seems hardly debatable that the increasing pressure from civil society aiming at the respect of human rights derives essentially from their being rooted in culture and human consciousness, it is useful to recall at least the most important steps of this path, also to provide a clear vision of the risks presently incurred by an enterprise responsible for violating them.

The first question to be addressed in dealing with human rights is their definition. In a purely literal sense, human rights are rights that belong to every individual simply for the fact of being a human being. In a larger sense, human rights represent instead a set of values and innate principles, characterized by universality and indivisibility, which are recognized as belonging to all human beings, regardless of nationality, religious beliefs, culture, gender, etc. From a legal point of view, human rights are fundamental rights of individuals, which consist in interests, faculties or claims, absolutely protected by the legal system.

Whatever the accepted definition could be, human rights have their basis and have their own evolution built on the concept of human dignity as the first expression of a natural law, tied to two elements: human nature and reason.

From a historical and philosophical point of view, the concept of Natural Law appears for the first time in ancient Greece and in particular in the thought of Aristotle who, speaking of justice, distinguished between what is right ‘by nature’ and what is right ‘by law’, considering the former more relevant than the latter. He defined nature as ‘cause’ and ‘purpose’; nature is the man and living beings’ origin, and at the same time it is the engine that determines the development of human societies. According to Aristotle, ‘natural’ is what has the same validity everywhere and is therefore universal, while what has been enacted by law, regardless of its essence, is ‘legal’.

In the Middle Ages, the doctrine found in the ius naturae - understood as a system of legal and philosophical theories that define the existence of a ‘right of nature’ - a complex of innate rights belonging to human being as such. Built on the precepts of the divine law, the Natural Law secularized the Christian
ethics and consecrated the individualistic conception according to which man, thanks to his will and
reason, is the master of his own actions (as opposed to all other creatures), and is therefore free.

One of the most important Natural Law proponents in the frame of the Christian doctrine was Saint
Thomas Aquinas, according to whom the principles of equality and dignity of the human being reside in
his being the only end of the Creation and the Divine Providence: in this sense, man, according to St.
Thomas, plays a central role within the Cosmos since he acts as a ‘mediator’ between God and the Cosmos
itself.

In accordance with St. Thomas Aquinas, Immanuel Kant, in his work ‘Groundwork of the Methaphysic
of the Morals’ stated that everything is oriented to the human needs; every man, because endowed with
will and reason, has his own dignity. But according to Kant, dignity, which coincides with man’s greatness,
consists precisely in the fulfilment of the moral law, the ought to be through which human nature is realised.
Consequently, Kant infers that human being and the respect for his dignity should be the goal of any and
each human action. In the categorical imperative that represents one of the cornerstones of his thought,
Kant says: «Act in such a way that you treat humanity, whether in your own person or in the person of any
other, never merely as a means to an end, but always at the same time as an end».

Although focused on a strong sense of human dignity, the Greek civilization and the medieval society
are still firmly based on status and hierarchy: thus, rights are not for everyone, but belong only to certain
social classes. The Magna Charta (1215) - that is considered to be one of the first documents recognising
to people certain rights in respect of the authority and the political power - does not attribute them to
everybody, but only to the most important social classes. The Christian tradition instead, on the one hand
has the advantage of considering all men equal before God, but on the other is founded on the concept of
sin, defining the human rights only according to an ethical and divine order.

At first with the Enlightenment and then with the American and French Revolutions, the affirmation of
human rights records its historical turning point. During the Enlightenment the concepts of Natural Law
and human dignity abandon the ‘divine’ connotation and their relationship with God, to embrace the logic
of reason. Natural Law takes a modern form and identifies with empiricism and rationalism instead of
metaphysics. Thomas Hobbes, John Locke, Hugo Grotius and Jean Jacques Rousseau, according to whom
the natural rights are the rights of the individual - that are citizen rights - are the main engines of this
evolution of the concept of Natural Law. During the Enlightenment, the State and the laws do not have a
’supernatural origin’, but are the result of a social contract freely entered into among citizens for their
common welfare and security; the authority is recognised as such by the free will of man, with the ultimate
goal of consciously submitting oneself to the general will of the community. The sovereign power remains
such until it is wielded in favour of citizens and protecting the natural rights (such as private property and
the freedom of thought) that, as a result of human equality, are inalienable. They are not conferred by any
State authority, nor can in no way be removed or restricted by the authorities. Compared to the past, for
the first time the society’s hierarchical model, typical of classical and medieval times, is questioned and
replaced by the egalitarian model: the Natural Law in the era of the Enlightenment is therefore rightly
considered as the archetype of the modern conception of human rights.

With the Enlightenment a new social class (the merchant) also developed, acquiring more relevance
and, as a consequence, a greater level of political participation within the society. In this period in England
another cornerstone of human rights is enacted: the Habeas Corpus Act (1679). It stipulated that nobody
could be arrested, and thus deprived of his personal freedom, arbitrarily and without hard evidence of his
guilt. After this document, in 1689 the Bill of Rights was approved; it recognized freedom of religion, of
speech and press.

In the course of the XVIII century, the American and the French Revolutions led to the adoption of two
documents that are the core of human rights in the modern era: the Declaration of Independence of the
American Colonies (1776), which claimed the right to liberty and revolution and the French Declaration of
the Rights of Man and of the Citizen (1789), which established for the first time fundamental rights such as
equality, private property and freedom of thought. After their independence from the British mothercountry,
the new United States of America adopted their Constitution (1787): its first 10 amendments became the
The Bill of Rights, which confirmed the freedom of speech and religion, the right to property, the prohibition of arbitrary confiscation of goods, and the ban on cruel punishment by the State authorities.

During the XX century, also as a result of the crimes perpetrated during the Second World War, the need to reaffirm a commonality of ethical values for peace and mutual coexistence caused the spread of constitutionalism at national level, and of communitarianism at supranational level, as an attempt to re-establish a balance between law and justice, and between justice and human dignity. That was the start of the principle of regulation and of limitation of the political power, in addition to the establishment of the value of morality and the rule of law.

The international community gave birth to a process of positivisation of human rights, beginning with the adoption of the Universal Declaration of Human Rights of 1948, where the primacy of human dignity on a global scale is acknowledged for the first time. In its Preamble, in fact, the Universal Declaration states:

«Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world».

International law begins to move slowly from a consensus-based system to a system based on values. The influence of the Universal Declaration in this respect has been substantial indeed: its principles have been incorporated into the national constitutions of hundreds of countries all over the world, and although it is not legally binding (because of its nature of Declaration), it represents the universal basis for a democratic society, and many of its rules and principles are deemed as having acquired the status of customary international law. As a result of the Universal Declaration, and with the aim of creating mechanisms of protection of the guaranteed rights, the United Nations Commission on Human Rights subsequently drafted two Covenants: the International Covenant on Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights (1966). The former focuses on the recognition of the right to life and the fundamental freedoms, while the latter establishes principles such as the right to self-determination, the right to food and education, the right to work and to an equitable remuneration, etc. Together with the Universal Declaration of Human Rights, the two Covenants constitute nowadays the Bill of Rights, a kind of ‘International Code of Human Rights’.


In addition to the Covenants, the United Nations have promoted over the years the conclusion of more than 20 treaties, which further specify the extent of the protection of human rights and fundamental freedoms, applying them to specific areas and sectors. They condemned the most severe violations (such as Convention on the Prevention and Punishment of the Crime of Genocide or the Convention against Torture), protected the most vulnerable categories (see the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Convention relating to the Status of Refugees); or, finally, dealt with particular topics (such as the Convention on the Elimination of All Forms of Discrimination and the Convention on the Rights of Persons with Disabilities). The result is a complex, and in some ways even confused, system that will be illustrated and clarified in the following pages.

Notes

1 Aristotle, Nicomachean Ethics.
2 Immanuel Kant, Groundwork for the Methaphysic of the Morals.
3 For a definition of the system of international customary law please refer to Box No. 1.
In affirming that human rights are directly applied to enterprises, John Ruggie had certainly faced the problem of exactly determining the applicable rules. In fact, we have to consider that human rights are governed by sources, or legal systems, completely different one from the other: from the Universal Declaration of Human Rights to numerous international conventions directly or indirectly related to human rights, to regional Conventions such as the European one, in addition to national systems. What kind of source and what principles must respect an enterprise that wants to be respectful of those standards? Ruggie tries to solve the problem by making explicit reference to:

- the Universal Declaration of Human Rights;
- the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;
- the most relevant Conventions aiming at the protection of labour, promoted by ILO - International Labour Organization (Declaration on Fundamental Principles and Rights at Work) and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

The dilemma of the rules to be observed

Throughout history, principles and rules relating to human rights have diversified and multiplied, to the point that now the situation is very complex and therefore difficult to understand and manage.
The pragmatic intent of Ruggie to clearly identify and limit the sources - or rather, the texts containing the rules applicable to business - does not completely solve the problem. In fact, throughout history, principles and rules relating to human rights have diversified and multiplied, and now the situation is very complex and therefore difficult to understand and manage. 

To put some order into this subject, it is useful to make some clear distinctions:

● The most important act, or source, is still the **Universal Declaration of Human Rights**. However, no matter its universal value, undoubtedly it would not have technically the nature of a binding source. In fact, according to some jurists, its mandatory nature would be based on principles and customary international norms - or, better, it would now be the expression of consciousness/awareness of most human communities all over the world.

● The two Covenants (**International Covenant on Civil and Political Rights** and **International Covenant on Economic, Social and Cultural Rights**), on the other side, are certainly mandatory international conventions, which are binding only for the States which have ratified them, and which are the vast majority of countries around the world.

● **ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy** (the guidelines for multinational enterprises on labour standards), resulting from a tripartite consensus among Governments, employers and workers. In 1998, by adopting the **ILO Declaration on Fundamental Principles and Rights at Work**, member States decided to enforce a basic core of labour standards, which includes the principles enshrined in **ILO Core Labour Conventions**: freedom of association and collective bargaining, prohibition of child labour and of forced labour, prohibition of discrimination at the workplace.

● Regional Conventions, namely the European (**European Convention on the Protection of Human Rights and Fundamental Freedoms**, and the **Charter of Fundamental Rights**), the African (**African Charter on Human and Peoples’ Rights**) and the Inter-American one (**Inter-American Convention on Human Rights**) are applied only to those countries of their respective regions of the world that have ratified them. They are the most advanced systems of protection of human rights at the international level because they have judicial bodies (regional courts) that ensure their enforcement. Nevertheless, it

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has to be remarked that those regional Conventions allow individuals to appeal only against human rights violations perpetrated by States and by the State apparatuses, but not to appeal against the behaviour of enterprises.

- In addition, many other international conventions dealing with specific subjects not immediately relating to human rights or to the protection of the environment contain specific principles or rules which fall within the system of human rights protection (i.e. referring to conventions in defence of life and health, such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). They may then be invoked against the behaviour of businesses, where damaged individuals or groups consider that conduct directly or indirectly detrimental (in terms of complicity, which will be illustrated later) to individual human rights guaranteed by the above mentioned general sources, or by the rules contained in those Conventions.

- The Guidelines for Multinational Enterprises adopted by the Organization for Economic Cooperation and Development – OECD (in their current version of 2011) are recommendations addressed to multinational enterprises by the OECD member Governments and those that adhere to the Organization as observers (see Box No. 2).

- Finally, to identify more precisely the content of the responsibility of the enterprises with regard to the respect for human rights, the so called standards have been gradually adopted: under that name are included groups of rules and principles of general applicability, namely regarding the behaviour of enterprises as such (for example the Global Compact, the International Finance Corporation Performance Standards on Environmental and Social Sustainability, the ISO 26000 Guidance on Social Responsibility, and the Equator Principles), and the standards applicable to specific industrial sectors in their complex - such as mining (i.e. OECD Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas), palm oil (Principles and Criteria for Sustainable Palm Oil Production) or diamonds (Kimberley Process). The more relevant standards are promoted by international institutions, such as the United Nations, the OECD and the World Bank; other by organizations representing industrial sectors such as oil or mining industries; but also by associations of public institutions (e.g. the national export credit agencies). However, they are characterized by a fundamental and common characteristic: being voluntarily adopted by enterprises, international organisations and other private organizations of the civil society. Those standards, although not legally binding, are thus voluntary adhered by companies which declare that they respect them (in their official documents, on their websites, as well as in their annual reports). There is consequently a good ground to hypotize that in a not-too-distant future some public State administration or judges might recognize their binding force as contractual obligations. In any case, adherence to them and their respect will be always an important evidence of a positive corporate culture with regard to the respect for human rights compliance, since public authorities and the courts in many countries of the world consider it as an important parameter, when they are called to judge the firms’ conduct. Indeed corporate culture is very important, especially in today’s world, because it is considered an integral part of the image of a company and its behavioural standards and it has in fact a great relevance also for other important enterprise counterparts, such as rating agencies, international financial institutions and commercial banks. The global human rights system becomes even more complicated considering that those standards are really numerous, and actually cover almost all business activities.
All that certainly gives the impression of a complex system, difficult to understand and manage. The manager (or the official of the company) should instead have strong references in order to always understand what is lawful and what is not. How else could he take decisions, how could he give start to or frame new programs or projects? In any case, it will always be true that the most careful analysis and forecast do not eliminate the risk in any business activity. In fact, the risk of human rights violations could emerge due to unforeseen factors, or could become manifest long after the normal running of a business or a project. And it is precisely the ‘risk factor’ the most understandable element for the enterprise, the one it is more accustomed to, because it is aware of the need to assess the possible damage to the environment, the consumers, or the risks that might result from natural or political events. Those arising from violations of human rights have emerged more recently, but that is not a reason for considering them less dangerous.

Let’s go back to the rules to be observed. It has been drawn up, with some approximation, a ‘tentative list’ (proposed hereunder, Table No. 1).

Given the breadth of those principles, today a thorough examination of the practical cases is extremely important, and will become more and more relevant in the future, because it allows to understand more clearly what the national administrations, judicial systems and, of course, civil society organisations, believe to be a violation of the principle of equality, of freedom of association or, even more difficult, to the right to education, etc.

It has been briefly introduced the concept of ‘risk’ of human rights violations, that will be analysed more in depth later on. At this point is certain that the risk factor consists of the potential non-compliance with the rules of the international system; its management, therefore, rests on a better knowledge of those rules. Other relevant elements of risk are due to the presence of national laws, but also to the potential and effectiveness of the controllers (especially the CSOs), as well as of the public, judicial and administrative authorities in charge of verifying the violations and of applying sanctions. It is perhaps useful to note that, because of those further aspects, the universal system of human rights protection appears even more diverse and complex. In fact the relating national norms are of the most various origins (they include the rules concerning the social responsibility of enterprises as well as administrative, criminal or labour law), and nature and potential of the actors involved are very different too: from the

BOX 2

OECD Guidelines for Multinational Enterprises - 2011
IV. Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:
1. Respect human rights, which mean they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.
international institutions, to NGOs, from national courts to new bodies of advisory/administrative type with tasks of investigation and mediation, such as the IFC Compliance Advisor/Ombudsman of the World Bank – described later on - or the OECD National Contact Points. NCPs are the offices created by national Governments to ensure the promotion and the correct implementation of the OECD Guidelines for Multinational Enterprises. The National Contact Points can be referred to by parties such as NGOs, trade unions, workers’ associations and categories that deem to be aware of, or to have directly suffered, human rights violations, in reference to the provisions of the Guidelines. They do not adopt binding decisions, but their investigations, conclusions and suggestions, are certainly very important documents, both for the media and, where appropriate, even before national courts.

A synthetic overview of the most important sources can be useful, in order to understand this complex system (see Box No. 3).

<table>
<thead>
<tr>
<th>Principle/rule</th>
<th>Situations connected to the principle based on case studies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to life</td>
<td>Violations committed by the security apparatus of enterprises, by officials or employees of the State responsible for safety, or arising out of the use of weapons or dangerous products that have caused death or impaired the physical integrity of persons.</td>
</tr>
<tr>
<td>Right to a healthy environment/Right to health</td>
<td>Every type and form of pollution that caused damage to the natural environment, to people's health or to their living conditions.</td>
</tr>
<tr>
<td>Rights of indigenous peoples</td>
<td>All kinds of activities that have negatively affected indigenous peoples, their natural, cultural and social environment.</td>
</tr>
<tr>
<td>Freedom of movement</td>
<td>Compulsory displacement of individuals and communities.</td>
</tr>
<tr>
<td>Right of workers</td>
<td>Gender, ethnic, religious or cultural discrimination, prohibition or restriction of the freedom of association, forced labour, child labour, working conditions hazardous to life and health.</td>
</tr>
<tr>
<td>Civil and political rights</td>
<td>Obstacle to exercise of civil and political rights, or to the freedom of expression and thought.</td>
</tr>
<tr>
<td>Non-Discrimination</td>
<td>All forms of racial, ethnic, religious or cultural discrimination not relating to workers’ rights, such as apartheid.</td>
</tr>
<tr>
<td>Bribery of public officials</td>
<td>Bribery of public officials who cause or facilitate human rights violations.</td>
</tr>
</tbody>
</table>
**International Bill of Human Rights**

The *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* form the *International Bill of Human Rights*. The *Universal Declaration*, adopted by the United Nations General Assembly in 1948 (with the favourable vote of 48 member States, no votes against, and the abstention of only Saudi Arabia, South Africa and six countries of the then Communist block) consists of 30 articles and represents the cornerstone of the fundamental rights of the present human society. The principles contained in the Declaration have been translated into over 400 languages and dialects, and today are mostly considered as customary international law (although, being in itself a Resolution of the United Nations General Assembly, it has no binding effect). Almost twenty years after their approval, those principles have been articulated and encoded in two international treaties, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (the two *Covenants* and the Optional Protocol to the Covenant on Political and Civil Rights, were adopted by the General Assembly of the United Nations in 1966 and entered into force in 1976. In 1989 a second *Optional Protocol* to ICCPR was finalized and one to the ICESCR in 2008, which came into force in 2013). When ratifying the two *Covenants*, the States are de facto obliged to recognize the protection of the rights and freedoms enshrined in the *Declaration*.

**ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy**

The *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (adopted by the ILO Board of Directors in 1977 and last updated in 2006) condensed the general principles on the rights of the workers, to be applied by enterprises, Governments, employers and workers. They are referred to employment, education, freedom of association, protection of health, as well as the main conditions to be granted to workers. Although those principles are contained in an act per se not mandatory, it has to be remarked that they derive from the several Conventions promoted by ILO on labour standards that are instead legally binding acts.

