INSIGHT

IMPLEMENTING "RESPONSIBLE BUSINESS CONDUCT" APPROACHES UNDER THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AT THE TIME OF COVID-19

MARCO FASCIGLIONE*

ABSTRACT: COVID-19 has prompted unprecedented changes to daily life across the EU and has affected the enjoyment of many of the rights set out in human rights international treaties. While the current debate on the impact of COVID-19 on human rights mainly has focused its attention on the role of States, on the emergency measures they have to adopt to contain the Pandemic spread and on the measures they are urged to implement to safeguard rights of individuals, less attention has been devoted to the role played by the private sector. The objective of the paper is exactly to review such a role and to assess, in the light of the UN Guiding Principles on Business and Human Rights (UNGPs), the scope and the content of the Corporate Responsibility to Respect (CRtoR). Under the UNGPs, in effect, enterprises are asked to implement responsible business conduct by respecting human rights in the course of their operations and throughout the entire value chain. Companies are asked to take the necessary measures to prevent their activities from having a negative impact on human rights and, if an impact is originated, to prevent, mitigate and remedy it. This framework applies of course also in respect to the human rights risks associated to pandemic outbreaks, such as the COVID-19 crisis.

KEYWORDS: COVID-19 and the EU – business and human rights – labour rights – responsible business conduct – UN guiding principles on business and human rights – human rights due diligence legislation.

I. INTRODUCTION

Europe is one of the epicentres of the global Coronavirus pandemic. Since the first confirmed case on 24 January 2020, all 27 EU Member States have been recording cases pushing WHO to declare on 11 March 2020 that the COVID-19 outbreak had reached the level of a global pandemic. This prompted a large majority of EU Member States to adopt

* Researcher of International Law, CNR-IRISS, Alternate member of the Management Board of the European Union Agency for Fundamental Rights (FRA), m.fasciglione@iriss.cnr.it. The views and opinions expressed in this *Insight* are those of the author. They do not purport to reflect the opinions or views of the FRA.

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emergency measures, of varying forms and durations, to contain the spread of the virus and to ensure the right to life and health for their citizens and any other individual. These measures include restrictions on public gatherings, requirements to stay at home except for limited essential activities such as food shopping, and orders to close businesses and cultural and educational institutions. Taken together, they have prompted unprecedented changes to daily life across the EU and affected the enjoyment of many of the rights set out in human rights international treaties and, with regard to regional human rights legal framework, in the European Convention on Human Rights and Fundamental Freedoms (ECHR), and in the Charter of Fundamental Rights of the EU (the Charter).[1]

In the light of this backdrop, the current debate on the impact of COVID-19 on human rights has focused its attention mainly on the role of States, and on the measures they are urged to adopt in order to cope with the pandemic outbreak without deserting their duty to protect human rights of individuals falling within their jurisdiction. Accordingly, discussions have addressed, on the one side, the lawfulness (whether from a constitutional standpoint or from an international human rights law standpoint) of the measures, derogating or restricting individual freedoms, that have been adopted in order to contain the spread of the pandemic. On the other side, attention has been paid also to the need for the adoption of economic and social measures aimed at providing a safety net for both individuals and businesses operators.

Less attention, however, has been devoted to the *no less important* role played by the private sector. The 2011 UN Guiding Principles on Business and Human Rights (hereinafter, UNGPs) remind us, indeed, that while States have the (positive) obligation to regulate the activities of private sector's actors so that they do not violate human rights,[2] the corporate responsibility to respect (CRtoR)[3] enshrined in the second Pillar of the

[1] For a periodic survey of the effects on human rights stemming from anti-COVID-19 measures adopted in the EU Countries, consult the Bulletins Series published by the European Union Agency for Fundamental Rights, *Coronavirus Pandemic in the EU – Fundamental Rights Implications*, www.fra.europa.eu.

[2] M. FASCIGLIONE, *Enforcing the State Duty to Protect Under the UN Guiding Principles on Business and Human Rights: Strasbourg Views*, in A. BONFANTI (ed.) ,*Business and Human Rights in Europe International Law Challenge*, New York: Routledge, 2019, p. 37 *et seq.* As far as in general the theory of positive obligations is concerned, see R. PISILLO MAZZESCHI, *Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme*, in *Recueil des Cours de l'Académie de Droit International*, 2008, p. 175 *et seq*.

