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Extraterritorial States' Obligations to Prevent Business-related Human Rights Violations and Requirements of Human Rights Due Diligence for Transnational Corporations
Looking for Some Rules of Regional Customary Law

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Abstract Focusing on the interplay between extraterritorial States' obligations to prevent business-related human rights violations and due diligence requirements for transnational corporations, this paper aims to investigate whether and to what extent some rules of regional customary international law, are emerging at the European level. To this end, the paper firstly analyses how the States' obligation to protect individuals against human rights violations of transnational corporations have been interpreted at international and regional level, particularly by the European Court of Human Rights. Secondly, it offers an overview of legal instruments adopted in this sector both at national and EU level.

Keywords Particular customary international law. States' obligation to protect human rights. Business-related human rights violations. Extraterritorial States' obligations. Due diligence.

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1 Introduction

Business-related human rights abuses have drawn a great deal of attention among academics and stimulated several initiatives at international and national level. A critical milestone is represented by the Report on *Protect, Respect and Remedy: A Framework for Business and Human Rights*, elaborated in 2008 by the UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie[1]. The Framework was further developed and, in 2011, Ruggie proposed the UN Guiding Principles on Business and Human Rights (UNGPs)[2]. They are based upon three pillars: the state duty to protect human rights from abuses perpetrated by transnational corporations and other business enterprises, the corporate responsibility to respect human rights, and the necessity to assure access to effective remedies.

While the UNGPs do not have binding nature, they have received several endorsements at international and national level. The most known is represented by the Resolution on human rights and transnational corporations and other business enterprises adopted in June 2011 by the Human Rights Council which, on this occasion, «endorse[s]» the UNGPs[3]. As for regional organisations, and in particular the European Union, in 2011, the European Commission adopted a Communication concerning «[a] renewed EU strategy 2011-14 for Corporate Social Responsibility». On that occasion, it invited EU Member States to meet corporate responsibility to respect human rights and develop national plans for the implementation of the UNGPs[4]. After this Communication, the importance of the UNGPs has been stressed by the EU institutions in several documents[5]. In this regard, it is worth mentioning

1 Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 (2008).

2 Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31 (2011).

3 Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. A/HRC/RES/17/4 (2011), para. 1.

4 European Commission, 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 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final, 25 October 2011, p. 14.

5 See, among others, the European Commission, *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights. State of Play*, SWD(2015) 144 final, 14 July 2015; *Commission Staff Working Document on Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights:*

the Conclusions on Business and Human Rights adopted by the Foreign Affairs Council of the European Union in 2016[6]. On that occasion, the Council affirms its «support[s]» for the UNGPs[7] and «calls on all business enterprises, both transnational and domestic, to comply with the UN Guiding Principles, […] *inter alia* by integrating human rights due diligence into their operations to better identify, prevent and mitigate human rights risks»[8]. Shifting the attention to the Council of Europe, it must be recalled the Recommendation on human rights and business, adopted in 2016 by the Committee of Ministers[9]. With the specific aim «to facilitate the implementation»[10] of the UNGPs, the Recommendation qualifies them as «the current globally agreed baseline in the field of business and human rights»[11].

In the last few years, corporate responsibility to respect human rights has been also regulated by several instruments adopted at national level, such as the US California Transparency in Supply Chains Act (2010), the Section 1502 of the US Dodd–Frank Act (2010), the UK Modern Slavery Act (2015), the French Law on the corporate duty of vigilance for parent and instructing companies (2017), the Australian Modern Slavery Bill (2018), and the Dutch child labour due diligence (2019). Some meaningful legal instruments have been adopted at the EU level, as well; in this regard, it is possible to recall the Regulation 995/2010 laying down the obligations of operators who place timber and timber products on the market (2010), the Directive 2014/95 on Disclosure of Non-Financial Information (2014), and the Regulation 2017/821 on Supply Chain Due Diligence Obligations for Importers of Minerals from Conflict-Affected and High-Risk Areas (2017).

In the light of this legislative proliferation, this paper aims to investigate whether and to what extent some rules of regional custom-

Overview of Progress, SWD(2019) 143 final, 20 March 2019; *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU (2019-2024)*. In this regard cf., *inter alia*, Augenstein, Dawson, Thielbörger, *The UNGPs in the European Union: The Open Coordination of Business and Human Rights?* in *Business and Human Rights Journal*, 2018, I, pp. 1-22; Gatta, *From Soft International Law on Business and Human Rights to Hard EU Legislation?*, in *Legal Sources in Business and Human Rights*, a cura di Buscemi, Lazzerini, Magi, and Russo, Leiden-Boston, forthcoming, pp. 248-275.

6 Foreign Affairs Council of the European Union, *Council Conclusions on Business and Human Rights*, 20 June 2016, 10254/16.

7 *Ibi*, para. 1.

8 *Ibi*, para. 8.

9 Council of Europe, *Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business*.

10 Council of Europe, Steering Committee for Human Rights (CDDH), Explanatory Memorandum to Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business, para. 2.

11 *Recommendation CM/Rec(2016)3*, cit., Appendix, para.1.

ary international law, requiring transnational corporation to prevent human rights abuses originating from their activities, are emerging in the European region. Indeed, as shown by the instruments listed above, the issue of human rights due diligence for transnational corporations has received particular attention at the European level. Against this background, firstly this paper will briefly address the question of regional customary international law, and more generally particular customary international law (PCIL). Secondly, it will analyse how the States' obligation to protect human rights against abuses perpetrated by transnational corporations (first pillar of the UNGPs) have been interpreted by human rights treaty bodies and by regional Courts. In the light of the objective of this paper, the analysis will be focused on the case-law of the European Court of Human Rights (ECtHR), although some meaningful references can be found in the African and Inter-American systems, as well[12]. Due to the fundamental role played by transnational corporations[13], a great deal of attention will be paid to the *extraterritorial* component of the States' obligation to protect. The analysis on the States' obligation to protect will consent to scrutinise the interplay between this obligation and the adoption of a regulative framework aiming to impose respect for human rights in business activities (second pillar). Final-

12 See, among others, African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria*, Communication No. 155/96, 27 May 2002; Inter-American Commission on Human Rights, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); Inter-American Commission on Human Rights, *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, 12 October 2004, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004); Inter-American Court of Human Rights, *Caso Comunidad Indígena Sawhoyamaxa v. Paraguay*, 29 March 2006, Series C No. 146.

13 The Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, approved in 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, defines transnational corporation as «an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively», cf. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), para. 20. For the definition of transnational corporations, cf. among others, Rigaux, *Transnational Corporations*, in *International Law: Achievements and Prospects*, edited by Bedjaoui, Paris-Dordrecht, 1991, pp. 121 ff.; Schiller, *The Transnational Corporation and the International Flow of Information: Challenges to National Sovereignty*, in *Current Research on Peace and Violence*, 1979, I, pp. 1-11; Marrella, *Protection internationale des droits de l'homme et activités des sociétés transnationales*, in *RCADI*, 2017, 385, pp. 52 ff.; Id., *Diritto del commercio internazionale*, Padova, 2012, pp. 122 ff.; Bonfanti, *Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato*, Milano, 2012, pp. 1 ff.; Sacerdoti, *Le società e le imprese nel diritto internazionale: dalla dipendenza dallo Stato nazionale a diretti destinatari di obblighi e responsabilità internazionali*, in *Dir. comm. int.*, 2013, I, pp. 109-122.

ly, an overview of legal instruments on due diligence requirements for transnational corporations, adopted both at national and EU level, will be provided.

2 Particular Customary International Law

Customary international law has attracted a great attention of the academia and, more recently, of the International Law Commission (ILC) which, in 2011, decided to include the «formation and evidence of customary international law» in its programme of work[14]. Michael Wood was appointed as Special Rapporteur and, in 2018, the ILC adopted on second reading, a set of 16 draft conclusions on identification of customary international law, with commentaries[15] (draft conclusions). The draft conclusions include a specific conclusion (conclusion 16) on PCIL. This latter is defined as «a rule of customary international law that applies only among a limited number of States»[16] which, however, might later evolve into rules of general customary law. Unlike "general customary law", the PCIL has not received a great deal of attention in most recent academic studies; instead, it is worth mentioning its main features.

Although Article 38 of the International Court of Justice (ICJ) only refers to customary international law as «a *general* practice accepted as law», since the first half of the 20th century, the majority of scholars has recognised the existence of PCIL, which has been significantly confirmed by the Permanent Court of International Justice[17] and then the ICJ. In the *Colombian-Peruvian asylum* case[18], the Court was called to assess the existence, argued by Colombia, of a «*regional or local custom peculiar to Latin-American States*» on dip-

14 UN General Assembly, *Report of the International Law Commission*, Sixty-third session (26 April-3 June and 4 July-12 August 2011), Supplement No. 10 UN Doc. A/66/10, para. 365; in 2013, the title of the topic was change to «Identification of Customary International Law».

15 ILC, *Draft Conclusions on Identification of Customary International Law, With Commentaries*, in UN General Assembly, *Report of the International Law Commission*, Seventieth session (30 April-1 June and 2 July-10 August 2018), Supplement No. 10, UN Doc. A/73/10.

16 ILC, *Draft conclusions*, cit., conclusion 16 on «Particular customary international law».

17 Permanent Court of International Justice, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion of 8 December 1927, 1927 P.C.I.J. (ser. B) No. 14 (Dec. 8); *Polish Postal Service in Danzig*, Advisory Opinion of 16 May 1925, 1925 P.C.I.J. (ser. B) No. 11 (May 16); in this regard, cf. Francioni, *La consuetudine locale nel diritto internazionale*, in *Riv. dir. internaz.*, 1971, pp. 396-422.