**European Charter of Fundamental Rights**

From December 2009, with the entry into force of the *Lisbon Treaty* (article 6, TEU), the *Charter of Fundamental Rights of the European Union*, which was attached to the Treaty as a declaration, has been given a legally binding value (namely the same legal value of the founding treaties of the European Union). It gathers together in a single text the civil, political, economic and social rights of the European citizens and of all those living in the territory of the Union (except for the United Kingdom and Poland, with reference to the territorial application of the Charter). The Charter not only reaffirms the rights contained in the *European Convention on Human Rights (ECHR)* (adopted by the Council of Europe), but also includes additional rights such as the right to the environment, the right to good administration, and to protection of personal data. The Charter divides the fundamental rights into six categories: dignity, freedom, equality, solidarity, citizenship and justice. The seventh chapter contains general provisions regulating the scope of application of the Charter (art. 51, para. 1, the provisions of the Charter «are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the member States only when they are implementing Union law»), and the relationships with the ECHR.

While the accession to the ECHR by the Union as a whole is still pending, a full correspondence in the interpretation of the rights established in the Charter and the rights dealt with in the ECHR (respectively by the Court of Justice and the European Court of Human Rights in Strasbourg) would be desirable.

**European Convention on Human Rights and Fundamental Freedoms - ECHR**

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* was adopted in 1950 and came into force in 1953. It has been ratified by 47 member States of the Council of Europe, including the current 28 member States of the European Union, which are obliged to respect the freedoms and rights of
individuals and legal entities guaranteed by the Convention in their own domestic legal order. Since 1998 the European guarantee and implementation system of the Convention is the European Court of Human Rights, which decides on the appeals submitted by the member States and by natural and legal persons (without any distinction of gender, race, colour, language, religion, political opinion, origin, birth).

OECD Guidelines for Multinational Enterprises
The OECD Guidelines for Multinational Enterprises are recommendations (voluntary principles and standards) that the signers of the 1976 OECD Declaration addressed to the multinational enterprises. As it is stated in the preface, «The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards», thus contributing to the economic, environmental and social advancement.

In 2011 the Guidelines devoted an entire chapter to the protection of human rights. In line with the Ruggie’s Guiding Principles, they reaffirm that States have the duty to protect human rights, affirming also that «the enterprises should» behave in a manner «to prevent or mitigate adverse human rights impacts» by adopting «a policy commitment to respect» them, using for this purpose due diligence processes, and possibly providing a remedy for the human rights violations in which they were involved (chapter IV) (see Box No. 2).

The Guidelines also provide for the establishment of National Contact Points to which the individuals having suffered human rights violations attributable to enterprises can refer directly (in this regard, see the Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, in part II of the Guidelines).

Global Compact
The Global Compact was launched in 1999 on the initiative of the (then) United Nations Secretary-General Kofi Annan, during the Davos Economic Forum. Welcoming Kofi Annan’s invitation to sign together with the United Nations «a global compact of shared values and principles» to give «a human face to the global market», large multinational corporations, public and private institutions and civil society organizations gathered in 2000 in New York to adopt the Principles of the Global Compact. The Global Compact is made of 10 principles of «voluntary corporate responsibility initiative» (over 12,000 companies, institutions and associations in most countries of the world joined the Pact later on). They can be grouped into four categories: human rights, labour, environment and anti-corruption (the latter principle was added in 2004).

IFC Performance Standards on Environmental and Social Sustainability
In the year 2012 the IFC has updated its Performance Standards that define the responsibilities of recipients of its funding activity in relation to the assessment, prevention and management of environmental and social risks possibly arising from the funded projects. The eight Performance Standards include:
- Assessment and Management of Environmental and Social Risks and Impacts
- Labor and Working Conditions
- Resource Efficiency and Pollution Prevention
- Community Health, Safety, and Security
- Land Acquisition and Involuntary Resettlement
- Biodiversity Conservation and Sustainable Management of Living Natural Resources
- Indigenous Peoples
- Cultural Heritage

The application of the Performance Standards is widely enhanced by the presence of an Ombudsman (CAO), whom can be addressed by the subjects who assume they have been harmed by violations of human rights committed by enterprises (on this issue see also the Operational Guidance, updated in 2013).

Equator Principles (EP)
The Equator Principles (developed in 2003 by IFC and other international financial institutions) have been voluntarily adopted by over 80 banks in 34 countries. They apply to international projects co-financed by
public and private funds, in order to assess and manage environmental and social risks. The ten Principles are the following:
- Review and Categorisation
- Environmental and Social Assessment
- Applicable Environmental and Social Standards
- Environmental and Social Management System and Equator Principles Action Plan
- Stakeholder Engagement
- Grievance Mechanism
- Independent Review
- Covenants
- Independent Monitoring and Reporting
- Reporting and Transparency

The above principles are meant for all the industrial sectors and four types of funding: Advisory Services, Project Finance, Project-Related Corporate Loans and Bridge Loans. In 2013 a new version was edited (Equator Principles III).

**Guiding Principles on Business and Human Rights:**

*Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*

Adopted by unanimity by the UN Human Rights Council in June 2011, the Principles (developed by John Ruggie, the then Secretary-General’s Special Representative on Business and Human Rights) constitute a ‘guide’ addressed to enterprises and States to prevent, manage and mitigate the adverse effects on human rights caused by economic activities.

The Guiding Principles are based on three pillars: ‘protect, respect and remedy’ and in particular include:
- **State duty to protect human rights**;
- **corporate responsibility to respect human rights**;
- **access to remedy** (the need to guarantee victims of abuse’s access to judicial and non-judicial mechanisms, both nationally and internationally available).

In June 2014 the UN Human Rights Council adopted a resolution sponsored by a group of States led by Ecuador, establishing a Working Group for the elaboration of a proposal for a legally binding international instrument in the field of business and human rights. The beginning of the activity of the Working Group is planned for January 2015.

**ISO 26000 - Guidance on Social Responsibility**

*UNI ISO 26000 Guidance Standard on Social Responsibility* (2010) is an international standard, but does not include a certification (such as quality management, environment, security systems, or SA 8000 standard on social accountability). However, it provides the guidelines on the Corporate Social Responsibility - CSR. ISO 26000 is applied to any type of organisation (whether public or private enterprises, administrations, NGOs) regardless of size, sector of activity and location, providing recommendations on CSR. The adhesion to that standard is exclusively on a voluntary basis. It is divided into 7 core subjects covering the following fundamental themes of social responsibility:
- Organizational governance;
- Human rights;
- Labour practices;
- The environment;
- Fair operating practices;
- Consumer issues;
- Community involvement and development.
Box No. 3 evokes only the basic sources for enterprise compliance with human rights, but the entire system is much more complex. From the practical point of view, one should firstly turn to the Ruggie’s *Guiding Principles*, which means taking the *Universal Declaration* as the prime and general standard of reference. Interpreting the principles of the *Declaration* in compliance with ethics and good faith, the vast majority of possible human rights violations can be readily identified. The two *Covenants* can be considered as interpreting the *Declaration*, as well as *ILO Conventions* applying the human rights principles to labour. Moreover, an enterprise can feel sheltered from most serious violations when it behaves in accordance with the *OECD Guidelines* and with the voluntary standards applicable to its field of activity, if it adhered to such standards. The above considerations do not pretend to solve the problem, however they can represent a first orientation. The cases analyzed in this paper will be perhaps even more explicit, since, showing what has happened in practice, they can certainly identify the businesses most at risk of human rights violations.

**Notes**

1 Ratifications, declarations and reservations can be found on https://treaties.un.org.
2 Conventions No. 29 and 105 on forced labour (with reference to the Convention No. 29, it is worth mentioning that in June 2014 a new binding protocol was adopted with the aim of dealing with the most recent forms of slavery, such as human trafficking); Conventions No. 87 and 98 on freedom of association and collective bargaining; Conventions No. 100 and 111 related to discrimination at workplace; Conventions No. 138 and 182 on minimum age for admission to employment and on worst forms of child labour.
3 In addition, in March 2008 the *Arab Charter on Human Rights* came into force.
The normative framework just briefly described shows the complexity of the international regulatory system for the protection of human rights. The critical step accomplished by Ruggie in establishing the direct applicability of human rights standards to enterprises has been accepted by other major international institutions – such as the World Bank and the OECD - which have consequently adopted or reformed the standards mentioned in the previous pages. Although not legally binding, they are of considerable importance because they originate from those authoritative international bodies: indeed important national institutions, such as export credit institutions and rating agencies, currently require from enterprises their compliance with specific standards, almost always containing the rules to protect human rights too. Some of those agencies are able to raise a significant pressure on enterprises.

Among the drivers of human rights compliance by enterprises which will be analysed below, OECD plays an important role through its promotional activities and the inquiry on complaints by the National Contact Points about alleged breach (as already mentioned).

The new attitude of the international financial institutions

The most important international financial institution is, without any doubt, the World Bank Group (WBG), consisting of five independent institutions (see Box No. 4)

**Further drivers of human rights compliance: international institutions, export credit institutions, and rating agencies**

*An increasing number of companies use social rating mechanisms to disseminate their corporate culture and attract investors*

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**World Bank Group**

- **International Bank for Reconstruction and Development** (IBRD) which funds Governments through loans at market conditions;
- **International Development Association** (IDA) which grants interest-free loans to the Governments of the poorest countries;
- **International Finance Corporation** (IFC) which supports the private sector through the acquisition of shareholdings, providing enterprises with loans, as well as assisting States in developing their private sector;
- **Multilateral Investment Guarantee Agency** (MIGA) that ensures private investments in the developing countries as far as political, natural disaster and exchange rate risks are concerned;
- **International Centre for Settlement of Investment Disputes** (ICSID) that handles arbitrations in the disputes between States and private entities, when dealing with investment.
The World Bank Group has long been reluctant to list the respect for human rights among the parameters for granting its funding. In more recent times, however, and especially after the adoption of the Ruggie Framework, it has finally aligned with the internationally prevailing conception which considers human rights as an essential condition for the promotion of sustainable development.

Moreover, the negative social and environmental impacts related to the development projects financed by the Bank had created (and still cause) a wide debate on the accountability of the international financial system with regard to respect for human rights. The attention of scholars and of the whole international community has increasingly concentrated on three interrelated concepts: combating poverty, granting fundamental freedoms and protecting the environment. It is now clear how those three elements are all integrated into a holistic view of development, which considers the respect for human rights and the environment as conditions necessary to promote the economic and social growth of every human community. In recent years, therefore, the Group has accepted the concept of sustainable development as fundamental policy, and has thus reoriented its global strategy by recognizing that human rights represent not only an ethical requirement, but a fundamental need to be complied with for promoting development. Nevertheless, the number of complaints relating to projects financed by the World Bank Group (as well as other financial institutions and commercial banks) has significantly increased. The latest report by ‘Human Rights Watch’ illustrates an example taken from a project financed by the Bank in Western Ethiopia’s Gambella region. The report affirms that the Bank, although pursuing development objectives (such as education, health, access to drinking water, the construction of roads and facilities for intensive farming, etc.), would have ended up favouring significant human rights violations within the framework of its development programme, which had caused the coercive displacement of the population; that would have happened while aiming at providing the affected communities with a better standard of living. This means that the Bank, like all other financial institutions, is progressively required to grant a higher level of care and monitoring of projects, in order to ensure the respect for human rights.

The best evidence of the Bank’s changed attitude is the adoption of new Operational Policies that include the protection of human rights, as well as the revision in 2012 of the IFC Performance Standards (see Box No. 3), which is intended precisely to adapt those standards to the protection of human rights as outlined in the Ruggie Framework. That means that the enterprises which benefit from IFC’s funding are therefore obliged to respect those standards while performing their own activities. That really matters, if considering that IFC is among the greatest worldwide promoters and funders of those operations putting together public and private sector (Public Private Partnerships-PPP), which are known by the acronyms of BOT (Build, Operate and Transfer), BOO (Build, Operate and Own), etc. Currently, given the increasing scarcity of public resources for financing major projects, those models make it possible to mobilise private lenders in order to build major infrastructures in the world (particularly in the emerging countries). In all those cases, IFC’s participation constitutes a substantial contribution in terms of political guarantee and financial resources. In any case, since IFC is an international institution which is responsible to the world public opinion’s social control more than any private entity, in addition to Performance Standards it has also promoted the Equator Principles mentioned above. The updated version of this tool contains references to specific standards in human rights protection, which have then become full-fledged principles that banks must follow when financing projects. Further, IFC has its own instance of investigation and control, the Compliance Advisor Ombudsman (CAO) whose role will be better explained in the following sections.

The position of Export Credit Agencies (ECAs)

National export credit agencies (Export Credit Agencies-ECAs) are institutions which nowadays are present in almost all major countries involved in international trade operations, because they provide for exporters and investors with a guarantee against any losses due to adverse political or natural events
and exchange rate risks. OECD has given life to a Working Party on Export Credits and Credit Guarantees (ECGs), which from the 90's is also in charge of environmental and social protection within the framework of the projects secured by those organisms. In 2012 the OECD Council has adopted a recommendation containing the Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the so-called Common Approaches), defining the role of ECAs in implementing a process of environmental and social due diligence aiming at identifying and managing the risks. The recommendation provides for a periodic review mechanism, which has contributed to the elaboration of the current version of 2012. The renewed text shows a greater attention to the social aspect when compared to previous versions, more focused on the environmental risk. ECAs located in the OECD member countries have implemented the new Common Approaches, improving cooperation at national level with stakeholders such as industrial and banking associations; that has been possible thanks to a greater consultation and the adoption of the internal process of due diligence to be applied to individual operations. One of the most interesting aspects of the Common Approaches is the coordinating and monitoring mechanism established between the OECD Secretariat and the member States in view of disseminating the best practices reported in the annual reports of the national ECAs and of promoting a greater dialogue on the subject. Finally, one last important aspect is the monitoring mechanism of the operations and projects for which insurance guarantees were granted; indeed it continues throughout the entire life of the projects and serves to guarantee the effective social and environmental performance. The examination of the case studies highlighted some interesting situations where the agencies have withdrawn from projects to which they had previously granted their support: certainly one cannot underestimate the serious negative impact of such a withdrawal, both in terms of project funders, and of the other - local and foreign - involved counterparts.

Rating agencies

The progressive care for the human rights is also manifested through the development of indexes of social and environmental sustainability that are used by the rating agencies; examples are the Dow Jones Sustainability Index and the FTSE4good, both measuring the performance of companies that comply with the international standards of CSR through corporate governance, the respect for workers' rights, the attention to the environment and the climate risk, the supply chain, etc. An increasing number of companies use social rating mechanisms to disseminate their corporate culture and attract investors.

Notes

Obviously, human rights are not only guaranteed at international level, but they are provided for and punished by many areas of different national legal systems, including certainly constitutions, family law, labour law and, of course, also criminal law with regard to the most serious violations. Over the past 10/15 years, voluntary or mandatory regulations designed to nationally govern the behaviour of enterprises were also adopted and developed, with reference to their respect for the rights of the communities within which they operate. Many of the provisions contained therein reflect principles and human rights standards, environmental protection rules and prescripts traditionally related to CSR. It is to be noted that the rules on CSR are first and mainly the result of a philosophy deeply shared in the Anglo-Saxon culture: it prefers self-regulation by companies instead of imposing them mandatory standards by the State, especially in those very matters more related to ethical beliefs rather than to legal obligations. Those ‘codes’ or ‘standards’, which go under the name of Corporate Social Responsibility, were promoted on several fronts (private and governmental) and at different levels (national and international) by associations of private enterprises and other institutions of the European Union. In its communication of 2011 on the EU strategy on CSR for the period 2011-2014, the European Commission defined the Corporate Social Responsibility as «the responsibility of enterprises for their impacts on society»: the behaviour of enterprises must therefore be addressed to the realization of those values of social cohesion and sustainable development corporate social responsibility is based on1.

At international level, several guidelines and standards were adopted. Among the most relevant:

- **ISO26000 Guidelines**: they are addressed to public or private enterprises that wish to operate in a socially responsible way, regardless of their sector of activity or their social dimension (see Box No. 3).
- **Global Reporting Initiative**: it proposes a universal model of non-financial reporting for social and environmental information related to the company reporting. GRI also contains general principles for drafting reports and for the quality of information;
- **AA1000 (AccountAbility 1000)**: that standard is relating to the accounting and auditing process and to the social and ethical reporting. It includes the criteria for an impartial verification of the corporate sustainability report, by a process of consultation and involvement of the stakeholders;
- **SA8000**: it identifies a standard of ethical certification of the human rights respect, especially with regard to workers’ rights, to the protection against the exploitation of minors, and to the safety at the workplace.

Studying the mechanisms of prevention/reduction/certification of the potential social impact of the enterprises on the communities involved, however, implies the analysis of the role of the national Governments in the development of a responsible and sustainable corporate culture. According to the *Guiding Principles*, indeed, among the duties of the State there is the preparation of normative and programmatic tools aimed at ensuring «corporate responsibility to respect».

Therefore, in order to make sure that an enterprise complies with the «responsibility to respect», States must adopt appropriate regulations. But the character of voluntary nature, which has always

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distinguished the CSR tools, has historically limited any type of intervention in this respect, on the basis of the general principle whereby any ‘attempt to regulate something that goes beyond the law is in itself a contradiction in terms’. In addition, the lobby power exercised by large business groups and the fear of the potential impact that a strong regulation could have on competitiveness and competition, have often represented a further obstacle to the adoption of new requirements or of mandatory requirements.

This traditional reluctance has thus determined the proliferation of soft law mechanisms also at the domestic level, such as the standards and codes of conduct focused on CSR and designed to compensate for the absence of a compulsory regulation about potential social and environmental impacts of the enterprise.

These new tools, however, are not easy to manage: if on one hand they are designed to ‘institutionalize’ a model of socially responsible enterprise, on the other hand - in most cases - they are left to ‘spontaneous’ obedience. Moreover, even when provided within the frame of regulatory instruments, often they do not contain any mandatory requirement or sanction mechanism to be activated in the event of non-compliance. The result is that it is possible to find out hybrid instruments, neither mandatory, nor of an entirely voluntary nature. There should not, however, be underestimated that the public opinion often bases leading campaigns against major human rights violations on these tools, and that the courts of many countries consider the adoption and the enforcement of CSR codes as an important evidence of the corporate culture. The latter therefore ends up being an important parameter for assessing the liability of companies involved in such violations.

To better understand how and to what extent CSR rules are applied in the national legal systems, it is interesting to refer to a 2009 study published by the World Bank, which analyzed the different types of State intervention with regard to CSR. They were divided into: i) endorsing, ii) facilitating xi) partnering, and iv) mandating.

Despite the different approaches adopted, national Governments have therefore begun to enforce CSR initiatives primarily through three models: i) the incorporation of international principles and guidelines within national legal systems; ii) by introducing specific rules within the framework of the company law; iii) the request for ‘positive action’ such as the preparation of sustainability reports, etc., on the part of the enterprises. In addition, some countries have provided for the creation of ad hoc supervision and control governmental bodies (in Spain the National Council for CSR, in Germany the Council for Sustainable Development).