[3] Corporate Responsibility to Respect is often associated to the notion of Corporate Social Responsibility and to the one of Responsible Business Conduct. However, the three notions differ each other. Corporate Social Responsibility, defined in the 2011 CSR Strategy of the European Commission as "the responsibility of enterprises for their impacts on society", is expression of a market forces-based approach and self-regulation of the corporate sector to the promotion of human rights, the environment, and other non-economic values in the course of their business operations (see Communication COM(2011) 681 final of 25 October 2011 from the Commission on a renewed EU strategy 2011-14 for Corporate Social Responsibility). Responsible Business Conduct, is an alternative term coined by the Organization for Economic Cooperation and Development (hereinafter, OECD) in 2018 with the view of progressively adapting its standards, and specifically the 1976 Guidelines for Multinational Enterprises, to the UN Guiding Princi-

UNGPs, urges enterprises to respect human rights in the course of their operations and throughout the entire value chain[4] and to take the necessary measures to prevent their activities from having a negative impact on human rights and, if an impact is originated, to mitigate and remedy it.[5] Well, to the extent that corporate operations are involved, this framework also applies in relation to the human rights risks associated to the COVID-19 emergency. The objective of these pages is to review, in the light of the Guiding Principles, the scope of the CRtoR when enterprises are asked to cope with such kind of emergency situations.

II. COVID-19, HUMAN RIGHTS AND SHAREHOLDER PRIMACY

As Tara Van Ho has recently pointed out,[6] the contemporary prevailing business model (based on the principle of the shareholder primacy) encompasses two avenues for reacting to the COVID-19 crisis: first, *a*) the use of "cash reserves to engage in stock buybacks", a simple and quick strategy to increase the value of shares – and to increase managers' stock options, which has, however, the effect of "depriving companies of the cushion necessary to survive a significant economic downturn"; second, *b*) the containment of costs and losses resulting from quarantine, taking advantage of the opportunity granted by the mechanisms of production along the global supply chains, to order the postponement of contractual payments, the cancellation of orders, or, even worse, the refusal to accept delivery of goods already produced. This has led businesses to attack unions, struggle the increase of minimum wages, and generally speaking to jeopardize the rights of workers who work along supply chains, often with little or no guar-

ples. According to the OECD, indeed, Responsible Business Conduct consists in *a*) making a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and *b*) avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products or services (see Organization for Economic Cooperation and Development, Due Diligence Guidance for Responsible Business Conduct, 2018). Corporate Responsibility to Respect, finally, expresses the business and human rights approach of the UNGPs. This approach, which is much more regulatory-oriented than the formers, recognizes that preventing and remedying abuses by businesses is a joint responsibility of the private sector and public authorities and that such responsibilities may be even enforced through legal instruments. For a deeper analysis of the differences between these notions, also from a policy-making perspective, see: Commission Staff Working document SWD(2019) 143 final of 20 March 2019 on Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights: Overview of Progress, p. 2 *et seq*.

[4] A. BONFANTI, M. BORDIGNON, *Seafood from Slaves': The Pulitzer Prize in the Light of the UN Guiding Principles on Business and Human Rights*, in *Global Policy*, 2017, p. 498 *et seq.*, especially at p. 501.

[5] As to the notion of "impact" in the UNGPs, a notion broader than the one of "violation", see the analysis of D. BIRCHALL, *Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights*, in *University of Oxford Human Rights Hub Journal*, 2019, p. 120 *et seq*.

[6] T. VAN HO, *COVID-19 Symposium: A Time to Kill 'Business as Usual' – Centring Human Rights in a Frustrated Economy (Part 1)*, in *Opinio Juris*, 2 April 2020, www.opiniojuris.org.

antees at work.[7] In other terms, the joint action of shareholder primacy principle with the economic inequality that characterizes global production processes, pushes corporations to abstain from engaging in effective actions countering the negative impact on human rights of COVID-19 and creates a favourable environment for their violation.