18 ICJ, *Colombian-Peruvian asylum case*, Judgment of November 20th 1950: I.C. J. Report 1950, fi. 266.

lomatic asylum[19]. Although the Court rejected the Colombian claim, it implicitly recognised the admissibility of this kind of custom. This implicit recognition has been further confirmed by the Court's case-law about bilateral customs, as well[20].

The more frequent examples of PCIL offered by international practice are about customs binding on States linked by a geographical or vicinity relationship; nevertheless, as specified by the commentary, a geographical link is not a constitutive element of PCIL. The pre-existing relationship making it possible the development of a particular custom can have different nature: it can also be represented by «a common cause, interest or activity» shared by a group of States, even sanctioned by a treaty[21]. In this regard, it is important to underline that the origin of particular custom can be different. A particular custom can develop autonomously or represent the evolution of a prior international norm[22]. In this latter case, the original norm can be a general custom which evolves and assumes a specific (derogatory) content among some States, or a conventional rule making it possible the emergence of a practice among States party to the treaty. It is precisely in the light of this that some authors identify two kinds of PCIL: regional or local customs and practices modifying multilateral treaties[23]. A very known example of this latter case is represented by the well-established custom according to which, in derogation to Article 27, para. 3 of the UN Charter, the abstention of one of the permanent members of the Security Council does not prevent the adoption of its Resolutions.

19 *Ibi*, p. 276 (emphasis added).

20 ICJ, *Case concerning right of passage over Indian territory (Preliminary Objections*, Judgment of November 26th, 1957: I.C.J. Report 1975, p. 125; more recently, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of July 13th, 2009, I.C.J. Reports 2009, p. 213. For an implicit recognition, see also *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of August 27th, 1952: I.C. J. Reports 1952, p. 176; *Fisheries (United Kingdom v. Norway)*, Judgment of December 18th, 1951: I.C. J. Reports 1951, p. 116.

21 Conclusion 16 of the draft conclusions refers to «A rule of particular customary international law, whether regional, local or other»; in this regard, the commentary specifies «The expression "whether regional, local or other" is intended to acknowledge that although particular customary international law is mostly regional, subregional or local, there is no reason in principle why a rule of particular customary international law could not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise» (p. 155).

22 ILC, *Third Report on Identification of Customary International Law By Michael Wood, Special Rapporteur*, UN Doc. A/CN.4/682, 27 March 2015, p. 56.

23 CONFORTI, *Diritto internazionale*[11], Napoli, 2018, p. 47; GIOIA, *Diritto internazionale*[5], Milano, 2015, pp. 28 ff.

1.1 Specific Features of Particular Customary Law: The (Overestimated) Relevance of States' Consent

Since the earliest scholar discussions on PCIL, a great debate has arisen about the specific features of this kind of custom: besides the limited scope of application *ratione personae*, is it possible to identify some other elements defining PCIL? The majority of scholarship has given a positive answer, identifying two features. First, there is the consent expressed by a State as a *condition sine qua non* to impose upon this State the particular custom and second, is the burden of proof requested to apply a particular custom. Let us dwell briefly on this latter point and then focus on the element of consent. Several authors argue that, unlike general customary law, which is ascertained by judge according to principle *iura novit curia*, the existence of a rule of PCIL must be rigorously proved by the part claiming it[24]. The necessity of a specific prove in the case of PCIL represents a well-settled principle in the ICJ's jurisprudence[25]. In this regard, it is interesting to recall the *San Juna River* case[26], ruled in 2009. On this occasion, the Court was requested by Costa Rica to declare the existence of a «customary right» allowing people living on the bank of the San Juna river, along which runs part of the border between Costa Rica and Nicaragua, to fish in this river for subsistence purposes. The interesting point is that, on this occasion, a specific proof of the alleged customary rule was not required to Costa Rica[27], and so one might argue that the Court overruled its previous case-law. As underlined by scholars, the stance taken in this case is not decisive: the lower standard of proof adopted by the Court is based upon the fact that, on this occasion, both parties clearly recognised the existence of this long-established practice[28].

24 Francioni, cit., p. 421; Cohen-Jonathan, *La coutume locale*, in *Annuaire français de droit international*, 1961, pp. 119-140, esp. p. 134; D'Amato, *The Concept of Special Custom in International Law*, in *American Journal of International Law*, 1969, II, pp. 211-223; Shaw, *International Law*[8], Cambridge, 2017, p. 68; Condorelli, *Custom*, in *International Law: Achievements and Prospects*, edited by Bedjaoui, Paris-Dordrecht, 1991, pp. 179-211, esp. pp. 206-7; Cassese, *International Law*[2], Oxford, 2005, p. 164.

25 ICJ, *Colombian-Peruvian asylum case*, cit., p. 276: «The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party».

26 ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, cit.

27 *Ibi*, para. 141: «The Court observes that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record».

28 Crema, *The 'Right Mix' and 'Ambiguities' in Particular Customs: A Few Remarks on the San Juan River Case*, in *International Courts and the Development of International Law. Essays in Honour of Tullio Treves*, edited by Boschiero et al., The Hague, 2013, pp. 65-75.

Turning now to the issue of consent, it can be grasped recalling that, as it is well known, the typical element defining customary law is its applicability to all States, regardless of the effective participation to the formation of the practice. The case of State which, although persistently expressing its objection to the affirmation of a customary rule, is not exempted to the application of this rule, is paradigmatic. Instead, according to the majority of scholars, a particular customary rule only applies to States which have accepted it[29]. They argue the necessity of consent by making reference to a couple of reasons. Firstly, there is the nature of PCIL in itself: as is it characterised by a limited scope of application *ratione personae*, it is necessary to identify specific States bound by the rule. Secondly, is the derogating nature of PCIL compared to general law[30].

With regard to the consent, it is important to make a couple of specifications. Firstly, the requested consent does not need an active and express participation by States during the formative process of the rule; it is the lack of objections to be decisive, and so implicit consent is enough. Secondly, there is the difference between PCIL and tacit agreement. The fundamental role played by consent in PCIL can recall the theories, tracing back to voluntarist approach of international law, which qualify customary law as a tacit agreement. In this regard, some scholars stress that even PCIL cannot be defined as such[31]. Indeed, unlike a tacit agreement which represents a singular act, customary law – even PCIL – supposes the existence of a behaviour uniformly and constantly repeated over time by States. One might argue that, from a practical point of view, this kind of practice can be hardly differentiated from the execution of a tacit agreement. Taking into account the psychological element, the distinction is more evident; unlike the tacit agreement, which results from the "meeting of the minds" of the parties at a given moment, *the opinio juris* is a psychological attitude which, progressively and spontaneously, grows up until a practice starts to be conceived by States as a legal obligation[32]. This difference is not theorical, as it has an important impact on the practice which is relevant to identify the existence of a particular customary rule. Indeed, a (tacit) agreement supposes

29 Francioni, cit., pp. 416 ff.; Cohen-Jonathan, cit., p. 133; D'Amato, cit.; Shaw, cit., p. 88; Condorelli, cit., pp. 206-7; Cassese, cit., p. 164.

30 Waldock, *General Course on Public International Law*, in *RCADI*, 1962, 106, p. 50.

31 In this sense, cf. Francioni, cit., pp. 406 ff.; Cohen-Jonathan, cit., pp. 138 ff. *Contra* Condorelli, cit., p. 206; Cassese, cit., p. 164, according to whom, PCL can be qualified as a tacit agreement. Cf. also D'Amato, cit.; the importance of consent, as a distinguishing element between PCL and general customary law, is so stressed by the author that he seems to implicitly qualify PCL as a tacit agreement.

32 These differences are stressed by Francioni, cit., pp. 406 ff., and Cohen-Jonathan, cit., pp. 138 ff.

the (implicit) action of a State's organ vested with the treaty-making power. Instead, conduct of *any* State's organ can be relevant to form and manifest a PCIL rule[33]. The importance to stress a distinction between PCIL and tacit agreement finds confirmation in the case-law of the ICJ. Beginning with the *Colombian-Peruvian asylum* decision, the Court, although underling the characterising features of PCIL, referred to the notion of customary law stipulated in Article 38 of its Statute and, in this way, implicitly recognised that a rule of particular custom is, ultimately, a rule of customary law. A similar approach emerges from the draft conclusions, as well: the commentary to the conclusion on PCIL specifies that it has been placed at the end of the draft conclusions because, unless otherwise provided, all other draft conclusions on general customary law apply to PCIL.

The necessity of an (implicit) acceptance of PCIL emerges in *Colombian-Peruvian asylum* decision. On that occasion the Court, after ascertaining the impossibility to find a constant and uniform custom with regard to the alleged customary rule, affirmed that even if this custom existed, it could not be invoked against Peru: its non-ratification of the Montevideo Conventions – setting out provisions on diplomatic asylum – proves that Peru did not want to accept this custom[34]. In other words, the fact that Peru manifested its will to not adhere to the supposed rule of PCIL on diplomatic asylum is decisive to exclude the possibility to invoke this rule against it.

The issue of the consent is covered by the draft conclusions, as well. Indeed, paragraph 2 of the conclusion on PCIL states that the existence of a rule of PCIL supposes a general practice «among the States concerned that is accepted by them as law (*opinio juris*) among themselves». The commentary is even more explicit, precising that, in the case of PCIL, the application of the two-element approach for the identification of customary international is «stricter» because «*[e]ach of these States* must have accepted the practice as law among themselves»[35]. As the first version of this conclusion did not include the final specification «among themselves», the question of consent arose some States' reactions and was highly debated during the drafting. As a matter of fact, some States firmly highlighted the necessity to specify that a rule of PCIL cannot create obligations for a

33 Cohen-Jonathan, cit., p. 139.

34 ICJ, *Colombian-Peruvian asylum case*, cit., pp. 277-278: «even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum».