The most frequent criticism however concerns the weakness of those policies and regulations, in particular those falling under the ‘mandating activities’ such as the non-financial reporting, in the event of non-compliance: even when they are required by law, in most cases the applied principle is that of ‘comply or explain’, under which the non compliant enterprise will only have to motivate the reason of its non-adherence. The result is that often, in applying this principle, enterprises allege reasons of confidentiality or excessive costs in order to justify their non-compliance.

In Italy there are not specific mechanisms on CSR: some provisions about non-financial reporting are contained in the Legislative Decree 32/2007 on the implementation of the European Directive 2003/51 EC. The Decree, which has no specific reference to human rights, merely provides that, with regard to the annual report, it must include the financial and performance indicators and «if appropriate, the non-financial ones that are relevant to the specific activity of the company, including information relating to the environment and to workers». Other CSR standards (although referred only to social enterprises) are contained in the Decree of January 24, 2008 of the Ministry of Economic Development, which provides that this type of companies adopt social reporting guidelines. On March 20, 2013, Ministries of Labour and Economic Development published the National CSR Plan 2012-2014, also sent to the European Commission, which identifies the CSR strategy and objectives to be pursued at national level. The plan identifies among the objectives: «increasing the culture of corporate social responsibility of enterprises and citizens; promoting transparency and dissemination of social and environmental information; promoting the respect for internationally recognised guidelines». The areas of intervention include the respect for human rights, labour and environment protection and the fiscal good governance.
KIND OF INTERVENTION | DEFINITION AND EXAMPLES
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ENDORRING | ‘Endorsing’ refers to those activities of CSR promotion in which State/governmental instruments contribute to the dissemination of information relating to the CSR. This category includes tools such as training, training programs for businessmen, bestowal of special awards or labels for those companies that prove socially responsible. Belgium is a good example of this type of promotional activity. Since it was one of the first countries in Europe to bestow the so-called ‘social labels’ on the enterprises that adhered to the ILO Conventions on workers’ rights.

FACILITATING | ‘Facilitating’ intends those supporting activities, through which the Governments ‘facilitate’ the adoption of a socially responsible behaviour. This type includes the preparation of guidelines and examples of good practices, the provision of certification systems or financial incentives such as tax breaks and subsidies.

PARTNERING | ‘Partnering’ includes those cooperation activities where Governments collaborate with companies on specific projects (such as Public Private Partnership) or promote State involvement in private initiatives such as CSR multi-stakeholders’ fora (nationally and internationally as well). The Ethical Trade Initiative in the United Kingdom and the Round Table on Corporate Code of Conduct in Germany are both examples of those initiatives. In Italy, in 2004, the Ministry of Labour set up a Multi-stakeholder Forum on CSR (which, however, was terminated in 2004).

MANDATING | Those activities where Governments require the adoption of CSR mechanisms through the provision of regulatory instruments, are considered as ‘mandating’. In this category are included the non-financial reporting tools, some specific rules incorporated into the Enterprise Law, the adoption of decrees or administrative regulations. Examples of non-financial reporting can be found both in the frame of specific fields of activities, or in relation to particular categories of enterprises. As regards the first case, the Dodd Frank Act (United States) of 2012 requires special disclosure requirements for companies that operate in the field of minerals and oil. An example of the second kind is represented by the 2011 Spanish Law, requiring that State-owned enterprises or those linked to the Central Government draw up annual corporate governance and sustainability report. Another important example with reference to financial reporting is the Companies Act (United Kingdom) amended in 2013, according to which the information to be provided in the sustainability annual report must include not only those concerning environmental and social activities, but also consideration on their effectiveness. Regarding legal instruments governing companies, the Dutch Corporate Governance Code stipulates that the Board of Directors and company managers must take account of CSR issues in the performance of their duties. Finally in France a decree of 2012 (implementing the Grenelle II Act) provides for transparency obligations regarding environmental and social issues for both listed and non-listed companies with a turnover of over a billion.
With regard to the non-financial reporting, it is worth mentioning that on September 29th, 2014 the Council of the European Union approved the Directive on non-financial reporting (confirming the text adopted by the European Parliament on April 15th) in order to enhance the transparency and social responsibility of the large enterprises. In particular, the Directive requires that companies with more than 500 employees and those with a net turnover of EUR 40,000,000 or a net balance of at least EUR 20,000,000, are required to prepare an annual statement containing information in the following areas: environment, social policies relating to employees, human rights and corruption. Also in Europe the principle of ‘comply or explain’ is maintained, although the Commission adopts (non-binding) guidelines about the drafting of the policy statement. The Directive has been published on the Official Journal of the European Union on November 15th, 2014.

Always dealing with the dissemination of a human rights corporate culture at domestic level, national Governments are now on their way to adopting their National Action Plans to meet their responsibility to disseminate and promote the Guiding Principles, in addition to administrative measures for the promotion of CSR. So far, Denmark, United Kingdom, the Netherlands and Italy published their Action Plans on CSR and also on business and human rights, while other countries such as Belgium, Switzerland, Finland and Spain are completing the previous consultation process with all stakeholders (companies, business associations, trade unions, civil society, etc.) and/or the drafting of the final version of their own Plan for the implementation of the Guiding Principles.

Notes


2 A recent study by the Swedish Agency for Growth Policy Analysis showed how regulation result particularly relevant for the economic growth when defining the rules of the market, providing for stability and preventing the occurrence of negative trends; on the other side, a hyper-regulation, ineffective policies and vague rules can constitute a significant obstacle to economic investments and production. Swedish Agency for Growth Policy Analysis, The Economic effects of the regulatory burden, Report (2010-2014). Available on http://ec.europa.eu.

The role of watchdogs

If it is assumed that (especially following the Ruggie Framework) the principles and rules which constitute at present the international system for protecting human rights are directly applicable to corporate activities, it is beyond doubt that the administrative authorities and the courts of the member States (guarantors of public order and judges) have a direct jurisdiction to investigate, detect and possibly punish illicit behaviours. The system continues however to be applied first by State bodies that belong to different cultures, with different levels of knowledge, competences and effectiveness. Especially, in those countries where the division of powers is theoretical more than real (so that the Executive largely dominates the legislative and the judicial branches), the protection of human rights could be minimal or even non-existent.

That is the reason why the weakest and most vulnerable communities in the world are today mostly defended by those Civil Society Organizations (CSOs) and those Non-Governmental Organizations (NGOs), commonly known as human rights watchdogs.

Basing on the typology of activities carried out, NGOs involved into the protection of human rights can be mainly divided into three main types: Humanitarian, Service and Advocacy.

In the first group (Humanitarian), those organizations deal with emergency situations, providing aid and assistance to victims of humanitarian tragedies such as wars, natural disasters, epidemics, etc.; in the second group (Service), the intervention of NGOs consists in their direct support to the affected communities through a specific project or within geographical area (such as health care or the building of infrastructure in the countries of the Southern hemisphere, etc.). Advocacy activity is carried out by most of the NGOs dealing with business and human rights and it has substantially developed at global level in recent decades. Those NGOs carry out lobbying activities, monitoring, dissemination of information, assistance and support to victims to have recourse to judicial and non-judicial remedies: all that they consequently have a decisive influence both inside and outside of institutional contexts. Such of influence is the special status accorded to NGOs accrued also within the international institutions such as the Economic and Social Committee of the United Nations and the Council of Europe. NGOs were thus able to develop more effective forms of action, such as the definition of the contents of the international agenda, their presence within the deliberative processes, and even the elaboration of norms and standards in their capacity as representatives of the most vulnerable human communities.

NGOs are also a powerful tool for information, communication and mobilization of public opinion. Their well-known complaints and boycott campaigns against the most serious human rights violations by the enterprises have in many cases allowed the achievement of extraordinary results. Just think of the Nike case, which broke out in the 90’s and forced the company - publicly charged with exploitation of child labour (with a consequent significant reputational damage) - to terminate subcontracting in Cambodia. The case of Big Pharma in South Africa is even more significant: in 2001, the great pressure...
exerted on world public opinion by a coalition of NGOs has brought 40 pharmaceutical companies to withdraw the lawsuit they had filed against the South African Government for unlicensed manufacturing of antiretrovirals drugs essential for the treatment of AIDS.

NGOs have also further crucial tasks such as the support and assistance to victims of abuse in lawsuits. In such cases, NGOs are increasingly allowed to participate in court proceedings, through the institution of *Amicus Curiae*, as well as representing the victims as counsel. For example, ‘Earth Rights International’ represents some Colombian families in their lawsuit against the company *Chiquita*, accused of having financed the activities of paramilitary groups which were responsible for serious human rights violations. Another significant example is the NGO ‘Accountability Counsel’, which was responsible for assisting the victims of abuse in complaints submitted to supervisory bodies of large financial institutions, such as the World Bank.

In Table No. 3 hereunder the crucial role of NGOs has been briefly illustrated: i) in the interruption of business, with financial and reputational damages; ii) in drafting international instruments aimed at a wider protection of human rights; iii) in ensuring compensation mechanisms for victims.

<table>
<thead>
<tr>
<th>SECTOR</th>
<th>CASE</th>
<th>DESCRIPTION</th>
<th>NGOs ACTION AND OUTCOME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy</td>
<td>BELOMONT DAM</td>
<td>Mega project of building dams and canals for a hydroelectric power station in the region of the Xingu River in Brazil, which produced serious environmental damages (including the diversion of watercourses and deforestation), with consequent impact on the health of local communities and the rights of indigenous peoples of the area.</td>
<td>The activity of NGOs focused on mobilisation and protest, which have caused several interruptions of the project (the last one in October 2013).</td>
</tr>
<tr>
<td>Defence/ armaments</td>
<td>CLUSTER BOMBS</td>
<td>Investment by public and private enterprises in the production of cluster bombs.</td>
<td>A strong media campaign led to disinvestment by many enterprises in this and in other related fields (including nuclear weapons). In addition, the <em>Cluster Munition Coalition</em>, an international campaign gathering more than 350 NGOs, contributed to the adoption of the International Convention on Cluster Munitions (2008).</td>
</tr>
<tr>
<td>Textile</td>
<td>RANA PLAZA</td>
<td>The collapse of a building hosting several textile factories in April 2013, which caused more than 1100 dead and 2000 injured people.</td>
<td>The action of NGOs led to the creation of a fund for the victims of the disaster. Recently in Spain the first judgments decided that victims to be compensated by the textile firms involved.</td>
</tr>
</tbody>
</table>
The role of national judges

If a complaint or a media campaign can be sometimes sufficient to induce an enterprise to remedy the wrongs eventually caused and to change its behaviour, it is also true that the assessment of potential human rights violations, and the decision of enforcement measures (penalties, damages, etc.), rest with national authorities and courts. However, if the authorities in the countries where the violations occurred prove blind, deaf or ineffective, it would be important to be able to obtain justice in those countries where public administrations and courts are competent, credible and effective. More specifically, the problem is to know whether affected individuals or communities (e.g. in an African country) can turn to the courts of the United States, France or UK, if the enterprise responsible for the violation has its headquarter in those Western countries.

Again, in order to understand and assess the potential risks an enterprise may incur, it is necessary to tackle the delicate issue of the jurisdiction of national courts, in particular those of the most advanced and democratic countries, that may be preferred by many victims for their impartiality, competence and effectiveness. Since it is not possible to conduct in this paper a wide analysis of the positions of the national courts of a large number of countries (given their great diversity), it would be enough to summon the present situations in the United States of America and in Europe, which can be considered as the most relevant, and even the more indicative of the current trends. The problem is therefore to determine whether those who assume to be victims of a violation of human rights by an enterprise may sue the latter not only in the country where the violation occurred, but also in the country where the company has its registered office, or to which it is strongly connected for other reasons. For example, one can figure out the case of a mining company based in the United Kingdom which is accused of violating the rights of association of the workers through an affiliate in a country of Latin America. Unquestionably, the courts of such country have jurisdiction over the case. Probably, however, the level of impartiality, but also the competence and effectiveness of the courts of that country (like those of many other emerging countries) suggest turning to the United Kingdom courts, also because the enterprise has there most of its assets, through which the compensation of victims (if due) would be granted. But then the question arises whether the courts of the United Kingdom would accept to deal with the case; more technically, dealing with the case would mean admitting their jurisdiction over the behaviour of a British enterprise abroad. That is jurists speak of that issue as ‘the extraterritorial jurisdiction of national courts’, or, in a much more innovative way, of ‘universal jurisdiction in human rights matters’.

The situation occurred in the United States of America is certainly exemplary in this field: many multinational companies belong to this country and therefore attempts to have their possible human rights violations judged by U.S. courts have often been made. In this country a 1789 Law - the Alien Tort Claim Act (ATCA) - allowed the U.S. Federal Courts to decide on the violations of international law committed against foreigners (aliens). The spirit of the law was to demonstrate the ‘credibility’ of the new United States of America in front of the international community, through the opportunity given to an alien to obtain justice from the U.S. Federal Courts for any violation of international law. However, this law could also be used to bring before U.S. Federal Courts those accused of human rights violations committed abroad (since such norms belong to international law). Consequently, ATCA was once ‘resurrected’ - so to speak - in order to allow U.S. courts to decide about human rights violations committed by U.S. multinational companies abroad. This occurred starting from the 80’s, with the case *Filartiga v. Pena-Irala*. Since then, the positions of the U.S. courts have not been univocal: some claimed that ATCA could be used only to judge individuals, and not companies. Also on the issue of jurisdiction, the Federal Courts have taken different positions over time. The last word on jurisdiction appears to have been said by the U.S. Supreme Court in the now famous and much discussed *Kyobel* case of April 2013. The Court, without entering into the merits of the dispute - between a Nigerian citizen and Shell - denied the jurisdiction of the U.S. courts, based on the principle that the U.S. jurisdiction was not appropriate to judge the case. Indeed, it stated that, due to the legal presumption prohibiting the
extraterritorial jurisdiction of U.S. courts, a case could be decided by them only if it was to ‘touch and concern’ the territory of the United States with an intensity such to justify an exception to this presumption. And this type of connection was not detected in the *Kyobel* case, because the alleged violation had occurred in Nigeria and the defendant Shell was based in the Netherlands.

Needless to say, this decision of the Supreme Court has raised criticisms; some even consider it equivalent to a denial of justice, aimed at protecting the position of American multinational corporations. It would be perhaps more prudent keeping in mind that every judgment is the result of an interpretation of the law, which is also conditioned by the historical and social situation, and in some ways even by political interests (at national and international level). As a matter of fact, under changing circumstances, in a future case even the position of the U.S. jurisprudence could change again. In fact, a judge will be requested to pronounce on what can ‘touch and concern’ the economic environment or the social order of such a large country as U.S., with different cultures and such a great sensitivity to ethical problems. It is consequently likely to hypothetize that the Kiobel decision would not definitely preclude the jurisdiction of U.S courts over human rights violations committed in foreign countries.

Regarding the problem of the extraterritorial jurisdiction, Europe seems to have adopted a more open position. The so-called *EU Regulations ‘Brussels 1’ and ‘2’* (Reg. 44/2001 and Reg. 1215/2012), which replaced the previous 1968 *Convention on Civil Jurisdiction and Recognition of Foreign Judgments in Civil and Commercial Matters*, establish that the competent jurisdiction is that of the country where the defendant is domiciled. With regard to enterprises, the competence belongs to the courts of the country where they have their registered office, their central administration or their main centre of activity. Based on this criterion, in a case of alleged human rights violation examined by the British courts, the Court of Justice of the European Union stated that the courts of the EU member States should always judge (cannot therefore deny jurisdiction) when at least one of the defendants accused of an alleged violation of human rights is domiciled in a EU member State. This was what happened in the *Owusu v. Jackson* case, where only one of the defendants - and certainly not the most important - was domiciled in the United Kingdom. In spite of the criticism based on the fact that the effect of that decision meant the defendants of greater importance were actually ‘dragged’ before a court or tribunal with which they had no connection, the judgement represented a significant contribution to the limitation of the use of the denial of justice based on the criterion of *forum non conveniens* (used by British Courts). In practice, the EU Court decision resulted in favour of the extension of the jurisdiction of the courts of the European countries in the protection of human rights involving the activities of the enterprises. The fact that often the activities carried out abroad by large multinational enterprises are conducted by affiliates established under the local laws, and therefore with a different legal personality in relation to the parent companies, could not matter. As a matter of fact, in almost every country in the world, with few exceptions, the behaviours of local affiliates are directly attributed to the parent companies on the basis of the criterion of control: namely, in cases where the parent company can - *de jure or de facto* - orient the behaviour of its affiliates, either because they hold the majority of their share, or because they can otherwise determine their actions and strategies, appointing and/or supervising the work of their managers.

Nonetheless, nowadays the excessive enlargement of the jurisdiction of national courts of most advanced countries still remains a problem, not only because the large multinational companies primarily belong to such countries (and there is thus an undeniable interest in protecting them), but also for an objective reason: national legal systems are financed through the State budget, that is finally by the taxpayers. Claiming an enlargement of their jurisdiction would imply loading on the Western democracies citizens’ shoulders most of the costs of litigations concerning the respect for human rights by enterprises. On the other hand, we cannot underestimate the pressure of public opinion that in Western democracies is less and less willing to accept impunity for the most serious and odious human rights violations. And this is especially true when the violations are committed against the populations of countries that are not able to defend themselves, for their intrinsic weakness or the inability and ineffectiveness of their judicial systems or Governments, often authoritarian and corrupt. No wonder, then, that the proliferation of instances of ‘innovative’ or ‘tactic’ litigation, is under everyone’s eyes, which means that the national courts have become increasingly daring,
Several events recently come to the attention of the media showed the importance of the respect for human rights in the exercise of entrepreneurial and economic activities in general. Some of them until a few years ago would not have been brought to the attention of the public opinion, but today they ‘race on the web’. The spreading of new information and communication technologies makes possible to convey information from different actors and worldwide, easily providing the general public and the experts with a significant amount of details in real time. On the other hand, that amount of data is difficult to be handled by the individual.

The Expert Group, that has been conducting a study on Business and Human Rights since 2009, dedicated great part of its activity to the identification and analysis of some significant cases of the last 15 years regarding violations committed directly or indirectly by enterprises, but also by financial institutions. Many sources were used for data retrieval (certainly the websites, but also - and especially - reports and documents coming from international organizations and NGOs, research and academic texts, newspaper articles, and, obviously, decisions of courts and arbitral tribunals); later on, the acquired information was submitted to cross-check. The sources selection process was accurate, and priority was given to documents from national and international courts and non-judicial bodies (IFC CAO Ombudsman, OECD National Contact Points, etc.); NGOs, research centres or newspapers documents were also considered, but as secondary sources.

While monitoring and studying data from around the world (mostly from Africa, Latin America and Southeast Asia), a systematization of the information became necessary and a database (in English) has been created to this purpose. The methodology used by the Group essentially follows the structure of the 2008 UN Framework that lists the human rights that can be violated by non-State actors (civil, political, social, economic and cultural rights, including the right to development).