On another perspective, also the "furtherance" of business activities by corporate actors may involve major risks of violations of human rights of workers. This applies, as for instance, to migrant workers, and to those workers operating in "informal" economies who normally carry on their work without health insurances that might alleviate situations of contagious illness. This applies, in the second place, also in respect to the emergency measures adopted by States to impede the spread of the virus. These measures, in effect, ban on the one side working activities in production sectors considered "non-essential" (e.g. tourism and hospitality), on the other side they authorise some specific categories of workers to continue their activities in key sectors (health, transport, and other basic services) because of their *being indispensable*: this, for example, for either ensuring medical care and other health treatment services; for delivering public transport services for other key workers; for assuring transport of goods to supply the population with basic needs (food, medicines, etc.). For all these "necessary workers", both States and companies are requested to adopt measures destined to assuring fair and just working condition,[8] to reducing workers' exposure to COVID-19 in the workplace[9] and to minimising the risks related to the right to health.[10] There are many ways in which such material situations fall within the scope of the CRtoR.

III. The UNGPs, the scope of the corporate responsibility to respect and the COVID-19 crisis

The UNGPs, unanimously adopted by the UN Human Rights Council in 2011,[11] are not a legally binding instrument. Nevertheless, they constitute the first authoritative global standard on business and human rights. The UNGPs, actually, have been internationally

[7] L. Smit, G. Holly, R. McCorquodale, S. Neely, *Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard*, in *The International Journal of Human Rights*, 2020, p. 1 *et seq*.

[8] European Union Agency for Fundamental Rights, Coronavirus Pandemic in the EU – Fundamental Rights Implications – Bulletin 1, 1 February – 20 March 2020, p. 21.

[9] Organization for Economic Cooperation and Development, Supporting people and companies to deal with the COVID-19 virus: Options for an immediate employment and social-policy response of March 2020.

[10] See Committee on Economic Social and Cultural Rights (CESCR), Statement on coronavirus and economic, social and cultural rights of 6 April 2020, UN Doc. E/C.12/2020/1, para. 16. See also: UN Working Group on Business and Human Rights, *Ensuring that business respects human rights during the Covid-19 crisis and beyond: The relevance of the UN Guiding Principles on Business and Human Rights*. *Statement by the UN Working Group on Business and Human Rights*, www.ohchr.org.

[11] Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises, 7 July 2011, UN Doc. A/HRC/RES/17/4.

acknowledged and recognized by several States and the major international organizations and institutions, including the European Union and the Council of Europe, as a basis for the development of their own Business and Human Rights policies and standards. Bodies charged with policy-setting functions in human rights regional systems have endorsed the Guiding Principles in the process of developing regional policy frameworks dealing with the negative effects on human rights of private sector activities. Accordingly, as far as the Council of Europe is concerned, the Committee of Ministers has adopted on 16 April 2014 the *Declaration on the UN Guiding Principles on business and human rights*[12] and on 2 March 2016 the *Recommendation on the UN Guiding Principles on business and human rights.*[13]

Similarly, as far as the European Union regional system is concerned, the EU institutions have been actively implementing the UNGPs: in 2011 the EU Commission updated its CSR Strategy by incorporating UNGPs provisions, and especially those concerning the corporate human rights due diligence;[14] in 2015 the Council of the European Union strongly emphasized the need for the implementation of UNGPs in the EU Action Plan on Human Rights and Democracy 2015-2019;[15] since 2011 the European Parliament has started a thorough work on Responsible Business Conduct by adopting a number of decisions and documents, including EU secondary legislation instruments;[16] in 2017, finally, the European Union Agency for Fundamental Rights (FRA) has issued a specific opinion concerning the implementation of the UNGPs' third pillar on access to remedy within the EU legal system.[17] As far as their content, the UNGPs rely on three Pillars: *a*) the State duty to protect human rights from abuses by third parties, including business enterprises; *b*) the corporate responsibility to respect human rights and *c*) the access to remedy for the victims.

The Corporate responsibility to respect (CRtoR) under the second Pillar of the UNGPs is a global standard of expected conduct for all business enterprises. CRtoR exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, while it does not diminish those obligations. According to Principle 11 of the UNGPs, companies "should respect human rights"; this implies that they "they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved". Describing the *ratione materiae* scope of

[12] See Committee of Ministers of the Council of Europe, Declaration on the UN Guiding Principles on business and human rights of 16 April 2014.

[13] See Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2016)3 to Member States on human rights and business of 2 March 2016.

[14] See *supra* note 3.

[15] See Council of the European Union, *EU Action Plan on Human Rights and Democracy 2015-2019*, 2015.