35 ILC, *Draft conclusions*, cit., p. 156 (emphasis added).

State without its consent[36]. In this regard, it is worth mentioning the stance taken by Greece, which underlined the importance to distinguish between «novel particular customs and derogatory particular customs, which required a stricter standard of proof»[37]. This affirmation is particularly interesting because, as recalled above, some authors have justified the necessity of the consent because of the derogating nature of PCIL. Greece's stance might open the door to some rules of PCIL which do not need States' consent, as they do not represent a derogation to a previous rule but develop autonomously.

More generally, the stance taken by the draft conclusions seems too rigid, as it does not take into any account that a rule of PCIL can emerge in very different contexts. It is possible to identifies (at least) three different scenarios. First, practices modifying multilateral treaties which need the consent (even implicit) of all States party to the treaty exist; indeed, the subsequent practice implies a derogation from or an integration of a rule that the parties originally agreed. Second, there is regional custom among States which share no more than their geographical position. In this case, which can also involve two or a very small number of States (local custom), the consent of all States concerned must be sought in order to precisely define the scope of application *ratione personae* of the custom. Finally, regional custom among States which, along with a geographical link, share the membership to a regional international organisation. As members States have relinquished certain aspects of their sovereignty to the organisation, with the aim to pursue the specific objectives defined by the founding treaty[38], the acts of the organisation can play a fundamental role in the formation and identification of customary law at regional level. Against this background, the consent of each and every member State cannot be qualified as a necessary requirement for the identification of a rule of PCIL. In this regard, the specificities of the EU cannot but be recalled. Indeed, if on the one hand, the EU can contribute to the development of (particular) customary international law as an autonomous actor, on the other, its international practice expresses the *opinio juris* of its Members States[39].

36 ILC, *Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur*, UN Doc. A/CN.4/717 (2018), p. 50; these suggestions were made by New Zealand, the United States, the Netherlands, the Check Republic, Greece, and the Russian Federation.

37 *Ibidem*.

38 A more flexible approach with regard to regional custom, and in particular custom among the Members States of the Council of Europe is argued by Saccucci, *L'abolizione della pena di morte in tempo di guerra nel Protocollo n. 13 alla Convenzione europea*, in *I diritti dell'uomo. Cronache e battaglie*, 2004, III, pp. 37-47, esp. p. 45.

39 Vanhamme, *Formation and Enforcement of Customary International Law: The European Union's Contribution*, in *Netherlands Yearbook of International Law*, 2008, pp.

3 The States' Obligation to Protect Human Rights Against Business-related Violations

As already recalled, the first pillar of the UNGPs concerns States' duty to protect human rights from abuses perpetrated by transnational corporations and other business enterprises. As clarified by the commentary to principle 1, this obligation refers to the well-defined classification of States' obligations to respect, protect, and fulfill human rights[40]. This typology of States' obligations traces back to the classification initially elaborated by Henry Shue[41]; it was further developed by Asbjorn Eide, the then Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Report submitted in 1987, on the *Right to Adequate Food as a Human Right*[42]. Eide's tripartite distinction has been widely accepted by the Committee on Economic, Social and Cultural Rights (CESCR)[43]. An analysis of this tripartite obligations focused on their objective permits us to underline that the *obligation to respect* is centered on *States'* violations: indeed, it requires States not to take any measures which can result in preventing or limiting enjoyment of the right at stake. Instead, the *obligation to protect* is focused on the *non-state actors'* violation: as stressed by the CESCR, this obligation requires States to take necessary measures seeking to *prevent* enterprises or individuals from interfering with the right of others. Finally, the *obligation to fulfil* can be defined as the States' obligation to adopt a set of economic, administrative, promotional, and educational measures aiming to promote the full realisation of the right[44].

127-154, esp. p. 131.

40 This clearly emerges from commentary to principle 1, according to which «States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction»; cf. *Guiding Principles on Business and Human Rights*, cit., p. 6.

41 Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, Princeton, 1980, pp. 52 ff.; the classification proposed by Shue was a bit different as it referred to the distinction among a) rights protecting individual physical security (security rights), b) rights assuring economic subsistence (subsistence rights), and c) liberty rights.

42 Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Adequate Food as a Human Right*, Report prepared by Mr A. Eide, UN Doc. E/CN.4/Sub.2/1987/23 (1987), paras. 66 ff.

43 This classification has been accepted beginning with *General Comment No. 12: The Right to Adequate Food (Art. 11)*, UN Doc. E/C.12/1999/5 (1999), paras. 15 ff.

44 The notion of the obligation to fulfil has been significantly developed by the CESCR; in the General Comment on the right to food, the Committee clarifies that the obligation to fulfil includes both an obligation to facilitate and an obligation to provide (cf. CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, cit., para. 15). In the General Comment on the right to health, the Committee adds a further importance piece, by making also reference to the obligation to promote as the obliga-

Although this classification was originally elaborated with regard to economic, social, and cultural rights, both scholars[45] and the CESCR maintain that it can be applied *to all human rights*[46]. Limiting the analysis to the practice of the monitoring body of the International Covenant on Civil and Political Rights – namely the Human Rights Committee (HRC) – it has never explicitly adopted the tripartite classification. Nevertheless, its practice incorporates (more or less implicit) references to the obligation to respect and, in particular, to the obligation to protect. References to the obligation to respect can be easily found: indeed, according to a traditional view, the implementation of civil and political rights implies, first of all, States' obligation to abstain from interfering with the exercise of the right at issue. Instead, the first references to the obligation to protect were elaborated by the HRC in relation to forced disappearance; identifying the perpetrator of a disappearance and, more generally, defining the direct responsibility of State's agents can be highly complicated. Against this background, in the General Comment No. 6 (1982) on the right to life, the Committee referred to States' obligation to «take specific and effective measures to *prevent* the disappearance of individuals»[47]. This

tion «to undertake actions that create, maintain and restore the health of the population». On that occasion, the Committee specifies that the obligation to promote includes, among other, «ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; [...] supporting people in making informed choices about their health» (CESCR, *General Comment No. 14 (2000), The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, para. 37). For a more detailed analysis on this obligation with specific regard to cultural rights, cf. M. Ferri, *Dalla partecipazione all'identità. L'evoluzione della tutela internazionale dei diritti culturali*, Milano, 2015, pp. 15 ff.

45 See among others, Pisillo Mazzeschi, *Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme*, in *RCADI*, 2008, 333 p. 244; De Schutter, *International Human Rights Law: Cases, Materials, Commentary*[2], Cambridge, 2019, pp. 279 ff. For States' obligations stemming from women's rights to health and reproductive health, cf. De Vido, *Violence Against Women's Health in International Law*, Manchester (forthcoming).

46 In this regard, it is paradigmatic CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, cit., para. 15: «The right to adequate food, *like any other human right*, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil» (emphasis added).

47 HRC, *General Comment No. 6: Article 6 (the right to life)*, para. 4 (emphasis added); cf. also HRC, *Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, 2 November 1987, UN Doc. CCPR/C/OP/2 at 192 (1990), para. 10.3. A similar interpretation was elaborated by the Inter-American Court of Human Rights which defined States' obligation to prevent human rights violations committed by third parties in the famous case *Velásquez Rodríguez v. Honduras* (Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, 29 July 1988), Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) dealing with the responsibility of the State of Honduras for detention and disappearance of Mr. Velásquez Rodríguez. Recalling Article 1 of the American Convention, which refers not only to States' obligation to respect the rights recognised by the Convention, but also to the obligation to ensure their exercise, the Court states that «An illegal act which

stance was later generalized by the HRC which, in its General Comment No. 31 (2004) on the nature of obligations of States Parties, referred to a «direct horizontal effect» of the obligations binding on States parties to the Covenant and held that they must «*protect*» individuals not only against violations of rights committed by their agents but also «against acts committed by private persons or entities». In these circumstances, a State can be held responsible for a violation of the Covenant when acts perpetrated by a private person or entity is the «result of States Parties' permitting or failing to take appropriate measures or to exercise *due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities»[48]. A similar stance was taken by the Committee against torture with regard to Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment which sets out the States Parties' obligation to take effective measures «to prevent acts of torture». In its General Comment No. 2 (2008) on this provision, the Committee clarifies that States must be held responsible for acts of torture or ill-treatment perpetrated by private actors, when state authorities «know or have reasonable grounds to believe» that these acts are being committed by private actors, and they did not exercise «*due diligence* to prevent, investigate, prosecute and punish» them[49]. This reference is enough to grasp two important elements, the first being *the dual content of the obligation to protect*. Indeed, this obligation consists of two different sub-obligations. First,

violates human rights and *which is initially not directly imputable to a State* (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, *not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention*» (para. 172; emphasis added). The Inter-American Court's case-law on obligations to protect is not limited to enforced disappearances: indeed, the Court has developed a wide practice in this regard, explicitly underlining that States' obligation to take measure to ensure human rights concerns also the relations between individuals.

48 HRC, *General Comment No. 31 (2004) on the Nature of Obligations of States Parties*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8 (emphasis added); the Committee continues stating «There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities». In this sense, see also HRC, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, para. 7. Cf. also the draft of the new General Comment No. 36 (2018) on the right to life, adopted by the HRC during its 124th session (8 October-2 November 2018), UN Doc. CCPR/C/GC/36 (2018), para. 7: «They [States] must also exercise *due diligence* to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State» (emphasis added).