In addition to systematizing the standard information (i.e. geographic location, industrial sector, stakeholders, description of the case, sources, etc.), the database allows to select cases dividing them into three main groups: those directly related to labour; those not relating to it; and those referring to the most vulnerable subjects (such as women, children, indigenous peoples, etc.). Many of the cases in the database involve enterprises, as well as banks, international financial institutions and export credit agencies: the database identifies the type of activity where the violation occurred (such as general credit, project finance, issuing letters of credit, portfolio and assets management, consulting, investment, opening bank accounts, relations with employees, etc.). It is also possible to classify information by ‘entries/themes’, such as: type of human rights violation; industrial sector; role of the various players involved (such as national companies, multinationals, State-owned enterprises; banks and financial institutions, export credit agencies, indigenous peoples and local communities; Governments; civil society, non-judicial bodies and courts); damages suffered by companies/banks (both in economic and reputational terms) and the relative magnitude of those damages.

The Expert Group has therefore been able to analyze a sample of 325 cases (updated up to 2012), the results of which are exposed in the book ‘Banks and Human Rights: pathways to compliance’ (Rome, December 2013), which presents the outcomes of the first phase of the research. Those findings certainly do not have a universal value (given the limitation of the sample and the wide variety of sources), but they definitely help delineating the trend of the most recent years in business compliance with human rights principles and norms, considered under their various dimensions and aspects: social, economic and, obviously, legal. The analysis showed an increased incidence of those cases at global level, mainly because of the media campaigns launched by many NGOs engaged in human rights protection.
At the end of the first phase, the Expert Group wanted to enrich the database improving it both in terms of quality and technology. 274 out of 325 cases were reviewed by the Group which is now providing for the gathering and systematization of the new cases.

The graphs that are proposed in the following pages are referred to a sample of 274 cases updated to September 2014. They refer to the industrial sectors where most cases of violation (referring to both companies and banks) took place; the most violated human rights; the role played by the courts and by civil society.

Figure No. 1 shows the industrial sectors concerned: it is evident that the sectors of oil, energy extraction and mining are those with the largest number of human rights violations (21%, 18% and 12% respectively). Both the manufacturing and the financial sector include anyway 9% of surveyed cases.

Figure No. 2 refers to specific categories of human rights which have suffered violations. Those arising from environmental damage and pollution of natural resources (31%) and those concerning labour rights (22%) are clearly visible, followed by trade and illegal use of weapons, and by the violations perpetrated by States officials (9%).

Figure No. 3, the majority, considers more specifically the labour-related violations: most frequent violations are relating to the standard and labour conditions, discrimination and the minimum wage (25%, 22% and 15% respectively). Slavery and forced labour reach altogether 21% (slavery, forced labour and human trafficking 14%; 7% is constituted by child forced labour).

Figure No. 4 refers to both the origin and the evolution of the complaints concerning human rights violations. In particular, the majority of cases (53%) originated from NGOs actions, such as - for example - strong media campaigns. The remaining 47% is referred to cases submitted to courts: obviously, it does not exclude that, in that latter group, also cases raised by national and international NGOs campaigns may be included. Indeed, civil society is often very active in the presentation of complaints and instances before the courts and in the defence of lawsuits communities concerned.

In conclusion, the data in the charts show a common trend with respect to the largest number of violations committed by businesses and related damage (energy exploitation and environmental damage) and, at the same time, a growing number of complaints by the civil society, which are leading to an increasing number of hearings in national courts and in non-judicial bodies.
Figure No. 2: The human rights violations (2014)

Figure No. 3: Labour-related violations of human rights

Figure No. 4: The role played by courts and the civil society (2014)
Since the graphs have been constructed on the basis of the information gathered in the database, it is useful to recall briefly its structure.

The control panel is composed of three entries. The first - Compilation Mode - is used by the Expert Group for the inclusion of the information; the second - Control Data - has the function of controlling the data collected; and the third one - Reports - sorts the data according to the type of analysis requested by the user.

The system allows also the users to consult the guidelines set forth by the Group for the collection, analysis and systematization of the information (Legend).

The Compilation Mode section of the database consists of three main modules:

- **Step 1.** Basic information about the event (geographic location, industrial sector, actors involved, description of the event);
- **Step 2.** Information regarding human rights violations (those directly linked to labour activities, those not related to them and those referring to the most vulnerable groups);
- **Step 3.** Information about the damage caused by the unlawful conduct of business/bank (environmental damage, casualties, damage to health, etc.); the role played by the courts and civil society (cases brought to courts or mediation bodies, cases reported by media campaigns and NGOs, etc.); the involvement of the financial institutions in relation to the banking and financial activities more exposed to violations.
Finally, the Group chose to select three cases of considerable importance and interest, because of the industrial sector to which they belong, the type of human rights violated, and the geographical location and the role played by the different actors involved. The first case is the Baku-Tbilisi-Ceyhan pipeline, which stretches nearly 2000 miles across three countries: it shows how the energy sector is among those which count the largest number of violations related to the construction and the functioning of major infrastructures. The second case concerns the use of private security forces by enterprises to protect and defend their own production sites: very often those forces were actually involved in violent actions to the detriment of the local population. The third case relates to the exploitation of workers in the extraction of the so-called ‘conflict minerals’ in Africa, at the base of the production of some components of mobile phones.

The Baku-Tbilisi-Ceyhan pipeline (BTC)\(^1\)

The Baku-Tbilisi-Ceyhan pipeline (BTC) is used to transport oil from the Caspian to the Mediterranean Sea and is the second longest in the world (1768 km crossing Turkey, Georgia and Azerbaijan). The project has a value of 4 billion dollars and received funding for 2.7 billion dollars from international financial institutions (including the IFC and the EBRD), from private banks (including UniCredit and Intesa San Paolo), as well as coverage from national export credit agencies. The project - whose realization started in 2005/2006 by a joint venture (JV) whose majority partner is British Petroleum (BP) - was accused of having produced significant environmental damage which resulted in health impacts on local populations, which have not even benefited from the power supply. In particular, local communities have suffered the expropriation of their land without an adequate compensation, thus causing an unnatural phenomenon of internal migration to other parts of their respective countries. In addition, in Azerbaijan the fish species of the area of the port of Baku were endangered, as well as the flora and fauna of the Borjomi Natural Reserve in Georgia. Finally, apparently no adequate consideration was given to the fact that the pipeline extends over some seismic zones in all the three countries of transit. Currently, the pipeline is working again, albeit after some suspensions, and during January-June 2014 it has conveyed about 2.3 million tons of oil. The case was considered by the Belgian and English OECD National Contact Points with particular attention to the violation of the OECD Guidelines for Multinational Enterprises, also with reference to the role of the lending banks. The IFC CAO Ombudsman has also received complaints about the project; the last complaint ended in January 2012 with a proposal for mediation between the parties. The main consequences suffered by the enterprises responsible for the project are in relation to the actions taken before the already quoted non-judicial bodies by groups of NGOs for the protection of the environment and human rights, which caused economic and reputational damage relevant to businesses and banks involved. In particular, the denunciation campaign ('Baku Ceyhan Campaign', whose partners include, \textit{inter alia}, even a small Kurdish NGO, 'The Kurdish Human Rights Project' - www.bakuceyhan.org.uk) promoted by some leading NGOs - including 'Friends of the Earth England', 'Platform', 'The Cornerhouse' - is still very active. The BTC pipeline case is illustrative of the impact that a project, involving several enterprises and developing through different States, may have on different although neighbouring territories and on populations of different cultures, ethnicities and social backgrounds. It is almost taken for granted that such projects are carefully monitored by human rights watchdogs, and that situation certainly imposes on the enterprises the need of being particularly careful. Finally, the case is very interesting also because of the direct involvement of the international financial institutions and private banks, which were considered responsible for human rights violations as much as the oil companies which are JV partners. It is very significant that some of them have decided to withdraw from the project, due to possible economic and reputational damage. Those institutions not only have been accused of violations in the context of media campaigns, but have also been involved in cases before the operating international judicial and non-judicial bodies.
The Chiquita case, Colombia

Colombia has been the theatre of an internal conflict between Government forces and guerrilla groups or self-defence groups for more than forty years. Since 2002 the ‘Autodefensas Unidas de Colombia’ (AUC), created to fight the guerrillas and regain the control of the territory, have been financing themselves through drug trafficking and acts of extortion. They are responsible for most of the disappearances and killings of civilians that took place in the country. In this context, the multinational Chiquita Brands International Inc. - one of the largest banana producers in the world - has been accused by workers’ organizations, environmental and human rights associations as the responsible for environment, health, and social damage due to the massive use of pesticides, the militarization of the territories and the frequent use of repressive practices against the local communities by those armed groups, for operations aimed at protecting its production facilities. Such abuse consisted in the occupation of land subsequent to the forced displacement of local communities, using torture and including even mass killings. Allegations of complicity are based not only on the paramilitary forces being financed by the multinational, but also on the supply of arms and other forms of assistance which ended by benefiting drug trafficking-related activities. In 2007 several associations for the protection of human rights submitted to the New Jersey Federal Court a complaint against Chiquita on 16 cases of murder, torture and other human rights violations and terrorism. Among the signers of the complaint we can find the NGO ‘Earth Rights International’ (ERI) - which represents many Colombian families that have been victims of abuse by the AUC - the Colombian Institute of International Law and two U.S. law firms already involved in other cases of breaches of human rights by the multinationals. Chiquita claimed instead to have suffered extortion by paramilitaries and asserted it had to pay to protect its employees. Nevertheless, the documents presented to the Court proved that the company’s management was fully aware of the real situation, and therefore the funds were also oriented to get the protection of Chiquita’s interests from paramilitary groups. The multinational was eventually forced to conclude an agreement with the Federal Court of the United States, in order to avoid the extradition of the investigated officials from Colombia. In the judgment of appeal of July 24th, 2014 however, the 11th Circuit Court of Appeals declared its lack of jurisdiction on the case, deferring its prosecution to the Colombian justice. In this regard, the Attorney General of Colombia stated that the evidence gathered was indicating the multinational enterprise’s direct aid and awareness of the commission of crimes by paramilitary groups, actually guilty of the murder of 4,000 civilians in the banana-growing region. Today Chiquita still has to face 9 trials in United States and one in Colombia. The Chiquita case is a very clear example of complicity by a multinational enterprise with groups and irregular security forces allegedly accused of illicit actions in defending the interests of the companies. In addition to the reputational damage caused by the various ongoing lawsuits, in 2007 Chiquita Brands International was ordered to pay a fine of 25 million dollars from the United States Department of Justice.

The electronics industry and the coltan conflict, Congo

The enormous economic and natural resources of the territory of the Democratic Republic of the Congo (DRC) could have represented a formidable growth factor for this African country. However the Government’s incapacity to control its territory and the political instability that afflicts the country have led to a situation of permanent war and disorder. Although in 2003 the so-called ‘second war’ officially terminated, the country still faces long food crises, ethnic conflicts and a deep economic crisis. Based on a UN Report of 2011, the main reasons for the conflict in the country are the access, control and trade of five major Congolese mineral resources, which would ensure income for about one million dollars per month to the guerrillas who largely control them. In this context, the proceeds of the illicit trade of the mineral known as columbite-tantalite or coltan feed the civil war. That is
partially due to the fact that the world demand for coltan is strongly increased over the last twenty years, mainly due to the expansion of cellular technology and industry, and predictably it will continue to grow. It is estimated that the wars for control of the coltan extraction have resulted so far in about 11 million deaths, and the use of thousands of children, whether as soldiers or as workers in the mines, exposing them to serious health damage. In addition, thousands of people were forced to leave their lands because of the forced expropriations carried out by companies and by Government forces. After the dissemination of the UN Secretary-General’s Report ‘Implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo’, some NGOs have launched a campaign of denunciation (previously evoked by the slogan ‘Blood in the Mobile’, one of the initiatives of a broader media campaign against companies of this sector) to raise awareness among enterprises and users about the use of minerals from this country in the mobile-phone industry. As a result of the media pressure many companies, including Motorola and Intel, and some airlines have voluntarily suspended the purchase or transportation of coltan from the region. In addition in 2009 the U.S. Government adopted the ‘Congo Conflict Minerals Act’, which prohibits the purchase of certain minerals produced in the Democratic Republic of the Congo and in neighbouring countries - such as Uganda, Rwanda, Burundi and Tanzania - and requires companies to verify and make known what are their sources of supply of coltan; the Act also provides that all companies monitored by the Securities and Exchange Commission declare the origin of the materials used. Moreover, OECD adopted the Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: a standard that provides precise recommendations to enterprises operating in the mining sector, in order to conduct their activities in full respect of human rights, and so preventing their contribution to the development of new or old conflicts. Finally, in 2011 the International Organisation for the Defence of Human Rights presented to the United Nations and the European Union a protocol for the certification of the origin of the coltan, based on the Kimberley Protocol (the standard for the production and trade of diamonds). The renewed efforts of the international community have forced enterprises and financial institutions involved in the trade and manufacture of coltan to invest important sums to check and certify the origin of the raw materials coming from Congo, which resulted in an increase in costs of production and marketing of many electronic devices. The media campaign and the strong international pressure have certainly been a success, although a global consensus regarding social and environmental impact of extracting coltan from Congo have not been definitively achieved yet, since some Asian and European companies continue to buy and sell that mineral.

The above cases can be considered as leading cases amongst those analyzed both in the first and in the second phase of the research. Not only they are referred to violations perpetrated in different areas and notorious to the world public opinion - also thanks to the action of the media and civil society - but they exemplify significantly some situations where a company or a financial institution could be involved in abuses against its workers, local communities and the environment.
Notes


2 Istituto di Ricerche Internazionali Archivio Disarmo, Guerre e Conflitti nel Mondo Colombia (Wars and conflicts in Colombia), tabbed information system (2011), see the website www.archiviodiesarmo.it; The National Security Archives: George Washington University, The Chiquita Papers, see www2.gwu.edu; Centro di documentazione di Conflitti Ambientali, Chiquita Brands e finanziamenti ai gruppi armati irregolari, see the website www.cdca.it; Noticias Uno, Primera condena por aportes de Chiquita Brands a paramilitares, can be found in noticiasunolaredindependiente.com; Business and Human Rights Resource Center, Chiquita lawsuits (re Colombia), available on the website business-humanrights.org; Peace Reporter, Chiquita Connection, see the website www.peacereporter.net.

3 The main Chiquita Brands International Inc. shareholders are: Barclays Plc 3.47% (UK); Barrow, Hanley, Mewhinney & Strauss Inc 3.4% (USA); Deutsche Bank AG 13.19% (Germany); Dimensional Fund Advisor Inc. 8.4% (USA); FMR Corp. (Fidelity Investments) 14.97% (USA); Goldman Sachs Group Inc. 6.14% (USA); Lindner Carl 14% (USA); Omega 5.2% (Israel); Oppenheimer Capital 7.2% (USA); Vanguard Group Inc. 2.71% (USA).


5 It is a rare metal used in the manufacture of filament lamps, chemical equipments, surgical instruments, mobile phones and computers. The major mineral deposits of columbite-tantalite are located in Western Australia, Nigeria and especially Brazil. On its side, the Democratic Republic of the Congo (Katanga province) has an annual production less than 50 tons. The magnitude of the total reserves in Africa has not yet been estimated. The term coltan has got a particular feedback from the media, and has been used by NGOs and pressure groups to highlight social, ethical and political implications related to the production and trade of this mineral.
coming to the point of impeaching even foreign Heads of State or extremely powerful managers. Moreover
to remedy those that could appear as ‘denials of justice’, many countries have adopted the policy of the so-
called forum necessitatis, which allows national courts to deal with a case in the occurrence of manifest
inability to obtain justice before any other court.

It is undeniable that, although in different ways and with different intensities, the various national legal
systems are widening their scope to include international crimes, in particular those covered by the Statute
of the International Criminal Court. And even though the latter may act only with respect to individuals, and
not to legal persons (as well as many national criminal systems, including the Italian one, whilst Australia
and Canada admit criminal liability of enterprises), the responsibility for the violation of human rights by a
company may also be attributed to its managers, those that ultimately decide the company’s behaviour.
They may then be held criminally liable for company’s acts. Involving individuals as the managers certainly
represents a strong deterrent to their decision to incur the risk of violation of human rights. It is also true
that those national systems that do not consider the criminal liability of enterprises, however provide for
administrative sanctions in case of illegal activities, as well as for compensation for damage caused to victims.
Finally, it is necessary to observe that the traditional territorial scope of criminal law is increasing, and the
same is true also for many national laws against child abuse, corruption or financial offences, even if
committed abroad. Having to face a court for a violation of human rights then becomes increasingly a threat,
all the more insidious because it is hard to predict. Indeed, the behaviour of national courts is rapidly
changing, referring to the advanced countries and to the emerging ones as well, and it is therefore not to
be excluded that one day managers or senior officials of large companies could be impeached, or even
arrested, upon order of an European, but also of a Latin American or Asian country court.

New bodies promoting the application of human rights to enterprises

Currently the application of rules or standards, especially in the economic matters, is facilitated by
the work of bodies with advisory, administrative and mediation functions, without stricto sensu
jurisdictional powers. Although they are not allowed to issue judgments, they can acquire information
and conduct investigations, proposing to the parties possible ways to prevent, eliminate or mitigate the
effects of possible violations or of violations which have already occurred. The use of these tools is
certainly growing, and so it is very appropriate to illustrate their role and their methods.

It is necessary to remember that, in recent years, several international organizations have incorporated
into their policy principles which include human rights protection for the benefit of Non-State Actors
(NSAs). The already mentioned IFC Performance Standards, issued for the first time in 2006 and updated
in 2012 (as the result of a consultation period of 18 months), constitute an important example involving
Governments, Multilateral Development Banks (MDBs), NGOs, private banking companies and CSOs.
The three large meetings which took place in Washington, Istanbul and Brussels for the discussion of
the new version of the instrument, have seen the participation of more than 500 stakeholders. The result
was a new version of the document which recognizes, inter alia:

- the key role played by local populations when directly involved in the implementation phase of a
  project, with special attention to indigenous communities;
- the importance of informed consent (Free, Prior and Informed Consent);
- the importance of applying principles based on transparency, much more than in the past.

The World Bank Inspection Panel

The first historically-known mechanism aiming at considering complaints submitted by individuals
or communities that assumed they had been wronged by the execution of projects, is the Inspection
Panel (IP) of the World Bank, established in 1993. That body, albeit without real jurisdictional powers,
has played a leading role for the expansion of the responsibility of intergovernmental organizations in the implementation of funded projects.

In the following years, most other MDBs have adapted themselves to the model created by the World Bank, by imitating its structure and functions and structuring their own dispute resolution mechanisms precisely following the model of the Inspection Panel.