[16] See both the adopted legislation and the ongoing legislative developments at the EU level, cited *infra*, section 6.

[17] See European Union Agency for Fundamental Rights, Improving access to remedy in the area of business and human rights at the EU level Opinion of the European Union Agency for Fundamental Rights, Opinion – 1/2017 of 10 April 2017.

the CRtoR, Principle 12 clarifies that it potentially applies to all internationally recognized human rights. Indeed, since business enterprises can have with their operations an impact on virtually the entire spectrum of internationally recognized human rights, then their responsibility to respect applies to all such rights. According to Principle 12 the minimum content of the category of internationally recognized human rights has to be "understood, at a minimum", as those included in the International Bill of Human Rights as well as those included in the Principles concerning fundamental labour rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. In addition, and extremely relevant for the present analysis, Principle 12 recognises that some human rights may be at greater risk than others in particular industries or *contexts*: therefore, in those situations they deserve "heightened attention". COVID-19 crisis originates situations deserving exactly such a heightened attention: these circumstances, rather than authorize derogations from human rights standard, impose on corporate actors an increased level of attention as far as respect of human rights. The condition of persons working in 'key sectors' perfectly illustrates this "higher attention threshold" which is urged from companies when called to cope with the challenges raised from the peculiar context of the COVID-19 pandemic. For these categories of workers, in fact, the risk of violation of the *right to life* (Art. 6 of the International Covenant on Civil and Political Rights, Art. 2 ECHR, Art. 2 of the Charter) which, it should be noted, is a right that cannot be derogated from, suspended or limited even in emergency situations, of the *right to the achievement of the highest attainable standards of physical and mental health* (Art. 12 of the International Covenant on Economic, Social and Cultural Rights – hereinafter, ICESR – and Art. 35 of the Charter), or of the *right to safe and healthy working conditions* (Art. 7, let. b), ICESCR, Art. 31 of the Charter), is much higher than the risk that other non-essential categories of workers, asked to remain at home for discharging quarantine measures, have to face. In short, these workers are in a particularly vulnerable condition because they run greater risks of suffering violations of the aforementioned rights following to their exposure to contagion.[18] Accordingly, companies employing such at risk categories of workers are requested either to "take adequate steps to ensure occupational health and safety in their operations",[19] or "to implement measures designed to ensure their health and safety at work".[20] A direct consequence stemming from such obligations consists in the right of these workers to be removed from their workplace where there is a reasonable justification to believe that an imminent and serious danger to health or life there exists. In such situations

[18] For an analysis at the European level, see: European Union Agency for Fundamental Rights, Coronavirus pandemic in the EU – Fundamental Rights Implications – Bulletin 2, 21 March – 31 April 2020, p. 9 *et seq*.

[19] See: the Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises, Employment and Industrial Relations of 1976 (revised in 2011), para. 4, let. c).

[20] See in this sense the International Covenant on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to just and favorable conditions of work (article 7), paras 74-75.

workers are also entitled to be protected from undue consequences in accordance with national conditions and practice.[21] It is precisely such right, for example, that has been invoked by employees of e-commerce companies in relation to the failure of their employers in implementing measures to achieve social distancing and ensure a safe and healthy working environment in their warehouses.[22]

IV. The content of the corporate responsibility to respect and the COVID-19 crisis

According to Principle 13 of the UNGPs, business enterprises may be involved with "adverse human rights impacts" either through their own activities or as a result of their business relationships with other parties. The concept of "human rights impacts" is one the core feature regarding the corporate responsibility to respect human rights.[23] Under Principle 13 of the UNGPs, businesses are responsible for those adverse impacts they cause, contribute to, or that are "directly linked to [...] their business relationships". In practice, this responsibility requires that enterprises: *a*) avoid *causing* adverse human rights impacts through their own activities (here causation includes both corporate acts and omissions); *b*) avoid *contributing* to adverse human rights impacts through their own activities; and *c*) seek to *prevent* or *mitigate* adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not caused neither contributed to those impacts.[24] Of course, the corporate responsibility to respect imposes to enterprises to address impacts when they occur. The abovementioned framework may be transposed to the current COVID-19 scenario. Just for example, with regard to the need to protect the right to health of "key" workers who have to be maintained at work, the failure of their employers to take the necessary measures to ensure protection from the increased risk of infection (e.g. providing personal protective equipment, or devices, implementing social distancing policies, etc.) is a self-evident example of causation responsibility case, contrary to the duty referred above under *a*).