49 Committee against torture, *General Comment No. 2, Implementation of Article 2 by States parties*, UN Doc. CAT/C/GC/2 (2008), para. 18 (emphasis added).

an *ex-ante* obligation seeking to take all measures necessary to prevent violations by private actors, namely individuals and business entities; in this regard, the obligation to protect can be rephrased as a general obligation to *prevent* which implies, among others, the adoption of a regulative framework aiming to lay down and promote respect of human rights in business activities (second pillar of the UN-GPs). Second, there is an *ex-post* obligation, which rises in the event of a violation, aiming to assure access to an effective remedy to the victims (third pillar). The second element emerging from the above quotation is the *principle of due diligence*, which consents to specify the content of the obligation to protect.

Due diligence plays such a fundamental role in several areas of international law that it can be qualified as a principle of international law[50]. It has been significantly developed in the sphere of international environmental law in relation to the obligation to prevent transboundary environmental damage, but it has gained a meaningful role in international human rights law. Although it is not the purpose here to dwell on the notion of due diligence, it is important to recall that it can be defined as a standard of conduct against which to assess whether a State has taken reasonable measures to prevent violations of international obligations and – with specific regard to human rights – to prevent human rights violations committed by private actors[51].

Moving to the European context, and in particular to the European Convention on Human Rights (ECHR), the ECtHR has elaborated a meaningful case-law on States' positive obligations to protect human rights against violations perpetrated by private actors[52]. The identification of these obligations is linked to the theory of horizontal effect of the rights protected by the Convention (or *Drittwirkung* theory) which – as authoritatively affirmed – implies the existence of some «obligations positives à effets horizontaux»[53]. In this regard, it is worth

50 Koivurova, *Due Diligence*, in Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012.

51 For due diligence principle, cf. among others, Pisillo Mazzeschi, cit., pp. 390 ff.; Koivurova, cit.; French, Stephens, *ILA Study Group on Due Diligence in International Law. First Report*, 2014; Barnidge, *The Due Diligence Principle under International Law*, in *International Community Law Review*, 2008, I, pp. 81-121.

52 For the case-law of the ECtHR on positive obligations, cf. among others Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, 2004; Akandji-Kombe, *Les obligations positives en vertu de la Convention européenne des Droits de l'Homme: un guide pour la mise en oeuvre de la Convention européenne des Droits de l'Homme*, Strasbourg, 2006; Pisillo Mazzeschi, cit., pp. 317 ff.; Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative. Obligations under the European Convention on Human Rights*, Cambridge-Antwerp-Portland, 2016; Bestagno, *Diritti umani e impunità. Obblighi positivi degli Stati in materia penale*, Milano, 2003.

53 Pisillo Mazzeschi, cit., p. 226.

recalling the leading case *Osman v. the United Kingdom*[54], concerning the violation of the right to life (Art. 2 ECHR) perpetrated by an individual whose aggressive and stalking attitude towards the victims was known to national authorities. The Grand Chamber of the Court stated that Article 2 entails not only the States' negative obligation to refrain from the intentional and unlawful taking of life but also «a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual»[55]. As for the content of this obligation to prevent, the Court clarifies that it not an immediate consequence of every risk to the right (to life); instead, the violation of the positive obligation to protect the right through specific preventive measures, and consequently the indirect State's responsibility for the act perpetrated by a private actor, supposes the finding that «the authorities *knew or ought to have known* at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they *failed* to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk»[56]. The test of «*knew or ought to have known*» allows the Court to limit the State's responsibility to foreseeable risks of violation by private actors. In other words, although the ECtHR does not explicitly refer to the notion of due diligence, it has elaborated an obligation to prevent which «est clairement construite comme une typique obligation de due diligence»[57].

It is interesting to consider how the ECtHR has defined the content of the obligation to prevent violations of the Convention's rights stemming from polluting and dangerous activities carried out by private business entities. Under the ECHR, serious harms to health of persons living close to polluting industrial plants raises an issue under the right to respect for private and family life (Article 8 ECHR). According to a well-established case-law started with the leading case *López Ostra v. Spain*[58], the Court has affirmed that environmental pollution «may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely»[59]. As specified by the Court, the negative effects

54 ECtHR, *Osman v. the United Kingdom* [GC], Appl. No. 23452/94, 28 October 1998.

55 *Ibi*, para. 115.

56 *Ibi*, para. 116 (emphasis added).

57 Pisillo Mazzeschi, cit., p. 395.

58 ECtHR, *López Ostra v. Spain*, Appl. No. 16798/90, 09 December 1994, para. 51; see also among others, *Guerra et al. v. Italy* [GC], Appl. No. 14967/89, 19 February 1998, para. 60; *Cordella et al. v. Italy*, Appl. No. 54414/13 and 54264/15, 24 January 2019, para. 157.

59 ECtHR, *López Ostra v. Spain*, cit., para. 51.

of environmental pollution fall within the scope of application of Article 8 providing that they attain «a certain minimum level» which must be assessed with a «relative» evaluation, taking into account «all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects», and the general context of the environment»[60].

The issue of States' obligation to prevent the environmental pollution arising from a private industrial plant close to the applicant's home was analysed by the Court, among others, in the *Fadeyeva v. Russia* case. On this occasion, the Court dealt with the attribution of the alleged violation of Article 8 to the defendant State as the plant, although initially belonging to the defendant State, which was then privatised and, at the material time, it was neither owned nor operated by the State. The Court, developing some principles already outlined in some previous decisions, specified that these cases must be assessed in the light of the State's «positive duty […] to *take reasonable and appropriate measures* to secure» the right to respect for private and family life[61]. Applying the *Osman* test to the situation of polluting activities arising from private industrial plants, the Court must assess «whether the State could reasonably be expected to act so as to prevent or put an end» to the alleged violation[62].

In the case of pollution activities, the application of the «*knew or ought to have known*» standard acquires a specific configuration: national authorities of the defendant State are presumed to be in a position to evaluate the pollution hazard and «take adequate measures to prevent or reduce them»[63], when, despite the plant privatisation, they continue to control its industrial activities, by authorising them or imposing certain operational conditions. This control places national authorities in a position allowing them to be «aware» of the environmental risk[64]. As for the content of the measures which States have the obligation to adopt in order to prevent or reduce the risk, the Court has made reference to two kinds of measures. First, measures exist aiming to provide individuals exposed to environ-

60 ECtHR, *Fadeyeva v. Russia*, Appl. No. 55723/00, 9 June 2005, para. 69; see also *Cordella et al. v. Italy*, cit., para. 157.

61 ECtHR, *Powell and Rayner v. the United Kingdom*, Appl. No. 9310/81, 21 February 1990, para. 41; *López Ostra v. Spain*, cit., para. 51; *Guerra et al. v. Italy*, cit., para. 58; *Di Sarno et al. v. Italy*, Appl. No. 30765/08, 10 January 2012, para. 110; *Tatar v. Romania*, Appl. No. 67021/01, 27 January 2009, paras. 87-88; *Giacomelli v. Italy*, Appl. No. 59909/00, 02 November 2006, para. 78; *Taşkin et al. v. Turkey*, Appl. No. 46117/99, 10 November 2004, para. 113; *Jugheli et al. v. Georgia*, Appl. No. 38342/05, 13 July 2017, para. 64.

62 ECtHR, *Fadeyeva v. Russia*, cit., para. 89; in this sense, cf. also *Cordella et al. v. Italy*, cit., para. 158; *Guerra et al. v. Italy*, cit., para. 58; *Di Sarno et al. v. Italy*, cit., para. 105.

63 ECtHR, *Fadeyeva v. Russia*, cit., para. 92.

64 *Ibi*, paras. 90 ff.; *López Ostra v. Spain*, cit., paras. 52 ff.

mental pollution with information enabling them to know and assess the risks of this exposition[65]. Second, there are measures seeking to «regulate private industry properly»[66]; the general reference to regulatory measures has been clarified by the Court making reference to "dangerous activities". Although the Court has not specified the notion of "dangerous activities", it seems to include in this category all pollution activities which might cause serious damage to health. In the context of these activities, States have the obligation to adopt regulations which must be «geared to the specific features of the activity in question», and in particular to «the level of risk potentially involved». It is worth mentioning that, according to the ECtHR, this regulatory framework

> must govern the licensing, setting-up, operation, security and supervision of the activity and must make it *compulsory for all those concerned to take practical measures to ensure the effective protection* of the citizens whose lives might be endangered by the inherent risks[67].

In conclusion, all polluting activities can affect the right to respect for private and family life, implying the States' obligation to take adequate and reasonable measures seeking to prevent or reduce any environmental risk, and these measures include also the regulation of private enterprises carrying the activities at stake. Moreover, when industrial polluting activities pose a particular threat to health and life (dangerous activities), the States' obligation to protect includes the adoption of a regulatory framework aiming to impose on private actors involved in these activities the adoption of practical protective measures.

65 ECtHR, *Guerra et al. v. Italy*, cit., para. 60; *Giacomelli v. Italy*, cit., para. 83; *Taşkin et al. v. Turkey*, cit. para. 119; *Tatar v. Romania*, cit., para. 88 and 100 ff.; *Di Sarno et al. v. Italy*, cit. para. 107.

66 ECtHR [GC], *Hatton et al. v. The United Kingdom*, Appl. No. 36022/97, 08 July 2003, para. 98: «Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly»; in this sense, cf. also *Giacomelli v. Italy*, cit., para. 78; *Jugheli et al. v. Georgia*, cit., para. 73.

67 ECtHR [GC], *Oneryildiz v. Turkey*, Appl. No. 48939/99, 10 January 2012, para. 90; *Di Sarno et al. v. Italy*, cit. para. 106; *Tatar v. Romania*, cit., para. 88; *Cordella et al. v. Italy*, cit., para. 159.