**IFC’s Compliance Advisor Ombudsman (CAO)**

Another investigation and mediation body is the Office of the Compliance Advisor Ombudsman-CAO. Established by IFC in 1999, based in Washington, it is an independent body that responds directly to the President of the World Bank. It is a tool to be used for projects funded and/or guaranteed by IFC and MIGA, the two institutions of the World Bank Group financing the private sector.

One of the main tasks of CAO’s mandate is to receive complaints from individuals or communities who complain about the violation of their rights. CAO’s work also aims at:

- improving the outcomes of social and/or environmental impact projects, whose funding has been provided by IFC or guaranteed by MIGA;
- making the operations of those institutions more transparent and promoting a greater accountability.

The procedure before IFC’s CAO is preceded by a phase of verification of the conditions of admissibility of the application (eligibility screening), which are as follows:

- appeals shall be relating to operations carried out during the execution of IFC or MIGA projects;
- they must concern aspects of social or environmental nature;
- applicants must be individuals or communities of individuals directly affected by the implementation of those projects.

**Dispute resolution methods**

When exercising the function of a mediator, IFC’s CAO does not state a judgement, nor impose solutions or finds any liability. Its sole objective is to help the parties to identify problem-solving strategies they themselves have chosen and freely agreed. The assessment of the case, that is the key-phase of the proceedings, spreads over a period of 120 days. The basic aim is to clarify the issues raised by the applicants; gather information; collect the views of the others involved in the affair, in order to get an overview of the
case, as impartial as possible. CAO often uses the work of external mediators in order to interact with local communities. In most cases, it is matter of experts who work in the same place of implementation of the project and who possess the necessary linguistic and cultural backgrounds to work with the affected communities.

In this phase (assessment of potential for achieving resolution), CAO specialists work with stakeholders to develop an assisted negotiation process and find a solution based on mutual consent. The Terms of Reference (ToR) specifically articulating their mandate, shall prescribe the qualifications of the individuals called to serve in this role. The final outcome of the proceedings, i.e. the resolution of the case, must be based on an appropriate strategy for the elimination or mitigation of the negative impact caused by the projects.

At the end of this phase, the CAO shall draw up a Memorandum of Understanding, whose correct fulfilment will constantly be monitored. If it finds that a solution based on mutual agreement is not possible, the case will be transferred to the Department specifically responsible for the compliance function.

The ‘compliance role’

The compliance process is started as a result of the inability to reach an agreement, or at the request of the parties. It is also possible to refer the case to its jurisdiction at the request of some particular subjects, and, more specifically:

- at the request of the President of the World Bank Group, or of IFC or MIGA senior managers; or
- at the discretion of the Deputy Chairman of the CAO itself.

Through this process, IFC’s CAO checks how IFC and MIGA have implemented the project for which a risk of social or environmental impact is alleged, examining its compliance with the relevant policies, standards and guidelines. Firstly, the need for an additional control of conformity is evaluated. Such prior assessment (appraisal) is made to ascertain the existence of substantial social or environmental problems; that phase must be defined within 45 days. Where it is established that the issues raised do not deserve any further verification (audit phase, if any), the CAO will close the case. On the contrary, if a prosecution is proved necessary, an investigation will be conducted by an independent group of experts. The audit may be based on the review of project documents, interviews to IFC and MIGA staff, observation of activities for the implementation of the project, and of its results. The results of that survey are then included in an official report, which is submitted to the attention of the IFC and MIGA senior management, in order to allow them to formulate comments and observations and, finally, to the President of the World Bank Group for his/her approval. Any reviews on the IFC or MIGA’s liability contained in the report, although not legally binding, constitute de facto a guidance relevant to the parties, not only because they affect the realization of the questioned project, but because they also affect future ones. The possible outcomes of the procedure are as follows:

- IFC/MIGA are recognized as having acted in accordance with their policy; in that case CAO Compliance will close the audit phase affirmatively;
- In case IFC/MIGA have somehow contravened the principles that govern the execution of their projects, CAO Compliance monitors the situation ensuring that necessary corrective actions be undertaken.

Finally, it is worth noting that, following CAO’s experience gained in the case studies, IFC’s CAO is also responsible for providing general advice to the President of the Bank and to IFC and MIGA staff on policies, procedures and guidance.

The attitude of the other international financial institutions

There are many examples of MDBs which have created, over the past few years, appropriate mechanisms to give a voice to the grievances of individuals directly affected by development projects.
It is interesting to note that the majority of independent bodies created by those institutions provides for a ‘problem-solving’ action but also for a ‘compliance review’ function, with differences relating only to procedural aspects, to the conditions for admissibility of complaints and to the extent of the powers granted to them in the investigative phase.

The growing attention to the ways in which those new bodies operate has led to substantial revisions in recent years, almost always in order to enhance their role and effectiveness. Think of the Project Complaint Mechanism of the European Bank for Reconstruction and Development (EBRD), whose operating procedural discipline was reformed in 2014, and of the Asian Development Bank, which provided for a review of the policy of his Accountability Mechanism in 2012. Even the Independent Review Mechanism of the African Development Bank (AfDB), established in 2004, is currently undergoing a major structural reform. Significantly, in the latter case, the attention towards local communities led to the strengthening of communication strategies (so called outreach activities).

Undoubtedly, the jurisprudence originated by all the Accountability Mechanisms created on the basis of the example of the Inspection Panel of the World Bank, is absolutely fundamental for the evaluation and identification of possible violations; but there is more. The measures suggested by them tend to ensure the success of projects, but also the equitable balancing of all the interests at stake, and the collaboration by the enterprises - particularly where the evaluation of the operations of the private sector is included in their mandate (see Table No. 4).

### Table No. 4

<table>
<thead>
<tr>
<th></th>
<th>BASIC REQUIREMENTS OF THE APPEAL (ELIGIBILITY CONDITIONS)</th>
<th>POLICIES AND PROCEDURES TO BE EVALUATED BY THE BODY</th>
<th>NATURE OF THE INQUIRY AND INVESTIGATION POWERS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>IFC - CAO</strong></td>
<td>Written form expressly required. No prescription about the language to be used.</td>
<td>Broad mandate.</td>
<td>Limited to ascertaining the facts in dispute. It is possible to make recommendations.</td>
</tr>
<tr>
<td><strong>AFDB - IRM</strong></td>
<td>The conditions for the admissibility of the action are screened with great flexibility. However, the written form is essential. Appeals must be duly signed and sent to the Director of Compliance Review and Mediation Unit (CRMU).</td>
<td>Broad mandate.</td>
<td>Limited to ascertaining the facts in dispute. It is possible to make recommendations.</td>
</tr>
<tr>
<td><strong>ADB - AM</strong></td>
<td>The conditions for the admissibility of the action are screened with great flexibility. Appeals may be written in any of the languages of the member Countries.</td>
<td>Broad mandate.</td>
<td>Limited to ascertaining the facts in dispute. It is possible to make recommendations.</td>
</tr>
<tr>
<td><strong>EDRB - PCM</strong></td>
<td>Appeals can be submitted in any written form, in any of the organization’s working languages.</td>
<td>Mandate limited to specific policies and procedures.</td>
<td>Limited to ascertaining the facts in dispute. It is possible to make recommendations.</td>
</tr>
</tbody>
</table>
Notes

1 That is the case of Geneva Law by the International Committee of the Red Cross, the Coalition for the establishment of the International Criminal Court and the Convention on the Rights of the Child.

2 The most active NGOs in the field of corporate social responsibility: Business and Human Rights Resource Centre (United Kingdom), European Coalition for Corporate Justice (Belgium), Fidh (France), SOMO (The Netherlands), European Centre for Constitutional and Human Rights (Germany), ICAR (U.S.A.).

3 Amicus curiae represents a form of participation in the judicial proceedings that, generally speaking, allows an individual (NGO, legal entity or a natural person) to express their vision of the case. The amicus curiae (literally ‘friend of the Court’) is actually a ‘third party’ which is not involve in the judgment, and which goal is only to present to the Court comments regarding legal or factual matters relating to the dispute.


9 European Court of Justice, Andrew Owusu v N. B. Jackson, case C281/02, Judgment of the Court (Grand Chamber) of 1 March 2005.

Complicity as an insidious form of corporate involvement in human rights violations

Complicity depends on how much the accomplice knows about the use of goods and services he provided to the offender, as well as by the level of actual support offered to the perpetration of the crime. However ethics and law do not always coincide on the identification of an accomplice.

Ethical and legal: the two dimensions of complicity

While it may appear pretty clear when an enterprise makes a particular act that results in the form of a human rights violation, much more difficult may be ascertaining whether it was contributing to an act of infringement committed by others - as other enterprises, individuals, private associations or even States. Indeed, it is difficult to identify complicity since not only the concepts accepted in national legal system or adopted by the courts differ, but also, and more importantly, because of the much wider sense of complicity under moral, social and ethical conceptions. This means that for the enterprises is much easier being deemed accomplices from an ethical or social point of view, than by law.

In order to guide the behaviour of enterprises and minimize the risk of human rights violations, one should consider the above two dimensions of responsibility: first, the legal liability, which can lead to convictions imposed by national courts; second, the social/ethical responsibility, that can have even a more serious impact on the company with its ‘blame and shame’, since it affects the enterprise’s image or reputation. Those two levels of responsibility have a great value not only for users and consumers of enterprises’ products or services, but also referring to its relations with public institutions and the rating agencies. Moreover currently - and increasingly - lenders fear that a company’s involvement in human rights violations may result in damage to the business, slowing or even stopping its ongoing projects.

The legal dimension of complicity

In order to understand the legal dimension of complicity, reference should be made to the most important international studies on the subject that provide a comparative vision of the concept, and to the international conventions in criminal matters, because they represent the most shared worldwide approaches.

According to the prevalent Common Law culture - prevailing in a wide number of countries - complicity in a crime occurs when a person becomes responsible for ‘aiding and abetting’ unlawful acts carried out by the perpetrator. In an in-depth study of 1996, the International Commission of Jurists (ICJ) asserts that complicity depends on how much the accomplice knows about the use of goods and services he provided to the offender, as well as by the level of actual support offered to the perpetration of the crime. This view appears to be homogeneous enough both in Common and Civil Law countries, considering the accomplice as the person who provided the offender with ‘l’aide et l’assistance, la fourniture des moyens’.

More precisely, an accomplice is the person who shares with the offender both the actus reus (namely the actual perpetration of the unlawful act) and the mens rea (that is the intention of committing the
offence). However, with regard to human rights violations, we must observe that ascertaining presence of this dual requirement creates some problems. Very often the intent may not be shared; let’s think of a situation when, for example, the objective of the enterprise is merely the undisturbed exploitation of a mine or an energy source, whilst the security forces violent repression of demonstrations against such activity is only aimed at receiving money or other benefits. This is the reason why, in certain countries, jurisprudence requires the integration of sharing illegal objective with ‘predictability’. For example, in Germany and the Netherlands, according to this criterion, a company can become an accomplice to an offence if it is aware of the fact that a customer, or a vendor, or a security agent, had been formerly implicated in human rights violations, and therefore it could be predicted that providing him with goods, services or money could facilitate or encourage such illegal behaviour.

With regard to the international conventions in criminal matters, just consider the notion of complicity adopted by the 1998 Statute of the International Criminal Court. Article 25 (3) defines the accomplice as whoever «orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; [...] For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission» or «in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose».

The requirements of complicity identified in the ICJ study are based on some well-defined parameters that can help managers and business consultants to better understand when they might be in a position of complicity in relation to the author of a human rights violation. Such requirements are:

- causing or contributing to the prohibited behaviour (causation);
- being aware that the support provided contributes, or may reasonably be expected to contribute, to the commission of the unlawful act (knowledge);
- being in a situation of proximity to the subject responsible for the violation, also with regard to its relations with the culprit.

For a better understanding the meaning of those requirements, ICJ further enlightens them. One can cause or contribute to causing the prohibited behaviour (causation):

- by placing the author of the crime in the actual condition of committing it (enabling). For example, the security forces or a local police may threaten, torture or even kill trade unionists who work in an enterprise only if the latter would provide them with their names;
- by increasing or amplifying the effects of the prohibited behaviour (exacerbating). For example, when an enterprise supplies local authorities with machinery and equipment able to destroy housing and/or the property of persons or groups that the Government intends to illegally and forcibly displace from their places of living;
- by facilitating the commission of the violation (facilitating). This can occur when a company provides local Government authorities with equipment, hardware and/or software that allow them to more effectively identify dissidents or opposition groups, so that repressive activities can more easily be arranged.

The second element of complicity is the knowledge that the accomplice must have about the fact that his contribution in goods and services will (or might) support the illegal activities of the perpetrator. As already mentioned above, however, in many national legal systems the concrete and effective knowledge of the unlawful act is no longer needed, because it is sufficient that the accomplice had the ability to predict it (foreseeability). This results in a greater risk for the enterprise, which must adopt a higher level of caution with respect to its counterparts, particularly those which are known for having been accused of human rights violations.

The third element, proximity, is more rarely adopted, at least in the continental legal systems, such as the Italian one. It responds fairly well, however, to the need to correctly identify the possible complicity of large structures, such as multinational corporations which do not always have close relationships with their counterparts. It should be noted therefore that proximity would more often simply constitute evidence and confirmation of complicity, or an aggravating circumstance, and not a constituent element.
In practice, a company can be considered as an accomplice to a violation of human rights when it provides support to its fulfilment, knowing or being able to predict that such a support could be used for the fulfilment of the human rights breach.

But, in the current global economy era, there are many forms of interaction, and thus relations, among the players in the economic field. Individual entrepreneurs, partnerships, corporations but also Governments and other central and local public authorities can cooperate in a myriad of different forms, from the simplest business relations to the most sophisticated forms of investment and joint ventures. It is obvious that the type of relations deeply affects the various levels of involvement in responsibility/accountability when carrying out an act. A supermarket sells knives designed for being used in the kitchen: nevertheless it certainly provides a tool which can also be used to kill. But typically a supermarket does not have any knowledge of the crime that may be mediated by the occasional buyer. Therefore, knowledge, or even the simple predictability, manifests itself as the essential element of complicity, especially when it is the case for regular commercial transactions.

The Court of Nuremberg was among the first to face the issue of the definition of complicity, for example when it dealt with the two cases of the bankers Rasche and Puhl. Rasche was a board member of the Dresdner Bank during the Nazi regime: his bank had been accused of having granted loans to many German companies indicted of having benefited from forced labour of concentration camps inmates. The Court acquitted him because, under ordinary bank transactions, his knowledge of the forced labour used by the financed companies had not been proven. On the contrary, Puhl was considered an accomplice, since he had been directly and actively involved in the management of the inmates' assets and even in recycling gold proceeds (from their teeth and their jewels). Despite not having participated directly in the extermination, he had been an accomplice, as well as the directors of the Krupp Company, who were also found guilty of complicity, because they had actively contributed to the spoliation of the victims of racial persecutions, as well as for their employment in forced labour. However, it should be noted that Puhl's behaviour could better be considered as ‘participation in violation of human rights’, since it constituted an actual involvement, and not simply an external support.

More recently, the International Criminal Tribunal for the Former Yugoslavia, in its 1988 judgement Prosecutor v. Furundzija established again complicity on the basis of its two traditional components: actus reus (the practical assistance, encouragement or moral support, which had a substantial effect on the commission of the violation) and mens rea (consisting of the knowledge or, better, the awareness of having provided actual support to the commission of the act). The Tribunal specified that the accomplice’s participation in the crime might be direct, indirect or even passive (silent). While a good example of direct participation is the above mentioned Krupp case, indirect participation was correctly identified by the Nuremberg Tribunal in the Zyklon B case (Zyklon B gas supply to concentration camps): since it was predictable that it would be used to carry out mass crimes - although the suppliers had not materially committed such crimes - the Tribunal has recognised the indirect complicity. An example of passive complicity is instead the one detected in the Furundzija case, where the commander was convicted because he had not used his authority to prevent the abuse of a subordinate against a Muslim woman he was questioning.

Therefore, while it is relatively easy to demonstrate the existence of a support to the commission of the infringement, the intention of committing the offence or the consciousness that it could have been perpetrated thanks to the support offered by the accomplice is much more difficult to be proven. According to the Tribunal for the Former Yugoslavia, there is no need to share criminal intent, because it is sufficient that the accomplice knows, or could reasonably have been aware of, the possible effects of his collaboration. That allows to introduce the concept of reasonable knowledge, which certainly represents an expansion of the traditional legal notion of criminal complicity, based on an actual and timely knowledge. The accomplice is no longer requested to share the criminal intention in the specific case, but it is sufficient he can reasonably expect that his cooperation could result in a support to the crime perpetrator.

The recent paper UN Commentary to the Norms on the Responsibilities of Transnational Corporations
and Other Business Enterprises with Regard to Human Rights (rightly considered an excellent interpretation of the widespread position of the international community) is even more specific. Accomplices are the persons who «were aware or ought to have been aware» of the support provided to the commission of the offence. It is therefore introduced a presumption of knowledge that any court could consider as the position accepted in international law. However, this significantly broadens the responsibility of enterprises: they can no longer simply demonstrate they did not know about the illegal conduct, but instead, they shall demonstrate that this knowledge did not fall among their tasks, their duties or the professional skills required to carry out the task assigned to them.

Needless to say, that wider notion of responsibility/complicity is much more in line with the one claimed by civil society organisations and human rights defenders, when it comes to defining the involvement of enterprises in such abuses.

Also U.S. courts - which had long remained tied to the traditional vision of complicity as collaboration in the single infringement, and not as a general support to the author of the crime - have changed their opinion, at least with regard to complicity in acts of terrorism. This happened subsequent to the adoption of the US Anti-Terrorism Act (ATA) of 1992, admitting that there are organisations that «are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct».

Once more this position coincides with the civil society organisations and human rights defenders one, when they condemn funding and other forms of aid and assistance provided by banks or companies to Governments that notoriously and pervasively violate their peoples human rights. However, if the presumptions of complicity against those who provide financial or technical support to terrorist organisations or countries whose Governments violate human rights is certainly a step forward, it has to be remarked that in many cases it might not be easy to identify such organizations or Governments. Certainly the associations or organizations included in the lists nationally or internationally recognized under the United Nations Convention for the Suppression of the Financing of Terrorism (December 1999) can be considered as terrorists, but the targeted associations and organizations do not include States.

In many countries Governments, if not entirely dictatorial, have however the power concentrated in the hands of a single person or small oligarchies. And only in a very limited number of cases the dictator in power actually concentrates most of the State functions. In such cases, if the dictator notoriously violates human rights, companies or banks that provide loans or any other type of assistance to his State could be considered as accomplices. In other countries, however, even if the power is centralized in the hands of one or a few people, he - or they - do(es) not concentrate all the functions of the State. For example, funding the Ministry of Agriculture of a country does not necessarily mean to provide assistance to its police, often responsible for brutality towards citizens. As a matter of fact, it could have certainly been appropriate to distinguish between the Iraq of Saddam Hussein and Mubarak's Egypt: while in the first case the dictator concentrated upon himself all the power, in the second one the authoritarian regime was structured under a solid State organization.