[21] See the ILO Occupational Safety and Health Convention of 22 June 1981 (No. 155), Art. 13.

[22] A good example is provided by the complaints raised, both in US and in Europe, by warehouse employees of Amazon.com Inc., claiming that working conditions in the company's warehouses put them at risk of contracting the coronavirus. See, among the others: J. Eidelson, S. Soper, *Amazon Workers Sue Over Virus Brought Home from Warehouse*, in *Bloomberg*, 3 June 2020, www.bloomberg.com. In response to such complaints, Amazon.com Inc. has adopted a specific policy addressing these issues: www.blog.aboutamazon.com.

[23] See the comment on Principle 13 made by J. Ruggie, *Comments on Thun Group of Banks: Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context*, 2017, www.ihrb.org.

[24] The first two options are enshrined in Principle 13, let. a), while the third one (the so-called "directly linked responsibility") is enshrined in Principle 13, let. b).

What is important to note is the circumstance that in order to avoid responsibility under the second Pillar, business actors involved in one of the three kinds of human rights adverse impact have to implement measures enshrined in Principles from 19 to 22. Measures to be adopted are functionally linked to the type of involvement of the company in the negative impact. Where a business enterprise *causes*, or *may cause*, an adverse human rights impact and where it *contributes*, or *may contribute*, to such an impact, it should take the necessary steps to cease or prevent the impact and to establish some remedial actions (included the payment of compensation, if necessary). On the contrary, where a business enterprise has not caused, nor contributed to an adverse human rights impact, but that impact is nevertheless *directly linked* to its operations, products or services by its business relationship with another entity, the situation is more complex. In this case, actually, the action required by the company depends on several elements, such as the extent to which the enterprise may exercise a leverage (*i.e.* influence)[25] over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

Importantly, the corporate responsibility by linkage has a pivotal role to play within contemporary supply chains mechanisms. Indeed, the COVID-19 crisis painfully exposed the vulnerabilities of contemporary global economy and of unregulated global supply chains, and how the burden of the negative effects of the measures taken by companies as a consequence of the pandemic spread is mainly discharged on the workers of the supply chains.[26] The case concerning the production of gloves for healthcare workers is a plastic example of this circumstance. The pandemic spread has led to a surge in global demand for such health care devices,[27] with an increased pressure on manufacturing plants (e.g. in Malaysia, the world's largest supplier of health care gloves). Manufacturers have started, hence, to subject employees to overtime shifts, with the risk of violating the customary rule prohibiting forced labour, which is increasingly applied even in respect to private actors conducts.[28]

Well, the corporate responsibility by 'linkage' is grounded exactly on the circumstance that, due to their power to fix prices and quantities of goods ordered, companies at the top of the supply chains may *influence* the activities of companies downstream.

[25] In the UNGPs system, a leverage is considered to exist where the enterprise has the ability to stimulate change in the wrongful practices of an entity that causes a harm.

[26] Organization for Economic Cooperation and Development, COVID-19 and Responsible Business Conduct, 16 April 2020, p. 4.

[27] See L. Lee, *World's largest glove maker sees shortage as coronavirus fight spikes*, in *Reuters Business News*, available at www.reuters.com.

[28] As to the authorities confirming the direct applicability of this *jus cogens* norm to companies, see recently the Supreme Court of Canada judgment in the *Nevsun Resources Ltd*. case (Supreme Court of Canada, judgment of 28 February 2020, *Nevsun Resources Ltd*. *v. Araya*, 2020 SCC 5 (CanLII), para. 114.

With specific regard to the COVID-19 crisis, this ability to influence may imply for the upstream companies the responsibility to take the necessary measures to avoid that employees of their subcontractors and suppliers along the supply chain might suffer, as result of the pandemic, negative impacts on their right to health or safety at work. The pandemic crisis, in sum, has highlighted the need to rethink supply chains model in order to rendering "responsible business conduct and sustainable supply chains the norm" and a "strategic orientation for businesses".[29] The question is: how companies should achieve such a goal?