1.2 The Requirement of Corporate Human Rights Due Diligence as a *Component* of the States' Obligation to Prevent Business-related Human Rights Violations

It is now necessary to investigate the interplay between the States' obligation to protect human rights against violations perpetrated by private corporations (and in particular its *ex-ante* dimension consisting in the obligation to prevent) and the requirement of human rights due diligence for corporation.

As recalled above, the first pillar of the UNGPs concerns the States' duty to protect human rights, and principle 1 defines the States' obligation to protect against human rights violations committee by third parties, «including business enterprises». As specified by the principle, this obligation entails that States must take «appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication».

Along with the *States' obligation to protect human rights*, the UNGPs stipulate the *business enterprises' responsibility to respect human rights* (second pillar). Before analysing the interplay between States' obligations to protect human rights and corporate responsibility to respect human rights, let us outline the second pillar of the UNGPs, which significantly inspired the chapter on human rights introduced in the 2011 edition of the OECD Guidelines for Multinational Enterprises[68]. The core of corporations' responsibility to respect human rights is defined by principle 13 of the UNGPs, which corresponds to paragraphs 2 and 3 of the OECD Guidelines' chapter on human rights[69]. According to these principles, business enterprises must

> Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services

68 OECD, *Guidelines for Multinational Enterprises*, 2011 edition, para. 36; chapter on Human Rights is «draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation».

69 As specified both by the OECD Guidelines and the UNGPs, the notion of human rights, which must be respected by business enterprises, covers human rights recognised at the international level, and «at a minimum» by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, along with the fundamental rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Moreover, business enterprises are requested to respect some additional standards depending on the circumstances; for example, in situations of armed conflict the principles of international humanitarian law.

> by their business relationships, even if they have not contributed to those impacts[70].

Principle 15 of the UNGPs clarifies that business enterprises must meet their responsibility to respect human rights putting in place appropriate policies and processes, including a) a policy commitment to respect human rights; b) «a human rights due diligence process to identify, prevent, mitigate and account for how they address their impact on human rights»[71]; c) a process aiming to remedy every human rights violation it causes or contributes[72]. With specific regard to *human rights due diligence process*, principle 17 specifies that this process entails

> assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed[73].

The human rights due diligence process must cover both human rights impacts that the business enterprise may cause or contribute through its activities and also human rights impacts, which may be directly linked to its operations, products and services by its business relationships. Principle 17 refers both to potential and to actual impacts: the former must be addressed through prevention or mitigation; in relation to the latter, corporations must assure a remediation. The human rights due diligence process must be implemented as early as possible, and it is an ongoing process because human

70 These two different situations are further detailed by principle 19 of the UNGPs and the OECD Guidelines. The first situation occurs when a business enterprise is causing o may cause a human rights violation; in this case, the enterprise must take the necessary steps to cease or prevent the violation and to mitigate every remaining negative impact using its leverage; this leverage exists «where the enterprise has the ability to effect change in the wrongful practices of an entity that cause an harm». The second situation occurs when negative impact on human rights stems from enterprise's business relationships; this expression refers to every relationship «with business partners, entities in the supply chain, and any other non-State or State entity directly linked to its business operations, products or services». In this case, business enterprise is requested to exercise its leverage to prevent or mitigate negative human rights impacts. The commentary to principle 19 details this case, specifying that the appropriate action to put in place must be defined taking into account several factors, such as the relationship's cruciality, the nature of the violation, and whether terminating the business relationship would have adverse human rights consequences.

71 UNGPs, principle 15, lett. b); in a similar stance, cf. OECD, *Guidelines for Multinational Enterprises*, cit., chapter II «General Policies», para. 10.

72 In this sense, cf. also OECD, *Guidelines for Multinational Enterprises*, cit., chapter IV «Human Rights», paras. 4, 5, and 6.

73 Principles 18, 19, 20 and 21 of the UNGPs specify each of these components; similarly, cf. OECD, *Guidelines for Multinational Enterprises*, cit., commentary on Human Rights, para. 41.

rights risks can evolve over time. This process can be included within the enterprise risk-management system, provided that this system «goes beyond simply identifying and managing material risks to the company itself to include risks to rights-holders»[74].

Focusing now on the *interplay* between States' obligations to protect human rights and corporate responsibility to respect human rights, principle 2 specifies it, affirming that «States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations». The interplay between States' obligations to protect human rights and corporate responsibility to respect human rights has been further clarified and developed by some instruments adopted after the UNGPs. Among them, it is worth recalling the Recommendation of the Council of Europe and the General Comment No. 24 on state obligations in the context of business activities adopted in 2017 by the CESCR.

In the Council of Europe's Recommendation, the Committee of Ministers does not only recommend States to «implement the UN Guiding Principles on Business and Human Rights», but it further develops them, by framing them into the classification of States' obligations. While recalling and endorsing the three pillars defined by the UNGPs, the Recommendation adopts a state-centred approach and, in relation to each of these three pillars, details the content of the corresponding States' obligations. It is worth mentioning the second session of the Recommendation on the «State duty to protect human rights», and the third session on the «State action to enable corporate responsibility to respect human rights». As for the first element, the Recommendation specifies that:

> Within their jurisdiction, member States have a duty to protect individuals against human rights abuses by third parties, including business enterprises […] Such obligations consist of requirements to prevent human rights violations where the competent authorities had known or ought to have known of a real risk of such violations.

With this formulation, the Recommendation formalises the case-law elaborated by the ECtHR. However, the Recommendation affirms that Member States should apply the necessary measures to require business enterprises domiciliated in their jurisdiction «to respect human rights throughout their operations *abroad*». The third session of the Recommendation includes some interesting aspects. The member States of the Council of Europe are requested to adopt the necessary measures «to encourage» or «require» business enterprises

74 UNGPs, commentary to principle 17, p. 18.

to «carry out *human rights due diligence*» in respect of their activities and to provide regular information on their efforts on corporate responsibility to respect human rights.

Moving to the General Comment No. 24, it represents a critical milestone in the definition of States' obligations in the context of business activities and, it certainly represents one of the most revolutionary General Comments adopted by the CESCR. The Committee frames the States' obligations within the classical tripartite typology; with specific regard to States' obligation to protect, the Committee affirms:

> The obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that States parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies[75].

This formulation clearly refers to States' obligation to take necessary measures to prevent business-related human rights abuse. With regard to the obligation to protect, it is worth recalling two additional aspects. Firstly, the CESCR explicitly clarifies that, in the case of violations of the rights secured by the International Covenant on Economic, Social and Cultural Rights caused by activities of business entities, State must be held indirectly responsible when it fails «to take *reasonable* measure», which would make it possible to prevent the violation. The Committee embraces the well-established approach elaborated by human rights regional Courts, and the content of States' obligation to protect is defined adopting a standard of reasonableness. Secondly, the CESCR specifies the interplay between States' obligations to protect human rights and corporate responsibility to respect human rights. Indeed, it affirms that

> The obligation to protect *entails a positive duty to adopt a legal framework* requiring business entities to exercise *human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights*, to avoid such rights being abused,

75 CESCR, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc. E/C.12/GC/24 (2017), para. 14. For an analysis of the Comment, cf. Ferri, *The General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: between crystallisation of international human rights law and seminal prospects for development*, in *Federalismi*, 2017, III, pp. 1-36.

> and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights[76].

As proved by the verb «entail»[77], the duty to adopt a legal framework on human rights due diligence in supply chain is conceived by the CESCR as an *essential component* of the obligation to protect. Needless to say, in this paragraph, the Committee refers to the second pillar of the UNGPs on the corporate responsibility to respect human right and human rights due diligence. This reference is made clear by a footnote, placed at the end of the cited paragraph, which refers to principles 15 and 17 of the UNGPs.

The extraterritorial dimension of States' obligations to prevent business-related human rights violations has raised a great debate, and it is authoritatively sustained by several scholars[78]. International human rights law has not developed (yet) a uniform practice in this regard. Starting from the European level, as emerging from the case-law analysed in the previous paragraphs, the ECtHR has never recognised the extraterritorial dimension of the States' obligation to prevent environmental risk arising from dangerous industrial activities carried out by private corporations. Moreover, as underlined above, the Court has applied the «*knew or ought to have known*» standard to polluting and dangerous activities, making reference to the fact that national authorities must be in such a position to "control" and be aware of the environmental risk. However, the position to what the Court has referred supposes an activity of authorisation, regulation and supervision, which is significantly more restrictive compared to the notion of domicile adopted by the CESCR. A completely different position is adopted by the Council of Europe's Committee of Ministers in its Recommendation CM/Rec(2016) on human rights

76 CESCR, *General Comment No. 24 (2017)*, cit., para. 16.

77 The English "to entail" corresponds to the verb "découler" employed in the French version of the General Comment.

78 Cf. *inter alia* Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on Its Development*, Oxford, 1995, pp. 147-150; Langford, Scheinin, Vandenhole, Van Genugten (eds.), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, 2013; De Schutter, *International Human Rights Law*, cit., pp. 187 ff.; Bulto, *The Extraterritorial Application of the Human Right to Water in Africa*, Cambridge, 2014, p. 127 ff.; McCorquodale, Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, in *The Modern Law Review*, 2007, IV, pp. 598-625, esp. pp. 602 ff.; Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, in *Human Rights Law Review*, 2011, I, pp. 1-35; De Schutter, *Extraterritorial Jurisdiction as a tool for improving the human rights accountability of transnational corporations*, available at *cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf*, pp. 6 ff.

and business. Although this is a non-binding instrument, it is worth mentioning that, according to the Recommendation, members States «should» impose on business enterprises, domiciliated in their jurisdiction, the obligation to respect human rights also throughout their operations «abroad». An intermediate position characterises the UNGPs which, indeed, have been defined as «vecteurs d'une extraterritorialité modérée»[79]. As a matter of fact, on the one hand, they stress that States are not prohibited from regulating the extraterritorial activities of transnational corporations domiciled in their territory and/or jurisdiction and underline that «strong policy reasons» ask for States to do so. On the other hand, the UNGPs affirm that, at the moment, international human rights law does not bind States to regulate the extraterritorial activities of their corporations.