It is interesting to provide an example of complicity concerning the relations of an enterprise with the organization responsible for the security of its worksites and facilities. The case concerns the Yadana pipeline in Myanmar (Burma) and it also enlightens the difficulties and problems encountered by large multinational companies operating in countries ruled by dictatorships.

The case of the Yadana pipeline, Myanmar (Burma)

Since 1994 the Myanmar armed forces have performed frequent and serious human rights violations, in particular by using forced labour and committing murders, rapes and torture, such as during the realisation of the Yadana pipeline. The case originates from the oil project run by Oil Company of California - UNOCAL- which had promoted the creation of a joint venture (JV) with the French company Total and the Myanmar Oil and Gas Enterprise, for the construction and subsequent management of the Yadana pipeline, aimed
at supplying gas to Thailand. UNOCAL was the reference partner of the JV, having subscribed for the 25% of the capital. The security of this infrastructure had been entrusted to the military forces of Myanmar. A group of inhabitants of the Tanasserim region, crossed by the pipeline, appealed to the District Court of New York, arguing that the armed forces had committed various human rights violations which UNOCAL was aware of - even for their consolidated practice of committing abuses of this kind - and then it could be considered an accomplice. In order to prove complicity, the court considered necessary the concurrence of three elements: causation, proximity and knowledge. As regards the first element, the applicants claimed that UNOCAL, besides having chosen to entrust the security of the pipeline to local armed forces, had provided them with a concrete cooperation (including aerial photogrammetries, precision surveys and topographic maps) in order to allow a better localisation of heliports and other structures necessary to ensure security. Finally, the JV business partners had directly paid, in cash or food, villagers who collaborated with the military forces to carry out the project tasks. With regard to the element of proximity, the court found hardly debatable that there were very close links between some officials of UNOCAL and the commanders of the armed forces, since they were holding daily meetings. As in all cases of alleged complicity, however, what it is difficult to prove is the knowledge/awareness of providing support to the commission of an unlawful act. In the present case, the first and perhaps the most obvious evidence was given by the notoriety of the offending conduct of which the armed forces were frequently held liable. In fact, the consultants appointed by UNOCAL (the Control Risk Group) had largely confirmed the use of forced labour by the armed forces, as well as their frequent commission of other serious human rights violations. Besides of that, the Vice President of UNOCAL in his deposition clearly stated that the conduct of the local armed forces probably would not have been in line with the company policy. Similarly, another senior official said that denying the use of forced labour on the part of the armed forces for the development of the project activity would not have ‘withstood’ a serious investigation. Finally, in an e-mail communication between UNOCAL and Total, information concerning forced displacements of villagers in connection with the construction of the pipeline were provided; indeed, the author of the communication, while saying that the two oil companies could not in any way be held liable for actions committed by the armed forces, admitted that, as regards forced labour, it could not be denied that UNOCAL and Total are in a sort of grey zone. The court ascertained the complicity of UNOCAL in the commission of human rights violations perpetrated by the armed forces of Myanmar, relying on the two traditional standards of the participation in the actus reus - having provided concrete assistance to them - and the sharing of mens rea – since UNOCAL was aware of the violations and of the substantial effect that its own support would have on their commission. Finally, confirming the difficult identification of complicity - intended as support to the commission of a tort - it is worth mentioning the dissenting position of Judge Reinhardt. On the one hand, he does not believe that the international criminal law offers a well-established notion of complicity (even considering the interpretation of the Criminal Tribunal for the Former Yugoslavia and for Rwanda); on the other, he thinks that referring to the traditional Common Law notions about JV or agency-relationship would be enough. In conclusion, the court, while not believing that UNOCAL can be considered complicit in torture, has considered reasonable to conclude that it could be held liable for having aided and abetted the armed forces in their commission of murder, rape and the use of forced labour. It is therefore interesting to note that being members or partners of the subject that commits a human rights violation may result in joint responsibility or complicity, depending on the levels of involvement and the approach applied by different national courts.
A second element very useful to support the presumption of knowledge derives from the nature of the goods or services supplied to the perpetrator. In the case Doe v. Nestlé\(^{14}\) (one of the cases raised in the United States, relating to the time of apartheid in South Africa), the U.S. Court had to compare the sale of bulldozers to the supply of military vehicles. It appears almost obvious that a misuse of military vehicles is simpler to be demonstrated than the misuse of regularly traded products or equipment. In particular, bulldozers are earth-moving machines used on construction sites, even though they may be used during conflicts for alleged human rights violations, as it happened when somebody suggested that the manufacturer (Caterpillar) could be held complicit with the Israeli Government that had used such machines to destroy the homes of people suspected of terrorism.

The relevant sources and the case law allow to understand that reasonable predictability could be easier to be established than the direct knowledge, basing on three main elements:

- first, the nature of the activities performed by the subject which is provided with assistance or support;
- secondly, the nature of the goods and services provided; and
- last but not least, the ability of the potential accomplice to know his counterpart and to predict the use it could make of the goods and services provided to it.

The ethical and moral sense of complicity

The legal concept of complicity has been tentatively illustrated so far, as the level of cooperation of an enterprise with the responsible of a human rights violation that could be likely considered by national courts as a form of complicity (‘likely’, because the judges of different countries still adopt different criteria, and certainly the notion of complicity is subject to restrictive or extensive interpretations, also depending on the pressure of public opinion).

As it has been mentioned several times already, human rights watchdogs adopt a much broader vision of complicity, especially as regards the involvement of multinational corporations and banks in human rights violations by their counterparts, which can be suppliers or buyers of goods or services, partners, but also Governments and public authorities. In the view of those important players of the international system of human rights protection - including important bodies like ‘Amnesty International’ or ‘Human Rights Watch’ - the presumption of knowledge of providing support or assistance to acts violating human rights is substantially expanding. In practice, there is a switch from considering an accomplice ‘one who knew’, or ‘could reasonably have known’, to holding accomplice one who ‘should know’, or even worse, ‘could not ignore’.

Even Ruggie states that - in order to avoid their implication as accomplices in a violation of human rights committed by third parties - the ‘responsibility to respect’ pertaining to enterprises requires from them a greater attention than the care which would be needed to avoid one of the legally relevant forms of complicity. In other words, companies would be required to avoid any action that could result in a support to other entities in violation of human rights. Corporate responsibility to respect human rights also unquestionably extends the concept of complicity, although it is still difficult to determine to what extent. So, if there are not defined parameters to determine when a company can be held complicit in a violation yet, it is certain that the safest method - if not to eliminate, at least to address and manage risk - is certainly the adoption of proper and thorough due diligence process. The process may however prove effective only if one does not reduce it to a mere determination of risk level, but extended its objective to the identification of all those measures that can be put in place to cope with the negative impacts of corporate activities on local communities, particularly those that could result in human rights violations.

The case that we are proposing, while relating to the banking sector, is very significant to explain the expansion of the concept of complicity claimed by the civil society. It poses a question that today is certainly not possible to provide with an unambiguous answer: how far should the level of information...
and knowledge of an enterprise should go - and therefore its responsibility - with regard to the production chain of the goods or services dealt with?

The exploitation of child cotton harvester in Uzbekistan

In some States of Central Asia, especially Uzbekistan, cotton is notoriously hand-harvested by minors and students, taken out of schools against their will by the police forces (about 2.7 million students each year are obliged to participate in this activity). Uzbekistan is among the top five largest producers and exporters of cotton in the world, along with the United States, China, Pakistan and India. According to several reliable sources, however, this economic activity is also responsible for the economic stagnation and environmental degradation of the territory in which it is carried out. In addition to local companies and multinational enterprises importing cotton (e.g. Louis Dreyfus Commodities Suisse s.a, DEVCOT and Cargill), also certain commercial banks, such as ABN-AMRO, BNP Paribas, Credit Suisse and Citibank, have been involved in this activity and have financed in various ways the production or trade of Uzbek cotton. Recently, in 2013, some of these banks - including BNP Paribas - decided to suspend all types of financing, due to continuous human rights abuses by the Uzbek Government. It should be noted that Uzbekistan has signed and ratified all the treaties with regard to child and forced labour, as well as those concerning work dangerous to personal safety and health, concluded within the United Nations and ILO. In September 2013 the Uzbek Human Rights Society has submitted a request for investigation to the Inspection Panel of the World Bank on a project of support to Uzbek enterprises engaged in the collection and production of cotton. The case was considered worthy of further investigation by the Board of Governors of the Bank. Moreover, in 2008 a significant number of Uzbek dissidents and activists had denounced the exploitation of child-workers employed in the country since the Soviet era. Given the enormous media pressure and the ongoing complaints, in 2010 a coalition of NGOs called on the international community - the European Union, the European Bank for Reconstruction and Development (EBRD), the World Bank, UNICEF, ILO and some States (including the United States, China and Russia) - to stop buying Uzbek cotton and deny any kind of support of such a State. Those NGOs and other pressure groups have also organized boycott operations and a large media campaign on the web (www.cottoncampaign.org), which involves a large number of stakeholders and plays a significant role as a platform for the exchange of information, a reference site for online publications and a communication tool for social networks. Although the campaign has achieved the goal for which it was launched - namely raising awareness about the case and causing reputational damages to the companies involved - on the other hand it should be admitted that the income arising from the sale of cotton on the international market - still very relevant - continues inter alia to be conveyed on current accounts and investment funds whose ownership is difficult to be identified.

Nevertheless, it is unquestionable that the mobilisation of public opinion against the human rights violations perpetrated in harvesting Uzbek cotton has produced some significant results, since many multinational enterprises that imported or marketed products obtained with the Uzbek cotton (such as the Louis Dreyfus Commodities Suisse s.a, DEVCOT and Cargill) have decided to review the contracts and even not deal any more with the product originating from that country. That happened essentially in order to avoid the reputational damage they were suffering, being considered accomplices of the authorities of that country in the commission of serious violations of human rights.

This case presents a particular interest with regard to the identification of the relationship...
of complicity. Many of the companies involved in the media campaign did not directly import cotton from Uzbekistan, but only marketed products obtained through this raw material. Indeed, their relationship with the authorities of the country involved in human rights violations was entirely indirect: according to the traditional conception of complicity, it could not be said that they shared the mens rea, namely the intention to commit the unlawful act.

Certainly, all the companies dealing with Uzbek cotton were benefiting from its price, definitely competitive, due to the fact that the cotton harvest was accomplished through the exploitation of forced child labour. Following this idea, it would be considered an accomplice whoever, at any level of the supply chain, exploited forced labour to obtain a product or to perform a business activity. It appears thus unquestionable, as analysed in the case studies, the existence of an ethical vision of complicity alongside the legal one.

It is true that many national courts would not accept yet the idea that one who ‘could not ignore’ can be considered an accomplice. But large multinational corporations and international banks have powerful organizations and very relevant financial resources allowing them to acquire quickly and effectively all the information available on their counterparts, the use of the services or products they wish to buy or provide. They may also resort to consultants and experts – what they usually do today, especially when resorting to in-depth due diligence processes in order to assess the consequences and the risks of productive and commercial activities on the natural, and now, increasingly, even on social environment. But, as Ruggie clearly says, one thing is asking companies to respect human rights, another is making the enterprises always responsible to protect them.

At present the undeniable developing trend in the concept of complicity has to be adequately taken into consideration. Also in case the enterprise escapes the sanction of the national courts (especially in terms of compensation to victims, but even of criminal convictions of its managers and the senior officials) it is undoubtedly not sheltered from the ‘blame and shame’ generated by the media campaigns unleashed by civil society and human rights defenders. They affect enterprises and banks in their reputation and image, which have notoriously even a greater value than money, especially for those enterprises that are on the market, and depend on the consumers trust. Indeed, it is not possible to forget that many of such campaigns also resulted in boycotts of products or services, as it was in the case for the soccer balls produced by Nike, accused of using child labour. If civil society often moves more quickly than judges, it is also true that judges tend to rapidly align to public opinion: who could ever imagine that a Spanish court would have impeached a foreign Head of State, as the Chilean dictator Pinochet?

Notes

3 International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Furundzija, ICTY, IT 95 17/1 (10 Dec. 1998), § 1. The complete text of the judgement can be found on www.un.org. The case was also quoted by the UN Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, The International Law Standard for Corporate Aiding and Abetting Liability, (Jul 2006).
7 On this issue, M. Robinson asserts: «a company that promoted, or assisted with, the forced relocation of people in circumstances that would constitute a violation of international human rights could be considered directly complicit in the violation». Mary Robinson, Beyond Good Intentions: Corporate Citizenship for a New Century (London, Ed. Kevin Boyle, 2002).
8 «Supplying [of] a violator of the law of nations with funds - even funds that could not have been obtained but for those loans - is not sufficiently connected to the primary violation to fulfill the ‘actus reus’ requirement of aiding and abetting a violation of the law of nations.» Sabine Michalowski, No Complicity Liability for Funding Gross Human Rights Violations?, Berkeley Journal of International Law, Volume 30, Issue 2, Article 5 (2012).
10 In fact, in Weiss v. National Westminster Bank PLC the Court believes that: «an organization designated as a terrorist organization and consequently an entity whose nature and objectives the bank is expected to know. » Specifically, the judgement affirms that – in order to raise the case before the Court – the injured party will «allege, for example, that the funds supplied by the defendant were used to buy the specific weapons and train the specific men who killed or injured the plaintiffs. […]» «to prove proximate cause, it would be sufficient to assert, as the plaintiffs did, that NatWest reasonably foresaw that funds provided directly to known terrorist groups would be used to perpetrate terrorist attacks.» V. Weiss v. Nat’l Westminster Bank PLC, 453 F. Supp. 2d 609, No. 17 (2006), p. 631 and 632.
11 The Convention has extended the means used against financing international terrorism. International rules and guidelines formed the subject of several national provisions collected and systematized in the Legislative Decree No. 109/2007 adopted in transposition of the Directive 2005/60/EC. The rule requires that the parties freeze the funds and the economic resources of the persons designated under Community regulations; communicate the freezing measures to the competent authorities; report as suspicious the transactions, reports and any other information available, referable to the subjects contained in the lists; and report suspicious transactions that, on the basis of available information, are directly or indirectly related to terrorist financing activities.
13 A joint venture partner is jointly responsible for the work of the others (UNOCAL was a member of the joint venture in the same way as the Myanmar armed forces). In case of an agency relationship, instead, UNOCAL would certainly have monitored the activities of the armed forces, having delegated to them the task of ensuring security. In any case, the concept of reckless disregard would have been applicable to the behaviour of UNOCAL: following such concept, becomes responsible of an unlawful act whoever, having the duty to prevent it and being aware of the possibility of it occurring, fails to act to prevent it. Certainly, it reminds the concept of silent complicity in the Furundzija case.
14 U.S. Supreme Court, Court of Appeals 9 Circuit, John Doe I, John Doe II, John Doe III, Individually and on behalf of Proposed Class members; Global Exchange, V. Nestlé Usa, Inc.; Archer Daniels Midland Company; Cargill Incorporated Company; Cargill Cocoa, Order and Opinion, No. 10-56739 D.C. & No. 2:05-Cv-05133- Svw-Jtl (2 Dec 2013).
16 UN General Assembly Resolution 44/24; ILO Convention No. 105 concerning the Abolition of Forced Labour; ILO Convention No. 29 concerning Forced or Compulsory Labour; ILO Convention No. 138 concerning Minimum Age for Admission to Employment; ILO Convention No. 182 on the Worst Forms of Child Labour.
The process commonly referred to as due diligence originated with the United States Securities Act of 1933. It stipulated that a broker of securities could avoid being held liable for insufficient customer information only by demonstrating that he had conducted a due diligence process. This process is typically designed as the research and analysis of situations and facts to be placed in relation to a specific regulatory instrument. In the present paper, such instruments are represented by norms and principles for the protection of human rights, and therefore, essentially the Bill of Rights, as well as those norms and standards which interpret it within the business sector, especially when the enterprise has voluntarily endorsed them (it is matter of the general standards, such as the OECD Guidelines, and of those relating to specific sectors such as the Kimberley Process for diamonds). More precisely, the due diligence is exactly what ensures the fulfilment of the ‘responsibility to respect’ that the Ruggie Framework attributes to enterprises.

The concept of risk, however, is obviously much wider, since it refers to any type of threat or potential damage to the corporate activity and which may be of various nature: an earthquake represents a risk caused by natural events; the fall of a Government is a political risk; a new law imposing additional burdens to the company represents a legal risk; the devaluation of a currency implies an exchange rate risk. Similarly, the use of violence by the security forces of an enterprise materializes a risk of complicity in a possible violation of human rights.

The methodology of a due diligence process is therefore not only of the legal nature, but it is rather multidisciplinary, since it requires different skills and techniques. That multidisciplinarity is suited to carefully consider the multiple aspects of all the situations wherein an enterprise may incur in different geographical, political, economic and social contexts of operation. The risks which corporate culture is more familiar with firstly came from the need to protect natural environment and nowadays include also social considerations, implying the respect of ethnicities, cultures, religions and traditions that characterize human communities and groups living where the company operates or intends to develop its activities. In order to provide the company management with a global overview of the different contexts of operation, it would therefore be desirable that the due diligence concerning the respect for human rights be always aligned and integrated with the existing risk management systems used by each company. Human rights risk would thus become an integral part of the general management of the enterprise: this process would allow to take account of the growing importance and danger of human rights risks (widely demonstrated by the case studies carried out by the Expert Group), even though such special risks will vary depending on the industrial sector and the countries and/or areas where the enterprise is active.

However it is important to underline that due diligence is not regulated by principles and rules that ensure its homogeneity and effectiveness, because under such a definition very different processes might hide. Prestigious consulting and law firms, NGOs, universities and other international bodies propose complex and expensive due diligence templates, which are often unsuited to companies or...
projects of medium or small size. Neither is there an official certification authority of a formal due diligence process, with the result that a simple and rapid survey of available documents might be formally defined as due diligence. Although avoiding to propose any model of the type ‘one size fits all’, it will be illustrated below a more complete and articulate process.

What is due diligence for?