V. Human rights due diligence and the COVID-19 crisis

Under the UNGPs (Principle 17) the answer is establishing meaningful corporate human rights due diligence processes (HRDD). Firms, in effect, in order to prevent human rights violations stemming from the measures they adopt to counter COVID-19 crisis, should proactively investigate their own impacts, included those occurring along their supply chains, through a process of human rights due diligence. Corporate human rights due diligence "consists in an on-going management process that a reasonable and prudent corporation has to undertake in order to meet its responsibility to respect human rights",[30] that has to be used to identify, prevent, mitigate and account for how they address their adverse human rights impacts. It should include the following four core components: a) identifying and assessing actual or potential adverse human rights impacts; b) integrating and acting upon the findings; c) tracking responses; d) communicating how impacts are addressed.

Interestingly, the notion of human rights due diligence embraced by the Principles merges two distinct concepts issuing from different areas: the due diligence notion as applied in corporate business practice with the same concept as applied within international human rights law. While under the first area due diligence indicates a process of analysis aimed at "identifying intangible factors responsible for undetected and therefore unmanaged risks leading to a common decision based in multi-actor situations facing intangibles and complexity"[31] (in other words, it operates as a risk assessment tool), under the second area due diligence indicates a standard of conduct, *i.e.* avoiding infringing rights. The notion of corporate human rights due diligence encompassed by the Guiding Principles aspires to adapt human rights due diligence as used in international human rights law with the managerial approach to business due diligence. From this

[29] Statement by Commissioner Reynders of 29 April 2020 in the Responsible Business Conduct webinar on due diligence, www.responsiblebusinessconduct.eu.

[30] See UN Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, HR/PUB/12/02, 2012).

[31] F. Knecht, V. Calenbuhr, *Using capital transaction due diligence to demonstrate CSR assessment in practice*, in *Corporate Governance*, 2007, p. 423 *et seq.*, in particular at p. 425.

perspective, corporate human rights due diligence in the UNGPs is a larger notion that encompasses both of these approaches.[32]

Accordingly, corporate human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders. Operatively, human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions. Obviously, human rights due diligence should cover also companies' value chain. [33]

It is self-evident that the risk assessment process encompassed by the corporate human rights due diligence has a role to play in situations such as those of pandemic crisis where, for example, companies, urged not to interrupt their activities, must demonstrate that they have taken all the appropriate measures to ensure the highest possible levels of occupational safety and health for their employees.[34] The Guiding Principles also apply this duty of care to supply chain workers, and require companies to assess the risks to the right to life, the right to health and the right to a safe and

[32] It encompasses indeed a standard of conduct and also "a standard of subjective mean of conduct drawn from the business practice sense of the term (*i.e.* "identify, prevent, mitigate and account for . . . adverse human rights impacts" as in Guiding Principle 15(b))". As to this 'amphibian' nature of corporate HRDD, see: J. BONNITCHA, R. MCCORQUODALE, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *European Journal of International Law*, 2017, pp. 899 *et seq.*; M. FASCIGLIONE, *The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of the EU Countries*, in *Human Rights and International Legal Discourse* 2016, pp. 94 *et seq.*. On corporate HRDD in general, see: D. DAVITTI, *Refining the* Protect, Respect and Remedy *Framework for Business and Human Rights and its Guiding Principles*, in *Human Rights Law Review* 2016, pp. 55 *et seq.*; O. MARTIN-ORTEGA *Human rights due diligence for corporations: From voluntary standards to hard law at last?*, in *Netherlands Quarterly of Human Rights* 2014, p. 44 *et seq.*; T. LAMBOOY, *Corporate Due Diligence as a Tool to Respect Human Rights*, in *Netherlands Quarterly of Human Rights*, 2010, p. 404 *et seq*. A considerable amount of work has been performed also by the International Law Association with its study on due diligence in International Law (International Law Association, Study Group on Due Diligence in International Law, Second Report, July 2016). See also the study commissioned by the European Commission at the beginning of 2020 (L. SMIT, C. BRIGHT, R. MCCORQUODALE, *Study on due diligence requirements through the supply chain. Final report*, February 2020, op.europa.eu).

[33] Of course, where business enterprises have large numbers of entities in their value chains, it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. In this case, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

[34] This is also the point of view of the European Parliament, who has stated that "corporate human rights and environmental due diligence are necessary conditions in order to prevent and mitigate future crises and ensure sustainable value chains" (European Parliament Resolution P9_TA(2020)0054 of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences).

healthy working environment for their employees, as well as to their right to social protection (Art. 9 ICESCR) and to freedom of association and collective bargaining. In other terms, emergency responses to Covid-19 of the corporate sector should ensure that human rights are respected by adopting a human-rights based approach in alignment with internationally accepted best practices set out by the World Health Organization, the ILO and the other international human rights institutions.