The extraterritorial dimension of States' obligation to protect human rights against violations perpetrated by third parties has been significantly recognised by human rights treaty bodies. It is worth mentioning the General Comment No. 16 (2013) on state obligations regarding the impact of the business sector on children's rights adopted by the Committee of the Rights of the Child (CRC)[80]. Not surprisingly, transnational business operations have drawn the attention of the Committee which, in a specific section of the General Comment, specifically focuses on this issue. After recalling that host States have the «primary responsibility» to assure that business enterprises, operating under their jurisdiction, do not impair children's rights, the Comment pays a great deal of attention to home States. In this regard, it affirms that

> Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a *reasonable link* between the State and the conduct concerned[81].

The Committee specifies that this kind of link exists when a business

79 Marrella, *Protection internationale des droits de l'homme et activités des sociétés transnationales*, cit., p. 147.

80 CRC, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, UN Doc. CRC/C/GC/16 (2013). Not surprisingly, scholars define it as «the 'birth certificate' of the UN's nascent attention to the substantive interaction between the business sector and children's rights», cf. Gerber, Kyriakakis, O'Byrne, *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect?*, in *Melbourne Journal of International Law*, 2013, 14, p. 3.

81 CRC, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, cit., para. 43.

corporation «has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned»[82].

The General Comment adopted by the CRC marks a critical step in the definition of extraterritorial States' obligations stemming from human rights for a couple of reasons. Firstly, the Convention on the Rights of the Child has a general scope of application, setting out all categories of children's rights. Secondly, in spite of the broad consultation promoted by the CRC during the drafting process of the General Comment, no State did express formal opposition against the recognition of the extraterritorial dimension of its obligations, and more generally on the drafts circulated[83].

The extraterritorial dimension of States' obligations has been stressed also by the Committee on the Elimination of Discrimination Against Women (CEDAW). A first reference is included in the General Recommendation No. 28 (2010) on the core obligations of States parties to the Convention[84]: on that occasion, the Committee specified that the States' obligation, defined by Article 2(e), of the Convention, «to eliminate discrimination by any public or private actor» covers also discriminations committed by «national corporations operating extraterritorially»[85]. This element has been further developed in some later General Recommendations, namely the General Recommendation No. 36 (2016) on the rights of rural women[86] and the General Recommendation No. 35 (2017) on gender-based violence against women[87]. The former offers two meaningful specifications as regards the content of extraterritorial obligations. The Committee clarifies that, firstly, States must regulate the activities of non-state

82 This in line with the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2012, principle 25; Maastricht Principles were elaborated by a group of international experts during a meeting organized in September 2011 by the University of Maastricht and the International Commission of Jurists; the text and a commentary are published in De Schutter, Eide, Khalfan, Orellana, Salomon, Seiderman, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, in *Human Rights Quarterly*, 2012, IV, pp. 1048-1169, *www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf*.

83 For the drafting process of the General Comment, cf. Gerber, Kyriakakis, O'Byrne, cit., pp. 12 ff.

84 CEDAW, *General Recommendation No. 28 (2010), Core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28 (2010).

85 *Ibi*, para. 36.

86 CEDAW, *General Recommendation No. 36 (2016) on the Rights of Rural Women*, UN Doc. CEDAW/C/GC/34 (2016).

87 CEDAW, *General Recommendation No. 35 (2017) on Gender-Based Violence Against Women*, UN Doc. CEDAW/C/GC/35 (2017).

actors under their jurisdiction, also with regard to their extraterritorial operations; secondly, States must assure effective and adequate remedies when they violate their extraterritorial obligations stemming from rural women's rights.

The General Recommendation No. 35 (2017) on gender-based violence against women is particularly important as the CEDAW affirms that States have the obligation to

> take the steps necessary to prevent human rights violations perpetrated abroad by corporations over which they may exercise influence, whether through regulatory means or the use of incentives, including economic incentives[88].

This affirmation is very meaningful not only because it points out some operative means to prevent business-related human rights violation abroad but also because of its general scope of application. Indeed, this obligation does not only deal with gender-based violence against women, which is the specific issue covered by the Recommendation, but more generally all women's human rights.

Extraterritorial States' obligations have been significantly recognised also by the CESCR which has proved to be particularly sensitive to this issue. This approach finds its origins in Article 2 ICESCR which identifies international assistance and co-operation as a means through which States party to the Covenant must assure the full realisation of economic, social and cultural rights. International cooperation, which is recognised by the CESCR as an obligation of States party to the Covenant, implies in itself an extraterritorial dimension. Against this background, it is not surprising that, beginning with the General Comment No. 12 (1999) on the right to food, the CESCR affirms that States must «respect the enjoyment of the right to food in other countries»[89]: as a matter of fact, the non-respect of economic, social, and cultural rights in other States would deny the obligation of international assistance and co-operation. However, the CESCR has not only recognised the extraterritorial dimension of States' obligation against the background of international cooperation but also with regard to the prevention of violations committed by non-state actors. In General Comments on the

88 *Ibi*, para. 24 (b).

89 CESCR, *General Comment No. 12: The Right to Adequate Food* (Art. 11), cit., para. 36.

right to water[90], the right to work[91], the right to social security[92], and the right to just and favorable conditions of work[93], the Committee specifies that States party to the Covenant have the obligation to take steps to prevent violations perpetrated abroad by third parties domiciled in their territory and/or jurisdiction. The Comment on the right to just and favorable conditions of work is particularly meaningful in the regard. The Committee starts from recognising that States' obligations can play a fundamental role, especially in the case of home States having an «advanced labour law systems»; as a matter of fact, they can promote an improvement of working conditions standards in host States. Against this background, the CESCR affirms that States must adopt a regulative framework to «support individuals and enterprises in identifying, preventing and mitigating risks to just and favourable conditions of work through their operations»[94]. Moreover, States must take appropriate measures to ensure that corporations are accountable for extraterritorial violations of the right to just and favourable conditions of work and to assure that victims have access to remedy.

Without a shadow of doubt, the General Comment No. 24 of the CESCR represents the most important Comment in this regard, because it introduces a generalisation of extraterritorial obligations. Indeed, in the previous General Comments, the extraterritorial dimension was only recognised with regard to the obligation to protect the specific right at issue. Instead, the General Comment No. 24 recognises the extraterritorial dimension of obligations to respect, to protect, and to fulfil stemming from each and every right secured by the Covenant. As for the obligation to protect, the CESCR affirms that:

> The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise *control*[95].

The Committee specifies that a State is directly responsible for vio-

90 CESCR, *General Comment No. 15 (2002) on the Right to Water*, UN Doc. E/C.12/2002/11.

91 CESCR, *General Comment No. 18 (2005) on the Right to Work*, UN Doc. E/C.12/GC/18.

92 CESCR, *General Comment No. 19 (2008) on the Right to Social Security*, UN Doc. E/C.12/GC/19.

93 CESCR, *General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work*, UN Doc. E/C.12/GC/23.

94 *Ibi*, para. 70.

95 CESCR, *General Comment No. 24 (2017)*, cit., para. 30.

lations perpetrated by business entities only if the entity's conduct can be attributed to the State according to the criteria defined by the Draft articles on Responsibility of States for Internationally Wrongful Acts[96]. Instead, States can be held indirectly responsible for violations committed by private business entities when they fail to «take reasonable measures that could have prevented the occurrence of the event»[97]. In this regard, it is worth specifying two additional aspects, firstly, the scope of application of the obligation to protect *ratione personae*. As specified by the Committee, this obligation covers corporations domiciled in the territory and/or jurisdiction of the State, and the notion of domicile includes corporations incorporated under its law and also corporations having their statutory seat, central administration or principal place of business on the national territory of the State. Secondly, there is the content of the obligation to protect, which implies that corporations are required to put in place human rights due diligence mechanisms aiming to identify, prevent and address violations of Covenant's rights related to conducts of the corporation itself, but also of its subsidiaries and business partners.

4 Legislative Instruments on Corporate Responsibility to Respect Human Rights

As recalled above, in the last few years, corporate responsibility to respect human rights has been also regulated by several legislative instruments adopted both at national and EU level. These instruments can be categorised according to two different criteria: the human rights violation covered by the law or the obligation imposed on corporations. The first analytical criterium consents to identify three different kinds of law. First, there are laws having a limited scope of application and only covering slavering and human rights trafficking, namely the UK Modern Slavery Act and the Dutch Law (this latter deals with a sub-category of these violations, namely the child labour). Second, laws exist concerning human rights violations which stem from conflicts minerals: the US Dodd-Franck Act and the EU Regulation on conflict minerals. Although the interplay between situations of conflict and human rights violations is self-evident, the

96 ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two. As recalled by the Committee, the entity's conduct can be attributed to the States if the entity is acting on State's instructions or under its control or direction (Article 8), when the entity is empowered to exercise elements of governmental authority under the State party's legislation (Article 5), or if the State acknowledges and adopts the entity's conduct as its own (Article 11).