First of all, answer should be given to a crucial question, although it may appear obvious. What is the due diligence process for? In its traditional conception it is primarily meant as an analysis that leads to the assessment of an actual situation. Before buying a property or an enterprise, its value is to be assessed. However, it is not difficult to understand that this type of investigation is very different with respect to the nature of the risk which is connected to an event/situation that has not occurred yet, in the aim at either avoiding it, if possible, or at least at reducing its adverse consequences - should it occur. Very cleverly and effectively a recent study compares the assessment of the risk of human rights violations to the analysis made by every insurance company prior to ensure its client or a specific operation. In order to be able to evaluate its acceptability, the insurance company is concerned not only about the gravity (namely the magnitude of the risk), but also by its actual chances of occurrence. Going on with this effective comparison, thanks to the risk analysis, the insurance company will be in the position to decide whether or not allow the coverage and how to structure the contract on the basis of the probability of materialisation of the insured risks. This approach helps to understand the objective and the direction of a due diligence process when applied to the risk of human rights violations: it will not be limited to the assessment of the probability and gravity, but it should allow the enterprise to assess its acceptability in a given time and in a specific social and environmental context. The process must then correctly start from an analysis of the situation, in order to identify actions and measures that may be used to prevent or manage the risk. An effective due diligence process should therefore demonstrate to the management, for example, that there is the risk of human rights violations, since the creation of a given infrastructure requires the displacement of some of the communities that live in the areas where it will be built. The same due diligence process, however - or a different assessment, as long as closely related and contiguous to it - should identify the measures that could mitigate this risk, for example by appropriately compensating those communities, also through the adequate preparation of the relocation area, or it can prevent the occurrence of the problem by changing the infrastructure project in a manner that will not result in the need to relocate those people. If the identified measures would reveal either not feasible or not effective, then due diligence would show that the risk would be unacceptable in such case and the management of the enterprise would have no choice but to refrain from the project. The above arguments are also confirmed by the experience made in a variety of environmental, social and cultural contexts of all those emerging countries (but not only) where the risk of violation of human rights by enterprises is generally higher. It is thus essential to implement a sound Stakeholder Management Process (large companies already accustomed to use it) by aligning it with a human rights risk assessment. In other words due diligence should not only tell us whether to do or not to do something, but above all, and more importantly, how to do it.

The company’s involvement in human rights violations

In this particular field, the risk depends on the direct or indirect involvement of the company in the violation of the norms protecting human rights. Indirect involvement - often referred to as ‘complicity’ (dealt with above in this paper) - is certainly the most subtle. The case study reveals how frequently the enterprise (but also the lenders) is involved in illegal - or allegedly illegal - activities conducted by other subjects with whom it has institutional and/or contractual, or even only de facto, relations. That increased
risk sometimes does not originate much from a real involvement, but from an alleged involvement perceived as such by the human communities somehow impacted by enterprise operations, or by the civil society organizations playing the advocacy role on their behalf. Indeed in many cases the expectations of individuals or groups are not fully met, thus generating a perception of the responsibility of the enterprise, which could be wrong or at least excessive.

The human rights violations risk assessment process

Although it is difficult to standardise such a delicate and multidisciplinary process, some procedures - although different in contents and complexity - were progressively developed. They usually envisage two main phases:

1. obtaining desk information, both at the corporate headquarters and in the country where the enterprise is based, mainly through the existing documents, with the aim to gather an initial frame of reference on the company, the sector in which it operates, the activity or the project to be developed, as well as the situation of the protection of human rights in that country and in the target area;

2. a subsequent field-based phase, which takes place in the country and in the area of operation. It allows a first initial interaction with the so-called stakeholders, i.e. those entities (public and private bodies, groups, individuals) who are differently affected by or involved in the corporate activity, since they can either be impacted by them (often negatively), or are somehow able to interfere with those activities, especially when they perceive them as harmful or conflicting with their interests. The field-based phase consists in contacts and individual or collective hearings with all stakeholders and with other useful informants present in the country.

It would be nonetheless advisable and useful adding a third phase, that is not always part of the traditional due diligence process, consisting in the identification of the actual ‘engagement’ activities, to be put in place to prevent or manage the risk of human rights violations. It might also be an autonomous analysis, not formally included in the due diligence process; but it is important that it remains contiguous and complementary in order to complete its results and ensure its effectiveness.

If used together, the above phases will obtain the best possible assessment of the level of acceptable risk and provide for mitigation and control measures, especially when the risk cannot be completely avoided.

In any case, the areas of investigation are: the corporate activity, the environment wherein the enterprise operates, its involvement and the perception of the effects of its activities by stakeholders.

The desk analysis

It is finalized at gathering information on:

- the enterprise and its activity, including its corporate culture;
- the potential occurrence of human rights violations in the industrial sector concerned;
- the activity or project the enterprise is going to develop;
- the internal and external stakeholders;
- the level of enterprise’s involvement with other entities for the development of the target activity or project;
- the political and economic situation of the country and in the target area;
- the level of human rights protection in the country where the corporate operations take place, with reference to the relevant legislation, as well as to its effective enforcement.
**The documents**

The desk phase aims at researching, gathering and selecting the documents already available within the enterprise, the different specialized national and international bodies and Internet, as well as at organizing meetings and establishing contacts with all the sources of information located in the country where the enterprise is based.

In particular, it will be necessary to acquire all the information typically to be found within the enterprise’s internal documents or through interviews with its management, allowing to understand the type of tasks normally carried out by the company, its track records, its operational practices - which obviously include the corporate culture - as well as the suppliers of goods and services normally needed for the development of the target activities, and all other persons who may be interested into or may affect the activity of the enterprise. During this first phase, all internal and external stakeholders should be tentatively identified, in order to allow verification and assessment during the field phase.

Several sources can provide useful information on the human rights situation in the country or the target area. The very first tool is always a good Country Guide (such as the CIA Guide to Country Profiles - Central Intelligence Agency, USA), to subsequently consider those specific reports that analyse the situation of the human rights in each country, for example the ones produced by the United Nations Specialized Agencies, such as UNDP (UN Development Programme). In addition, the reports available on the country risk evaluation, such as those issued by the various national credit guarantee agencies (in Italy, SACE) should be attentively considered. These reports usually deal with political, natural disaster and exchange rate risks, but also reviews of the environmental and social risks might be found. The databases specialized in the collection of human rights cases should not be underestimated, among which the ‘Business and Human Rights Resource Centre’ certainly is one of the most comprehensive and reliable. Finally, it could be consulted the websites of the international entrepreneurial associations, existing for almost all industrial sectors, and in particular those where the investments of large multinational corporations in emerging countries are concentrated (such as IPIECA for the oil sector). It is clear that if such associations or organizations have also promoted and adopted specific standards (as for the mining industry, for cotton, for diamonds, etc.), then there will be an additional reason to carry out a thorough analysis of the risks of human rights violations that are more likely to occur in that sector.

**Interviews with the management of the enterprise and other informants and experts**

Contacts very often prove useful to confirm and check the information taken from documents. Needless to say, the enterprise management, but also lower-level officers, can reveal an essential source of information: they are in the position not only to illustrate the activities of the enterprise, but also, and more importantly, its practical and operational approach, which represents the corporate culture and may also provide an essential contribution to the respect for human rights during operations. Additional valuable information can be obtained by the national entrepreneurial associations in the country where the enterprise is based (in Italy, for example, Federtessile - the textile industry federation), and/or the association of the Chambers of Commerce (Unioncamere in Italy), the embassy in the target country, the managers and officials of national enterprises operating in the same country.

This phase, often entrusted to consultants, can certainly be conducted also by officials of the company to whom the responsibility of due diligence and risk assessment has been attributed. However, an independent external expert able to provide a specialised and objective vision in the gathering and analysis of information, should always be associated with the corporate team.
The field-based phase

The field-based phase is of essential importance, because it allows collecting information directly from stakeholders and verifying the results of the desk phase, with the important corollary of starting contacts and collaboration with local communities. It is useful to keep in mind the types of stakeholders that, in principle, should be meet and interviewed.

- First of all, the central authorities of the country which are responsible for the industrial sector of the enterprise (which are usually located in the capital city), and the representatives of business associations, Chambers of Commerce, banks and major enterprises locally based.
- Later on, visiting the region where the company is going to operate, it is desirable to meet all the main stakeholder representatives, especially local communities, identified through the desk phase. Besides of formulating questions to assess their relative importance (i.e., the number of members, their mission, their belonging to religious, ethnical or tribal groups, etc.), it will be essential to know their position regarding the entrepreneurial activities already developed in that area and in the same sector, and to request their opinion on the company’s projects. Investigating on other eventual stakeholders which may have a major interest or impact on the activities of the company would be very useful to reach a comprehensive overview of all the relevant stakeholders. Subsequently the different responses to such question should be compared in order to finalize the stakeholders list. Each stakeholder would then be evaluated concerning its power and attitude in respect to the project, with the aim of contributing to the final assessment of the risk of human rights violation, its probability of occurrence and its intensity level. The meetings with local communities should preferably be informal, and should take place where such communities live, or by the centre of their traditional activities, in order to get spontaneous and truthful information. Very often in this phase the use of local staff or experts may be appropriate and effective, thanks to their greater familiarity with local communities, languages, traditions, etc. Sometimes having recourse to local staff is inevitable, for example when security conditions in the country or in the region do not permit the access to the firm’s officials or foreign experts. But in such case, to ensure the completeness and impartiality of information research and analysis, it is important that the staff or experts should not belong to the communities or groups to be interviewed. To this purpose, the local interviewers should be associated with, for example, experts from neighbouring countries, which are not perceived as foreigners by the local community, but which have no connection or common interest with the latter.
- Excellent information sources can also be the representatives - if any - of the most important international cooperation organizations based in the country, such as UNDP or the International Organization for Migration (IOM) - which almost always have a resident representative in all the emerging markets - UNIDO (UN Industrial Development Organization), which promotes industrial development projects and knows very well the economic and social situation of the country, and, of course, the World Bank, or the international regional banks active in the concerned country: the EBRD - European Bank for Reconstruction and Development, with regard to Eastern Europe and the Mediterranean, the AfDB - African Development Bank (for Africa) and the ADB - Asian Development Bank (for Asian countries).
- If the company already operates in that area, it will be helpful to meet expatriate management resident in the capital city or in the area where the company operates; or the directors and officers of other foreign companies locally active. During the meetings with the companies’ local management, it will be important to deal with the sharing of responsibilities between the headquarters and the local affiliate about risk management, especially referring to human rights violations. One of the aims of an effective due diligence process is indeed to suggest risk prevention, management, mitigation and remediation measures. These complex processes could be even more difficult, if not impossible, when lacking a clear definition of the responsibilities of the core management in relation to the local one, as well as the coordination methods used by both.
The phase of engagement in the prevention and management of the risk of human rights violations

If the due diligence process is aimed at identifying and assessing the risk of human rights violations, its main purpose cannot but be the prevention and management of this risk, by protecting the human communities affected by the activity of the enterprise. The result of the above analysis might be in the sense that there are no such risks in the performance of the activities or in the implementation of the project planned. More often, however, especially in the case of the emerging countries - and even more so for those which are considered as the less developed - due diligence might bring out minor or major risks, which are very often connected to the impact or, better, to the effects of the corporate activity on the territories where local communities or subgroups live, or from which they draw the natural and economic resources for their own sustenance. At this stage the engagement strategy should therefore be carried out in order to prevent the damage that these communities would eventually suffer from human rights violations, or at least to make it acceptable through its substantial mitigation. If the stakeholders were properly identified and interviewed, it is thus possible to fill in the so-called ‘Stakeholder Register’, which provides an overview of all the information relating to the stakeholders involved. (see Box No. 6)

The process of mapping the stakeholders takes place through the identification, categorization and analysis of the various stakeholders, both external and internal to the enterprise. A stakeholder is any person, group or organization that may affect or be affected by the policies, activities and strategies put in place by the company. Next to the identification of stakeholders, the Stakeholder Management Plan includes risk analysis, identification of the potential impact on business activities and the adoption of a strategy for the involvement of stakeholders in order to minimize the risks. The main stages are as follows:

<table>
<thead>
<tr>
<th>STAKEHOLDER MANAGEMENT PROCESS</th>
<th>INFORMATION</th>
<th>DEFINITION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category</td>
<td>It shows the different categories of stakeholders, external and/or internal to the enterprise (institutions, local communities, customers, suppliers, shareholders, media, non-governmental organizations, etc.).</td>
<td></td>
</tr>
<tr>
<td>Requirements</td>
<td>It shows needs, requirements and expectations of the stakeholder when considering the activities carried out by the enterprise.</td>
<td></td>
</tr>
<tr>
<td>Localization</td>
<td>It identifies the stakeholder with regard to a specific project and/or geographical area.</td>
<td></td>
</tr>
<tr>
<td>Impact</td>
<td>It identifies the possible impacts (positive and/or negative) of the stakeholder on the activities of the enterprise.</td>
<td></td>
</tr>
<tr>
<td>Interest</td>
<td>It shows the level of interest of the stakeholder with reference to the enterprise activity.</td>
<td></td>
</tr>
<tr>
<td>Awareness</td>
<td>It shows the stakeholder participation level with regard to the enterprise activity.</td>
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In order to better understand the meaning and the practical purposes of prevention or mitigation of human rights violations risk, it may be useful to distinguish some quite common cases that have to be considered as mere examples.

- The first type includes those situations where the damage suffered by a human community as a result of a human rights violation is easily identifiable and preventable. For example, if the water needs for the enterprise’s production processes could compromise the amount of water necessary to the human communities living in the area, it might not be difficult to create new sources, both to supply the needs of the enterprise and to satisfy those of the local communities. In this case, the risk can be prevented and eliminated.

- The second type includes instead those risks which, although easily identified, are neither completely preventable, nor completely avoidable. A typical example is the need to displace the communities or groups that reside or derive sustenance from the areas directly affected by the activity of the enterprise, such as in the case of the creation of a pipeline, or of a large infrastructure. In an industrialized country the required land would be expropriated, providing owners with an adequate compensation. In many other countries, however, simple cash compensation could be insufficient to prevent the damage done to a family or an entire community. In fact, it could not be so easy for them to settle in different locations, even if provided with money to buy the land: the latter might not be available in neighbouring areas or, for example, not be suitable for those agricultural or economic activities which were traditionally practiced by the displaced communities. This means that even if the local legal system includes the expropriation/compensation model, the company could not avoid committing a violation of the human rights of the populations concerned. Consequently, in that case, the task of prevention and mitigation could require the enterprise to buy and equip the relocation area for the affected people, also obtaining *inter alia* their consent: what could sometimes be difficult and possibly expensive. As an alternative, the enterprise may decide to move the route of the pipeline.
or the location of the infrastructure, but this may not always be possible. As a matter of fact, in this second type of cases the identification of risk mitigation activities is certainly much more expensive, complex and uncertain in its outcome.

- The third category concerns the emergence of risks that no measure or activity may prevent or mitigate. An obvious example is that of a business or a project be realised only through the destruction - or the serious impairment - of a site considered sacred by the indigenous, tribal or religious communities who live in the affected area. In that case, the mining field or the dam could not be realised without incurring a serious violation of the human rights of those communities: what would make almost impossible the implementation of the project, unless changing its localization and structure.

The above types of risks and associated mitigation and prevention methods necessarily represent a simplification of real situations that can be - and often are - far more complex and multifaceted. They must therefore be considered as mere examples, useful for a better understanding of the delicate task of a preventive identification of the engagement measures.

The prevention of human rights violations based on the Stakeholder Management Plan

There are, however, risks which are even more insidious, because they are only indirectly linked to the activities of the enterprise. They often derive from the perception and expectations of those human communities who live in the area affected by the economic activity envisaged. In fact, it is quite natural that such communities feel that the exploitation of natural resources or the creation of a large infrastructure in the territory in which they traditionally live should result in a consequent improvement of their living conditions. Those expectations are certainly not exclusively belonging to the poorest communities of the developing countries, since the same attitude is shown also in the industrialised countries. It may seem obvious that a municipality affected by the construction of a dump requires compensation in terms of infrastructure and services. Moreover, it almost always happens that the inhabitants of a place where an oil refinery is to be built will expect the creation of jobs. Indeed, the less developed and poorer the concerned human communities are, the higher their perceptions and expectations become. The non-fulfilment of those expectations ends up being very often the cause of a social malaise that turns easily into hostile attitudes of the population towards enterprises, likely to generate boycotts. And such acts risk to cause intense crackdowns, often violently repressed by public authorities or private security forces (used by companies to defend their production or construction sites), implying serious human rights violations. Although in such cases the risk of human rights violations may not appear actual (and certainly is very indirect), the case studies show that it can very easily materialise, with dangerous and often severe consequences. Furthermore, apart from the human rights considerations, it is worth mentioning that a preliminary stakeholder analysis aimed at the establishment of a ‘Stakeholder Management Plan’ is now a consolidated practice among companies, especially when they operate in emerging countries. Such document is aimed at i) identifying precisely all those subjects interested or involved in the activities of the enterprise; ii) evaluating the negative impact they could suffer or, vice versa, that they could cause on enterprise’s activities; iii) categorizing and assessing all types of risks (economic-financial, operational, reputational, social and in terms of security). The results of this phases would allow the identification of the risk management and mitigation measures included in the engagement strategy. In sum, the ‘Stakeholder Management Plan’ aims at preventing any negative interference between the activity of the enterprise and the potentially affected subjects, and even at establishing with them a climate of trust and cooperation, which can substantially contribute to avoiding risks, including those of human rights violations. The engagement activities are in practice those interventions that, on the one hand, eliminate the negative impacts on the local communities and, on the other hand, support and improve their economic and social conditions, so ensuring the regular and
fruitful development of the enterprise activity. Obviously it is not easy to figure out the appropriate and effective human rights violations prevention activities, when they are not directly related to a current and actual risk, especially because presently the ‘Stakeholder Management Plan’ is very often focused on the traditional business risks and more rarely deals with the respect for human rights. Again, an example may help. Many of the cases examined by the Expert Group concerned human rights violations committed by the security forces that companies use to protect their production and construction sites. Many of those abusive and violent episodes against local communities were caused by the need to prevent or limit hostile acts of those communities against the enterprise, like destruction, damage to or theft of machinery and equipment, or even threat or kidnapping employees. It is clear that such abusive behaviours of the security forces can be prevented or limited by strongly regulating and closely supervising them, but that is likely to be a palliative solution, if the actual causes of discontent of local communities would not be progressively eliminated. Ensuring jobs opportunities to the members of those communities, possibly after having provided them with an adequate training, or sub-contracting them for some services necessary to the enterprise - such as providing food, cleaning, transportation, etc. - can prove to be much more effective and sustainable for ensuring the smooth development of the enterprise’s activity or projects, but also for the prevention of human rights violations. Indeed, it should be pointed out how engagement measures aimed at creating job opportunities should today be preferred to the traditional social projects (such as building schools or hospitals), since they can improve the living conditions of local communities and also actually contribute to establish cooperative relation with the enterprise. Finally, there is almost no need to remind that the experience of many multinational companies proves that working in partnership with local communities through integrated multi-annual programmes shared with them reveal to be more fruitful and effective than responding to individual and occasional requests for intervention.

Very often, however, those diverse and complex interventions in favour of the local communities are not part of the experience of mining, oil, manufacturing or building companies. It is always desirable, therefore, that the management of the enterprise could be assisted by specialists with experience in development cooperation programmes.