VI. Post-pandemic developments: the EU path towards mandatory human rights due diligence laws

Although the corporate responsibility to respect and the human rights due diligence are soft law standards, nothing prevents their "normative hardening"[35] *via* domestic laws. Just from this perspective, noteworthy legislative developments have taken place in several jurisdictions with the introduction of legislations either encouraging or mandating human rights due diligence and reporting. Under such legislations, companies may be subject to specific duties with regard to the protection of human rights that are negatively affected by anti-COVID-19 measures that companies are required to adopt.

As far as human rights reporting (mandatory disclosure) laws are concerned, an increasing number of laws oblige companies to disclose information regarding labour issues. For example, in the US the California Transparency in Supply Chains Act 2010 requires large retail seller and manufacturer doing business in California to disclose their efforts to eradicate slavery and human trafficking from their supply chains.[36] The Modern Slavery Act 2015 in the United Kingdom has a similar scope. Under Section 54 large commercial organizations are required to publish an annual modern slavery statement setting out the steps they have taken to identify and address their modern slavery risks. Interestingly, the UK Home Office has issued a specific guidance for businesses concerning how to address and report on modern slavery risks during the coronavirus pandemic.[37]

At the European regional level, as far as EU secondary legislation is concerned, the EU Directive 2014/95 on Disclosure of Non-Financial Information also falls into the category of mandatory disclosure laws. Large enterprises must include a non-financial statement containing information about the development, performance, position, and

[35] C. Bright, C. Macchi, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in M. Buscemi, N. Lazzerini, L. Magi, D. Russo (eds), *Legal Sources in Business and Human Rights*, Leiden, Boston: Brill Nijhoff, 2020, p. 218 *et seq*.

[36] California Transparency in Supply Chains Act 2010 (US), s 1714.43(a)(1). As to the literature, see B.T. Greer, J. Purvis, *Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour*, in *The International Journal of Human Rights*, 2020, p. 55 *et seq*.

[37] See UK Home Office, *Modern slavery reporting during the coronavirus (COVID-19) pandemic*, 20 April 2020, www.gov.uk.

impact of their activity relating to employee matters, among several other elements.[38] Notably, enterprises have to report the risks of adverse impact stemming not only from its own activities, but also from those linked to its operations, products, services and business relationships, including its supply and subcontracting chains,[39] thus in line with the requirements fixed by the UNGP. However, companies falling within the scope of the Directive are not required to pursue policies in relation to those matters: they must only provide a clear and reasoned explanation for not doing so.[40]

Even though reporting legislations are a step forward, they do not establish necessarily due diligence liability neither they do clarify the conditions of liability for parent or contracting companies. This further step is the goal of a further typology of legislations establishing overarching mandatory human rights due diligence. Some of these legislations apply to specific sectors such as conflict minerals,[41] or child labour issues.[42] Other laws have a larger scope and apply horizontally across human rights issues and across sectors. This is the case of the French Law on the Duty of Vigilance of Parent Companies, adopted on 21 February 2017 and enacted on 27 March 2017.[43] The French law places a legal duty on large companies to undertake human rights due diligence in their operations and supply chain. Accordingly, French companies employing at least 5,000 employees in France, or at least 10,000 employees worldwide, are under the threefold obligation to put in place, disclose and implement a vigilance plan. Under the French legislation, human rights due diligence extends to the activities of the company as well as the activities of its subsidiaries

[38] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Art. 19a(1)

[39] *Ibid*. Art. 19a(1), let. d), and recital 8.

[40] *Ibid*. Art. 19a(1).

[41] See in the United States, the Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US), s 1502(b)(p)(1)(a), which requires companies to adopt a due diligence standard that must be exercised once a company has determined that it uses conflict minerals (see O. Martin-Ortega, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, *cit.*, pp. 55-57). The EU has recently taken a similar approach by defining the due diligence that importers of specific minerals originating from conflict-affected and high-risk areas must adopt beyond disclosure requirements. (see 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).