97 CESCR, *General Comment No. 24 (2017)*, cit., para. 32.

Annex II of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas specified them. Indeed, the Annex II highlights that serious abuses associated with the extraction, transport or trade in minerals in conflict-affected and high-risk areas are represented by torture, cruel, inhuman and degrading treatment, forced or compulsory labour, child labour, sexual violence, war crimes, serious violations of international humanitarian law, crimes against humanity, and genocide. A similar specification can also be found in the EU Regulation which makes also reference to disappearance, forced resettlement, and destruction of ritually or culturally significant sites. Finally, some acts cover all human rights violations: the French Law and the EU Directive 2014/95. Neither of them specifies international human rights instruments to which corporations must refer in assuring respect for human rights. However, both of them make reference to the UNGPs; in this regard, principle 12 is particularly relevant specifying the international human rights standards that business enterprises must respect. Moreover, it is necessary to consider human rights instruments ratified by each State; and in the framework of the EU Directive, the EU Charter of fundamental rights.

The second analytical criterium consents to reach a categorisation of these laws referring to the nature of obligations imposed upon corporations. Needless to say, it partially overlaps the first categorisation just described. It is possible to identify two kinds of law. First, there are some laws, such as the French Law, the Dutch child labour due diligence, the US Dodd-Franck Act, and the EU Regulation on conflict minerals which impose on corporations due diligence requirements in order to identify, prevent and mitigate human rights adverse impact of their activities and business relationships. Second, there are instruments imposing the obligation to adopt a statement allowing the corporation to disclose the actions it has taken to prevent human rights violations in their business and supply chains. This second category includes the US California Transparency in Supply Chains Act, the EU on Disclosure of Non-Financial Information (2014), the UK Modern Slavery Act (2015), and the recent Australian Modern Slavery Bill (2018).

After this categorisation, let us briefly analyse the content of these acts, focusing on those adopted at European level.

The *French Law on the duty of vigilance* (2017)[98] sets out that large

98 Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies. For a more detailed analysis of national legislation and additional references in this regard, see among others Macchi, Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in *Legal Sources in Business and Human Rights*, a cura di Buscemi, Lazzerini, Magi, and Russo, Leiden-Boston, forthcoming, pp. 218-247.

companies[99] must periodically adopt, disclose and implement a vigilance plan defining «reasonable vigilance measures to identify risks and prevent» serious violations of human rights, serious harms to health, safety and environment. The plan must cover risk resulting not only from the activities of French companies but also from the companies under their control, and from the activities of subcontractors and «suppliers with whom there is an established commercial relationship»[100].

The *Dutch Child Labour Due Diligence Law* (2019) requires that all companies, regardless of their domicile in the Netherlands or not, selling or supplying goods or services to Dutch customers[101], must submit a disclosure statement to the Dutch supervising authority declaring that they have implemented adequate due diligence measures to prevent their products or services from being produced in a way that involves child labour, and the statement will be published in a public register[102]. As specified by the Law, companies must investigate, through «reasonably known and accessible» sources, «whether there is a reasonable suspicious that the goods or services to be supplied have been produced using child labour»; in the event of a reasonable suspicious, the company must adopt and implement a plan of action aiming to exclude from its supply chain every goods and services suspected of being produced by child labour.

The *United Kingdom Modern Slavery Acy* (2015)[103] stipulates that large companies[104], wherever incorporated, which carries on a business, or part of a business, in any part of the UK, must prepare, for each financial year, a statement of the steps taken during the financial year «to ensure that slavery and human trafficking is not tak-

99 The Law covers companies « that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad» (Article 1, Loi no. 2017-399).

100 Commercial code, art. L. 225-102-4, para. 3 as modified by Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies.

101 The criterion chosen by the Dutch Law to define its scope of application is twofold. On the one hand, it is really comprehensive because it also includes companies registered abroad; on the other it does not cover companies which, although registered in the Netherlands, do not sell or supply their goods and services in the Netherlands. From this point of view, the Dutch Law is likely to exclude a significant number of companies, simply because the final consumers or their products are not in the Netherlands.

102 Already-existent companies are requested to send their declaration within six months after the entry into force of the Act, the new companies immediately after their registration in the trade register, and foreign companies within six months after supplying goods or services to Dutch consumers for the second time in a given year.

103 Modern Slavery Acy, Section 54 «Transparency in Supply Chain».

104 The slavery and human trafficking statement must be prepared by commercial organisations supplying goods or services which have a total turnover of not less than £36 million.

ing place in any of [their] supply chains or in any part of [their] own business»; otherwise, they can prepare a statement declaring that the company has not taken any step. The slavery and human trafficking statement must include information, among others, on the company's policies in relation to slavery and human trafficking, its due diligence process in its business and supply chains, and the training about slavery and human trafficking available to its staff[105]. The statement must be published on the company's website, if any; otherwise, it must be made available upon written request of anyone.

The *EU Directive on disclosure of non-financial information*, amending the accounting directive 2013/34/EU on the annual financial statements[106], stipulates that large companies[107] must also prepare a non-financial statement. This latter must incorporate a description of the principal risks and measures adopted to manage risks related to social and employee matters linked to the company's activities «including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas». If the company does not pursue any policy in relation to these matters, the statement must provide «a clear and reasoned explanation» for this lack of policy (the so-called "comply or explain" system).

The *EU Timber Regulation*[108] stipulates that any natural or legal person that places timber or timber products on the EU market, for the first time, must adopt a due diligence system to ensure it supplies products made of timber which have been harvested in compliance with the legislation of the country of harvest. To this end, operators must use a due diligence system, which must include firstly, measures and procedures gathering information on the operator's supply of timber or timber products placed on the market; secondly, risk as-

105 Modern Slavery Acy, Section 54 «Transparency in Supply Chain», para. 5: «An organisation's slavery and human trafficking statement may include information about (a) the organisation's structure, its business and its supply chains; (b) its policies in relation to slavery and human trafficking; (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; (f) the training about slavery and human trafficking available to its staff».

106 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, Official Journal L 182, 29 June 2013, p. 19-76.

107 The Directive applies to public-interest companies of over 500 employees.

108 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Official Journal L 295, 12 November 2010, p. 23-34.

sessment procedures aiming to analyse and evaluate the risk of placing on the market illegally harvested timber or products derived from such timber; and finally, in the event that the risk assessment procedures reveal a non-negligible risk, the adoption of risk mitigation procedures consisting of a set of adequate and proportionate measures and procedures to effectively minimise the risk.

The EU Regulation on Conflict Minerals. Before analysing this Regulation, it is worth recalling that in 2011 the OECD adopted a Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. As specified by the Guidance,

> «Risk-based due diligence refers to the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions»[109].

The Guidance defines a five-step framework for risk-based due diligence (Annex I), which companies should integrate in their management systems; according to this framework, they should 1) establish strong company management systems, 2) identify and assess risk in the supply chain, 3) design and implement a strategy to respond to identified risks, 4) carry out independent third-party audit of supply chain due diligence at identified points in the supply chain, and 5) report on supply chain due diligence[110].

The EU Regulation 2017/821, adopted in 2017[111], aims to impose due diligences obligations on EU importers of mineral and metals containing or consisting of tin, tantalum, tungsten or gold whose an-

109 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*[3], Paris, 2016, p. 13.

110 The Guidance also provides a model of mineral supply chain policy setting out a common set of principles (Annex II), suggested measures for risk mitigation, and indicators for measuring improvement which upstream companies may consider with the possible support of downstream companies (Annex III). The Guidance is completed by two Supplements on tin-tantalum-tungsten and gold tailored to the challenges associated with the structure of the supply chain of these minerals.

111 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Official Journal L 130, 19 May 2017, pp. 1-20. For a more detailed analysis, see among others, Voland, Daly, *The EU Regulation on Conflict Minerals: The Way Out of a Vicious Cycle?*, in *Journal of World Trade*, 2018, II, pp. 37-64; Grado, *The EU "Conflict Minerals Regulation": Potentialities and Limits in the Light of the International Standards on Responsible Sourcing*, in *The Italian Yearbook of International Law Online*, 2018, I, pp. 235-257; Id., *EU Approaches on "Conflict Minerals". Are They Consistent with the UN/OECD Supply Chain Due Diligence Standards?*, in *Business and Human Rights in Europe. International Law Challenges*, edited by Bonfanti, New York-London, 2019, pp. 156-167.

nual import volumes go over the volume thresholds defined in Annex I[112]. These obligations, which are largely based upon the requirement defined by the OECD Due Diligence Guidance, concern *management system, risk management, third-party audit, and disclosure*. As for the management system obligations (Article 4), the EU importers are requested to adopt a supply chain policy for mineral and metals potentially originating from conflict-affected and high-risk areas. Their supply chain policy, which must be clearly communicated to suppliers and the public, must incorporate standards against which supply chain due diligence is to be conducted, consistent with the model supply chain policy set out in the OECD Due Diligence Guidance. The supply chain policy must be included in contracts and agreements. The importers must structure their respective internal management systems in such a way aiming to support supply chain due diligence, by assigning responsibility to senior management to oversee the supply chain due diligence process and maintain records for at least five years. Moreover, the importers must establish a grievance mechanism and set up a chain of custody or supply chain traceability system of metal and minerals providing some specific information. Based on information obtained implementing the management system set out by Article 4, the Regulation imposes on importers some risk management obligations: they are required to identify and assess the risks of adverse human rights impact in their mineral supply chain and implement a strategy to respond to these risks preventing or mitigating the adverse impact[113]. Moreover, the importers must carry out audits via an independent third party; the audit must include all activities, processes and systems used to implement supply chain due diligence regarding minerals or metals. The audit must be conducted complying with principles of independence, competence and accountability set out in the OECD Due Diligence Guidance, and it aims to assure the conformity of the importer's supply chain due diligence practices with the Regulation's provisions and to make recommendations to the importer in order to improve its supply chain due diligence prac-

112 As specified by Article 1, para. 3, these volume thresholds are set at such a level to ensure that no less than 95 % of the total volumes imported into the EU of each mineral and metal fall within the scope of application of the Regulation.