Notes

1 Human Rights, Corporate Complicity and Disinvestment, edited by Gro Nystuen, Andreas Follesdal, Ola Mestad, (Cambridge, Cambridge University Press, 2001) The comparison refers to evaluations carried out by investment funds in order to prevent the risk of human rights violations, but it seems very effective also for the other sectors.
In the introduction to this paper the case of the conflict minerals as well as the one relating to the Arctic pollution by Shell, in which Lego was involved by the watchdog NGOs has already been mentioned. It is worth to better analyse them, especially because they are foremost the result of major media campaigns, organised by human rights NGOs, inter alia through the production of significant videos, demonstrating the use of sophisticated forms of communication suitable to attract public attention. The first case is represented by a trailer of a movie titled ‘Blood in the Mobile’, realised by the British journalist Frank Poulsen and available on Internet since 2010. It shows particularly harsh images of children working in the coltan mines in Congo (DRC) in dramatic health and safety conditions, in apparent contrast with the subsequent images of the presentation of a Nokia phone. The message is strong: whoever uses a Nokia phone contributes to child labour abuse, indirectly assuming that Nokia is held co-responsible. The second example of visual communication was produced by the agency ‘Don’t Panic’ in July 2014 with the short cartoon ‘Everything is not awesome’. As mentioned in the introduction of this paper, the violation of human rights is carried out by Shell as a part of its activities in the Arctic, involving also the Lego that sell its products through the Shell network. The video uses Lego bricks and figures to reproduce the nature and wildlife of the Arctic, while they are gradually flooded and blackened by oil spill polluting the environment.

Whilst it is true that the two movies have a strong impact on public opinion thanks to the intensity of the message and the techniques used, the communication remains at the base of many other large-scale campaigns that highlighted the involvement of enterprises. As it has been pointed out by the then UN Secretary General Kofi Annan, with regard to the occurrence of human rights violations in the ICT sector «Without openness, without the right to seek, receive and impart information and ideas through any media and regardless of frontiers, the information revolution will stall, and the information society we hope to build will be stillborn» (2006). Therefore, it is interesting to consider three additional cases: the collapse of Rana Plaza in Bangladesh, the construction of the Belo Monte dam in Brazil and the world campaign against cluster bombs.

Rana Plaza collapse, Bangladesh

On April 24th, 2013 at Rana Plaza in Savar (sub-district of Dhaka, capital of Bangladesh) an eight-story building collapsed. The complex housed a shopping centre, garment factories, a bank, several shops and some apartments. Rescue operations and search for the missing people lasted for almost a month, and according to the final estimate approximately 1,129 victims and 2,500 wounded were recorded. This case is considered the most serious incident that has involved textile companies. The causes of the accident was due to an structural failure ever detected before. Despite the building’s evacuation alert following the discovery of cracks (appeared the day before
the accident), textile workers were ordered to return to work the next day - when the disaster happened. However, the Rana Plaza's collapse is just the latest of major events related to the exploitation of workers in the textile industry, which have given rise to large media campaigns. Among them, since 2013 the ‘Clean Clothes Campaign’ (www.cleanclothes.org/ranaplaza) has certainly been one of the most effective, not only for the quantity and quality of the information collected about the disaster and for the continuous monitoring of the process compensation, but also in terms of spreading consumer and trader awareness. The campaign is now on Facebook and Twitter, and on the occasion of the first anniversary of the accident various events around the world were also organised. The news about the disaster and the evolution of the case have also occupied the main international newspapers, such as the BBC, The Guardian, The New York Times and others. In July 2014 The Guardian published news related to some labels affixed by unknown hands on certain clothing, to recall the origin and conditions of workers who had packed them. Finally, the Industrial Global Union, the world trade union of textile workers, has organized an online campaign in support of the unions in Bangladesh, to demand for the reform of the labour law in the country. To cope with the serious complaints related to the case of Rana Plaza, in March 2014, 7 out of 29 textile brands involved contributed to create a Trust Fund (Donor Trust Fund) for the victims, promoted by ILO (which was however so far paid only part of the necessary contributions). On the sidelines of the OECD Global Forum on Responsible Business Conduct this year (June 2014), the Governments of the Netherlands, Italy, Spain, France, Germany, the United Kingdom and Denmark requested again to their textile companies involved in the disaster to pay the due amount to the Fund, considered the only legitimate instrument to ensure the right compensation to all victims. Following the ‘Global Sustainability Compact’, a joint initiative of the European Union, the ILO and the Government of Bangladesh created with the aim of improve labour, health and safety of textile workers, the Bangladeshi authorities have committed to fulfil all conditions necessary for the eligibility to the ILO Better Work Programme (October 2014). The exploitation of workers in the textile sector, particularly in some parts of Asia (such as Cambodia and Bangladesh) remains a serious problem, despite the peculiar relevance it has had in recent years. The initiatives promoted by the Government of Bangladesh (including, for example, the increase by 77% of the minimum wage for textile workers) have remained unrealized and accidents continue to occur causing the death or injury of the workers, still forced to work in inhumane and degrading conditions. Despite the efforts undertaken by the international community, the international system for the protection of labour rights (ILO Declarations and Conventions for the protection of workers’ rights, including those relating to minor workers) has not been and is not respected yet. Although the case of Rana Plaza has brought to the attention the working conditions in the textile industry and caused reputational damages to enterprises of the industrialized countries involved in the accident, the need to reduce production cost imposed by the globalized market complicates the respect for human rights in this sector. It is therefore easy to predict that many NGOs will strengthen their complaint, possibly giving rise to other demonstrative acts, with foreseeable reputational damage for the companies involved, especially if the abuse will regard child labour, or even forced labour. And finally, as regards the use of cotton from Uzbekistan, it has been pointed out that companies should reflect on the establishment of a sort of ethical principle of complicity, requiring a significant increase in corporate social responsibility, at every level of the supply chain.
Belo Monte dam case, Brazil

The Brazilian Government has planned to build in the Amazon territory 60 dams over the next 20 years, causing the displacement of thousands of people and threatening the survival of the whole Amazonian ecosystem. This extensive program is motivated by the growth of the energy requirements of the Brazilian population, which can be satisfied only by increasing by 6000 megawatts (MW) per year the current offer. Despite the offshore reserves of gas and oil, Brazil has the third hydroelectric potential in the world (after China and Russia) and Government policy is willing to further exploit the hydroelectric resources of the country. In particular, the Belo Monte hydroelectric project, which began in 2009, resulted in the transfer of about 40,000 people and caused pollution of 1,500 sq.kms of land, including the lands populated by local indigenous peoples. The project provides the construction of 4 dams, 27 basins, 7 spillways and a gigantic by-pass channel, which should divert the Xingu River. It also will require the flooding of approximately 668 sq.kms (in particular, 400 sq. kms of rainforest, 100 km of which should be drained). The planned capacity is 11,233 (MW), which made Belo Monte the second-largest hydroelectric dam in Brazil and the third in the world. The 75% of the consortium that leads the development of the infrastructure (Norte Energia) is composed by companies controlled by the Brazilian Government, and it is mostly financed by the National Brazilian Development Bank (BNDES). Although the Environmental Impact Assessment (EIA) had predicted a strong environmental impact, in particular on the fauna of the area affected by the project, activities started but have been interrupted several times by protests of the local population, supported by Brazilian and international NGOs, as well as by some Brazilian judges’ rulings. In October 2013 the Federal Regional Court agreed to the request to suspend the licence to Norte Energia for the construction of the dam started in 2011. It also forbade the continuing of funding from BNDES to the enterprise, as long as the conditions for the granting of the license had not been fulfilled. In addition to economic damages suffered by the consortium involved - due to the blocking of the BNDES financing to Norte Energia - the reputational damages (for not respecting the principles 4 and 5 of the Equator Principles) suffered by companies and banks that are part of the consortium led by Banco do Brasil (Itaú, Bradesco, Santander, and Caixa Econômica Federal) must be considered. The local community, namely the 24 indigenous tribes whose territory is affected by the project, has suffered not only the forced displacement from their ancestral lands, but also soil and water pollution, resulting in risk of extinction for some species of the local fauna and flora on which is based their survival. Furthermore, the ‘forced migration’ caused social problems due to the relocation of those people. As regards the media campaign, primarily conducted by some NGOs interested in the protection of indigenous peoples rights and the Amazon environment (such as ‘International Rivers’ - www.internationalrivers.org and ‘Amazon Watch’ - amazonwatch.org), they have been highlighting the damage caused by the Belo Monte project. Furthermore, the case has also involved some major international newspapers, such as The Economist and Forbes. Finally, the campaign is also present on the major social networks (Facebook ‘Stop Belo Monte Dam’) and has been the subject of a documentary produced by the Hollywood filmmaker James Cameron, entitled ‘Message from Pandora’. This case - which includes State-owned enterprises, sovereign funds and commercial banks - can be considered an example of wide effects on human rights of local population, also connected to damages to natural resources. Because of its location in the natural and social ecosystem of the Amazon, the case shows how indigenous peoples could play a more significant role, especially due to the relevance that the media and the NGOs can give to their actions of protest and boycott, helping them to claim their ancestral rights. Although the project is currently still in progress, the number of suspensions imposed by Brazilian courts have created economic in addition to reputational damages to all companies and banks involved. In conclusion, it is useful to recall the role of certain international organizations, such as ILO and OAS (Organization of American States), in identifying and denouncing the infringements of the rules on protection of human rights and in particular those of indigenous peoples.
The world campaign against cluster bombs

Cluster bombs are weapons that kill and wound both at the time of their use, and during the following months and years. They remain active for a long time indeed, and the amount of unexploded devices makes the life of humans in the territories where they live dangerous for years. Their use is contrary to the established principles of international humanitarian law, given their indiscriminate effects on soldiers and civilians. The Ottawa Treaty of 1997 and the Convention on Cluster Munitions of 2008 dealt with this problem and partly helped to reduce the threat. To date, 161 States have signed up to the Ottawa Treaty, while 111 have acceded to the Convention on Cluster Munitions. Thanks to those treaties, hundreds of square kilometres of land first infested were cleared, more than 46 million anti-personnel mines were collected and 750,000 cluster bombs containing 85 million sub-ammunitions were destroyed. The number of casualties caused by these weapons has then progressively decreased significantly to less than 5,000 cases, compared with 20,000 a few years ago. The members of the international campaign to ban landmines and cluster bombs coalition, active in 50 countries around the world, call for States to put an immediate end to the use of landmines and cluster bombs, working to limit and remove them. During the course of this campaign, some NGOs from around the world have identified 137 private and public financial institutions that, in violation of international conventions on the subject, continue to invest important sums of money (about 43 million dollars) for the production and development of the bombs. Among the financial institutions identified by the campaign: Citigroup, JP Morgan Chase, Goldman Sachs, Deutsche Bank and China Merchants Bank. Indeed, a recent report published by IKV Pax Christi ‘Worldwide Investments in Cluster Munitions; a shared responsibility’ shows that in recent years, financial institutions have provided loans and assistance to the armaments industries for at least 4.1 million dollars and are owners of shares and bonds for almost 30.4 million dollars. In 2012, as a result of the pressure from civil society and of the action of the signatory States of the conventions, and certainly also because of financial losses and reputational damages to stop funding this sector, other financial institutions have started a policy of disinvestment, known as the ‘comprehensive policy’, aimed at stopping to fund this sector. Major efforts were done by the Australian Future Fund, Luxembourg’s Compensation Fund, SNS REAAL (the Netherlands) and WestLB (Germany). The movement against this type of weapons has inter alia created an important precedent in some countries particularly ‘engaged’ in the armaments industry; as a consequence Belgium, Ireland, Italy, Luxembourg and New Zealand have adopted specific laws on this matter. Nevertheless, important States are still producing of those munitions and their components and have not signed the Convention yet, including the United States, Russia, China, India, Israel, Pakistan and Brazil. Finally, in 2010 the UN Convention banning manufacture, export and store of cluster bombs was signed. The fight against these weapons was implemented through many big media campaigns animated by NGOs around the world: from among the best known: ‘Cluster Munitions Coalition’ (www.stopclustermunitions.org); ‘A Global Network Working for a World Free of Landmines’ (www.icblcmc.org); ‘Landmine and Cluster Munition Monitor’ (www.the-monitor.org); ‘Italian Campaign for Disarmament’ (‘Campagna italiana contro il Disarmo’, www.disarmo.org). Notably, the worldwide movement against cluster bombs was an important tool of media pressure at every level, obtaining positive results such as the withdrawal of funding by many banks and financial institutions to firms operating in this sector. That case significantly contributes to understanding the extent to which banks are now also involved in human rights violations, although they would not be deemed responsible under strictly legal terms. Very often the banks provide loans to large companies or multinational groups that produce many types of weapons, in addition to a wide range of consumer products. The destination of the funds cannot be identified with certainty; however, civil society also involves lenders, requiring information on the final target of their funding and not just a negative assessment about their involvement in the production and trade of goods and services potentially used for human rights violations.
The three cases proposed above show the results that can be achieved through large media campaigns promoted by watchdogs. The negative consequences to the image of companies and banks involved, which have influenced the consumer behaviour (but also government officials and other business counterparts involved) are well-known. Furthermore, it is worth reminding that those effects are often unpredictable and therefore particularly dangerous for the managers who are responsible for their enterprises’ choices.

Notes

1 The trailer of the movie can be viewed on www.youtube.com/watch?v=wQhlLuBwOtE#t=138.
2 The cartoon is available on http://vimeo.com/100203987.
4 The Economist, Dams in the Amazon: The rights and wrongs of Belo Monte, (May 2013); International Rivers, Belo Monte. Massive Dam Project Strikes at the heart of the Amazon, (May 2012); Amigos da Terra - Amazônia Brasileira, Belo Monte: mega proyecto mega riscos, Ed International Rivers (Dec 2010).
The main international sources on human rights protection that matter for business

Charter of Fundamental Rights of the European Union (Nice Charter), 2001
Charter of the United Nations (Chapter VII), 1945
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A renewed EU strategy 2011-2014 for Corporate Social Responsibility
Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 1949
Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea. Geneva, 1949
Convention (III) relative to the Treatment of Prisoners of War. Geneva, 1949
Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 1949
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe), 1950
Convention on Cluster Munitions, 2008
Convention on the Elimination of All Forms of Discrimination Against Women, 1979
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), 1993
Convention on the Rights of the Child, 1989
Decision on Granting a EU guarantee to the European Investment Bank against loses on their financing operations supporting investment projects outside the Union, 2013
Doha Declaration on the TRIPS Agreement and Public Health (Essential medicines), 2001
Equator Principles, 2013
European Social Charter (Council of Europe), 1996
Global Compact, 2000
Global Reporting Initiative G3.1 Guidelines, 2011
Hague Convention (and its Annex), 1899
Hague Convention, 1907
Hydropower Sustainability Assessment Protocol, 2010
IFC Policies and Performance Standards 2012
ILO C169 Indigenous and Tribal Peoples Convention, 1989
ILO Convention No. 138 on the minimum age for admission to employment and work, 1973
ILO Convention No. 182 on the worst forms of child labour, 1999
ILO Declaration on Fundamental Principles and Rights at Work, 1998
ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 1977
Inter-American Convention on Human Rights, 1969
International Convention for the Suppression of Terrorist Bombings, 1997
International Convention on the Elimination of All Forms of Racial Discrimination, 1965
International Covenant Civil & Political Rights, 1966
International Covenant Economic, Social & Cultural Rights, 1966
International Standards on Combating Money Laundering and the Financing of Terrorism & proliferation (the FATF Recommendations), 2012
ISO 26000 Social Responsibility, 2010
Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011
OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2012
OECD Guidelines for Multinational Enterprises, 2011
Principles and Criteria for the Production of Sustainable Palm Oil, 2013
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977
Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva Protocol to Hague Convention, 1925
Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the ‘Common Approaches’), OECD Council, 2012
SA 8000 - Social Accountability 8000, 2014
Statute of International Criminal Court, 1998
The Climate Principles, 2008
The EIB Transparency Policy, 2010
The Principles for Responsible Investment, 2006
Treaty on the Non-Proliferation of Nuclear Weapons, 1968
United Nations Convention against Corruption, 2003
United Nations Convention for the Suppression of the Financing of Terrorism, 1999
Universal Declaration of Human Rights, 1948
Voluntary Principles on Security and Human Rights (Extractive sector), 2000
Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework have been developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - professor John Ruggie - and officially adopted by the UN Human Rights Council through the Resolution 17/31. The Guiding Principles are reproduced hereunder without the related comments. The complete version of such document can be found on the website of the UN High Commissioner for Human Rights.

GENERAL PRINCIPLES

These Guiding Principles are grounded in recognition of:

(a) States’ existing obligations to respect protect and fulfill human rights and fundamental freedoms;
(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

I. THE STATE DUTY TO PROTECT HUMAN RIGHTS

A. FOUNDATIONAL PRINCIPLES

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

B. OPERATIONAL PRINCIPLES

General State regulatory and policy functions
3. In meeting their duty to protect, States should:
   (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
   (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
   (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
   (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

The State-business nexus
4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.
5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

Supporting business respect for human rights in conflict-affected areas
7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
   (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
   (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
   (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
   (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.
Ensuring policy coherence

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

10. States, when acting as members of multilateral institutions that deal with business-related issues, should:

(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

II. THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

A. FOUNDATIONAL PRINCIPLES

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights - understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

13. The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.
B. OPERATIONAL PRINCIPLES

Policy commitment
16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
   (a) Is approved at the most senior level of the business enterprise;
   (b) Is informed by relevant internal and/or external expertise;
   (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
   (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
   (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Human rights due diligence
17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
   (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
   (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
   (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
   (a) Draw on internal and/or independent external human rights expertise;
   (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.
   (a) Effective integration requires that:
      (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
      (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
   (b) Appropriate action will vary according to:
      (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
      (ii) The extent of its leverage in addressing the adverse impact

20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
   (a) Be based on appropriate qualitative and quantitative indicators;
In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;
(b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;
(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Remediation

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Issues of context

In all contexts, business enterprises should:

(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

III. ACCESS TO REMEDY

A. FOUNDATIONAL PRINCIPLE

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

B. OPERATIONAL PRINCIPLES

State-based judicial mechanisms

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.
State-based non-judicial grievance mechanisms

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Non-State-based grievance mechanisms

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

Effectiveness criteria for non-judicial grievance mechanisms

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.
AVSI is a non-governmental organization (Onlus) founded in 1972 and currently operating in Africa, Latin America and the Caribbean, Eastern Europe, Middle East and Asia on several areas of intervention with a network of over 60 organizations. This is an informal network of private social welfare institutions that work together to carry out projects and to promote reflection on development issues by sharing methods and experiences. The network includes founding members as well as partners. The mission of AVSI Foundation is to promote the dignity of the person through development cooperation activities, with special attention to education, according to the social teaching of the Catholic Church.