113 This strategy can include reporting findings of the supply chain risk assessment to senior management designated for that purpose, adopting risk management measures consistent with the OECD Guidance, considering their ability to influence, and where necessary take steps to exert pressure on suppliers who can most effectively prevent or mitigate the identified risk, by making it possible either to a) continue trade while simultaneously implementing measurable risk mitigation efforts, b) suspend trade temporarily while pursuing ongoing measurable risk mitigation efforts or c) disengage with a supplier after failed attempts at risk mitigation; implementing the risk management plan; monitoring and tracking performance of risk mitigation efforts; and undertaking additional fact and risk assessments for risks requiring mitigation, or after a change of circumstances.

tices. Finally, importers must make the reports of the third-party audit available to State's competent authorities.

5 Concluding Remarks

As is known, under the UNGPs the first and second pillars are independent from each other: as stressed by the principles, the corporate responsibility to respect human rights is autonomous from the ability and willingness of States to fulfil their human rights obligations. However, and in spite of the evolution of international law in this regard, States continue to be the main international actors, and they are bound by human rights obligations which must be fulfilled at national level. Against this background, international lawyers feel the necessity to read the UNGPs' pillars through the lens of States' obligations. The foregoing analysis has shown that the States' obligation to protect against violations perpetrated by private corporations, and in particular its *ex-ante* element (the *obligation to prevent* violations) «*entails* – borrowing the words of the CESCR – a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations» of human rights. This formulation clearly defines the interplay between an element of the first pillar (the *ex-ante* obligation to prevent) and the second pillar.

This kind of interplay, as defined by the CESCR, finds confirmation at the European level, and in particular in the Council of Europe's Recommendation CM/Rec(2016) on human rights and business and in the case-law of the ECtHR which, in this regard, seems very promising. Indeed, adopting a wide notion of private and family life, it has developed a well-established case-law on States' obligation to protect health and life against serious threat arising from polluting activities carried out by private corporations. As specified by the Court, this obligation to protect implies the adoption of «adequate and reasonable measures to prevent or reduce» the polluting hazard. These measures include the regulation of polluting activities carried out by private actors, namely the licensing, setting-up, and supervision them; they also entail the definition of a regulatory framework aiming to impose on private actors, involved in dangerous activities, the adoption of «practical measures to ensure the effective protection» for human health and life. Although the Court has never explicitly referred to the implementation of a human rights due diligence mechanism by corporations involved in dangerous activities, this latter might certainly be qualified among the "practical and effective measures" the Court has referred to. Moving to the *extraterritorial* dimension of the obligation to prevent, the international practice is less homogeneous; indeed, if it has been promoted by the

UNGPs and authoritatively affirmed by human rights treaty bodies, it has never been recognised by the ECtHR.

In conclusion, it is possible to affirm that the requirement of human rights due diligence for corporations is recognised at international and European levels as a component of the States' obligations to prevent business-related human rights violations. The same, however, cannot be said for the extraterritorial dimension of this obligation, and so for the definition of human rights due diligence requirements for transnational corporations. This assumption finds confirmation in the legislative practice whose analysis proves that the requirement of human rights due diligence for transnational corporations is not accepted by law neither at general nor at regional level.

However, this conclusion finds an important exception in human rights violations linked to conflict minerals. In this regard, it is worth recalling that the Group of Experts assisting the Democratic Republic of the Congo (DRC) Sanction Committee of the UN Security Council,[114] was tasked by the Security Council with elaborating recommendations «for guidelines for the exercise of due diligence by the importers, processing industries and consumers of mineral products regarding the purchase, sourcing […], acquisition and processing of mineral products» coming from the DRC[115]. Following this mandate, in 2010 the Group of Experts submitted its final Report which also includes a specific section on due diligence. Due diligence is defined by the Group of Experts as «a dynamic process whereby individuals and entities discharge their responsibilities with reference to a given standard». The scope of the application of the due diligence process is very comprehensive both from a personal and a geographical point of view. Indeed, it must cover all

114 The Sanction Committee was established by the UN Security Council Resolution 1533 (2004) to oversee the sanctions measures imposed by the Security Council. According to the UN Security Council Resolution 1533 (2004) the Group of Experts is mandated «To examine and analyse information gathered by MONUC in the context of its monitoring mandate; (b) To gather and analyse all relevant information in the Democratic Republic of the Congo, countries of the region and, as necessary, in other countries, in cooperation with the governments of those countries, flows of arms and related materiel, as well as networks operating in violation of the measures imposed by paragraph 20 of resolution 1493; (c) To consider and recommend, where appropriate, ways of improving the capabilities of States interested, in particular those of the region, to ensure the measures imposed by paragraph 20 of resolution 1493 are effectively implemented; (d) To report to the Council in writing before 15 July 2004, through the Committee, on the implementation of the measures imposed by paragraph 20 of resolution 1493, with recommendations in this regard; (e) To keep the Committee frequently updated on its activities; (f) To exchange with MONUC, as appropriate, information that might be of use in the fulfilment of its monitoring mandate as described in paragraph 3 and 4 above; (g) To provide the Committee in its reports with a list, with supporting evidence, of those found to have violated the measures imposed by paragraph 20 of resolution 1493, and those found to have supported them in such activities for possible future measures by the Council».

115 UN Security Council, *The Situation concerning the Democratic Republic of the Congo*, UN Doc. S/RES/1896 (2009), para. 7.

mineral products coming from the so-called "red-flag locations", which include not only the eastern part of the DRC but also other countries where minerals products transit, such as in particular Rwanda, Burundi, Uganda, Kenya, the United Republic of Tanzania and the Sudan. Moreover, the Group of Experts recommended that due diligence apply not only to importers, processors and consumers of mineral products but also to «other main participants in the supply chain of minerals from red flag locations»[116]. The due diligence process defined by the Group of Experts is based upon five steps which significantly recall the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas adopted by the OECD. The framework for risk-based due diligence in the mineral supply chain, elaborated by the Group of Experts, was endorsed by the UN Security Council which, in its Resolution 1952 (2010), calls upon all member States to «take appropriate steps to raise awareness of the due diligence guidelines»[117] elaborated by the Group of Experts and

> «*urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence by applying the aforementioned guidelines, or equivalent guidelines, containing the following steps as described in the final report* […]: strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings»[118].

In conclusion, the five-step framework for risk-based due diligence in the mineral supply chain, defined in the OECD Guidance, which largely characterises the EU Conflict Minerals Regulations, was also endorsed by the UN Security Council in its Resolution 1952 (2010). In the light of that, the requirement of a five-step framework for risk-based due diligence for transnational corporations operating in the mineral supply chain – which is an essential component of the extraterritorial States' obligation to prevent human rights violations in mining sec-

116 UN Security Council, *Final report of the Group of Experts on the DRC*, UN Doc. S/2010/596, para. 309.

117 UN Security Council, *Resolution 1952 (2010) on Extension of Measures on Arms, Transport, Financial and Travel against the Democratic Republic of the Congo Imposed by Resolution 1807 (2008) And Expansion Of The Mandate Of The Committee Established Pursuant To Resolution 1533 (2004)*, UN Doc. S/RES/1952 (2010), para. 8. This affirmation has been also said in several other Resolutions on the DRC, such as S/RES/2360 (2017), para 22; S/RES/2339 (2017), para 18; S/RES/2293 (2016), para 25; S/RES/2198 (2015), para 23; S/RES/2136 (2014), para 22; S/RES/2078 (2012), para 15; a similar affirmation is included in the Resolution S/RES/2219 (2015), para 32 on the Côte d'Ivoire.

118 UN Security Council, *Resolution 1952 (2010)*, cit., para. 8.

tor – can be qualified as a rule of PCIL (at least) at the European level.

As for the personal scope of application of this rule – and therefore the specific notion of "Europe" we are referring to –, it can be identified as concerning only the EU Members States. As previously stressed their membership to an international organisation – to which they transferred several aspects of their sovereignty – does not require ascertaining the consent of each State in order to prove the existence of a rule of PCIL. However, it is decisive that in the Council of the EU – which represents the Members States' *governments* – the EU Regulation on Conflict Minerals was adopted with the favourable vote of all Members States. By contrast, the scope of application cannot be extended to the States which are members of the Council of Europe (needless to say, we are referring to the States which are not EU Member States). In this regard, the case law of the ECtHR and the Recommendation on human rights and business adopted by the Committee of Ministers are not sufficient to affirm that the rule at issue binds the members States of the Council of Europe, as well.

Before closing, it is necessary to recall that this paper has only covered the *ex-ante* element of the obligation to protect against business-related human rights violations. Although not analysed on this occasion, the *ex-post* aspect, concerning the access to effective remedy for victims, is of utmost importance; indeed, as demonstrated by numerous studies[119], several obstacles may dramatically prevent victims from having access to effective remedy.

119 Marx, Bright, Pineau, Wouters, *Corporate Accountability Mechanisms in EU Member States for Human Rights Abuses in Third Countries*, in *European Yearbook of Human Rights*, 2019; Marrella, *Protection internationale des droits de l'homme et activités des sociétés transnationales*, cit., pp. 302 ff.; Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies, Report prepared for the Office of the UN High Commissioner for Human Rights*, 2014; Skinner, McCorquodale, De Schutter, *The Third Pillar - Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 2013. In this regard, cf. also Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse. Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/32/19 (2016).