[42] See the Dutch Child Labour Due Diligence Law of 14 May 2019 (adopted but not yet in force) introducing a duty for companies providing goods and services to the Dutch end users to undertake due diligence in order to identify and address the risk of child labour in their supply chains (see C. Bright, C. Macchi, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, *cit.*, p. 229 *et seq*).

[43] *Loi No. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*. See S. Brabant, E. Savourey, *French Law on the Corporate Duty of Vigilance. A Practical and Multidimensional Perspective*, in *Revue internationale de la compliance et de l'éthique des affaires – Dossier thématique, supplément à la semaine juridique entreprise et affaires*, 2017, p. 1 *et seq*.

and the companies that it controls directly or indirectly, but also to the activities of subcontractors and suppliers with whom the company maintains an "established business relationship". In case of failure to implement the law, interested parties can seek an injunction to order a company to establish, implement and publish a vigilance plan, accompanied by periodic penalty payments in case of continued noncompliance. In addition, a civil liability regime is created by the legislation according to which interested parties can file civil proceedings, under the general principles of French tort law (Arts 1240-1241 of the French Civil Code) whenever a company's failure to comply with the obligations set forth in the legislation gives rise to damage.

It is exactly in respect to the development of a harmonized European legal framework on mandatory human rights due diligence that the EU stands a vanguard role. On 29 April 2020, the European Justice Commissioner, Didier Reynders, announced the commitment of the European Commission to the establishment of new rules on mandatory corporate, environmental and human rights due diligence (mHRDD). In June 2020, the European Parliament published briefings on the proposed mHRDD legislation and on the related efforts to monitor, enforce and ensure access to justice for victims.[44] Later that same month, as a response to these developments, the Office of the UN High Commissioner for Human Rights published a list of "key considerations" for mHRDD initiatives. Importantly, the list expressly acknowledges the need for due diligence as a result of the pandemic and its potential role in aiding recovery.[45] In September 2020, the Committee on Legal Affairs of the European Parliament published the first draft report containing the recommendations to the Commission on corporate due diligence and corporate accountability.[46]

Both the Briefings and the Draft Report uncover the ambitious scope of the mHRDD regime proposed by the European Parliament. Among the large number of measures on which the future European legal instrument should rely,[47] the European Parliament has proposed that it should apply *a*) to all companies that are governed by the law of a Member State or established in the territory of the Union selling products or providing services into the internal market; *b*) to a company's own activities as well as those of its contractual counterparties and suppliers along the value chain; and *c*) in line with the UNGPs, to all internationally recognised human rights. As far as monitoring, enforcement and access to justice are concerned, the future legal instrument outlines a series

[44] See European Parliament, *Human Rights Due Diligence Legislation – Options for the EU*, 2020, www.europarl.europa.eu.

[45] See United Nations High Commissioner for Human Rights, *Mandatory Human Rights Due Diligence Regimes Some Key Considerations*, June 2020, www.ohchr.org.

[46] See European Parliament, Draft Report of the Committee on Legal Affairs (2020/2129(INL)) of 11 September 2020 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability.

[47] As to the legal form of the future secondary legislation to be adopted, the Draft Report proposes the form of a Directive.

of measures specifically targeting the corporate sector, Member States and EU institutions, as well. Companies are asked to ensure that relevant stakeholders, including trade unions and employees, participate in the design and oversight of due diligence processes and that due diligence efforts be elevated to the board level. At the Member State and EU levels, the draft legal instrument urges the communication to the public of their monitoring efforts, the establishment of the necessary powers to enforce due diligence requirements and to punish breaches, as well as the creation of independent national supervisory bodies. Here a potentially interesting option is attributing monitoring function to the national human rights institutions (if already existing).[48] On the other side, one cannot help but notice that the current formulation of the future legislation completely fails in incorporating the directly linked responsibility stemming from Principle 13(b) of the UNGPs: it only mentions, actually, the corporate responsibility by causation and the responsibility by contribution to human rights impact. The consequence of this failure is to limit the scope of the future legislation to the commercial relationships in the first tier and to exclude all the other tiers existing along the supply chain from the scope of application of the human rights due diligence duty.

This notwithstanding, the European Parliament Briefings and Draft Report represent, for the European private sector addressing due diligence practices in the wake of the pandemic, an important indicator of the likely elements of the new mandatory human rights due diligence regime and of the increasingly rigorous measures expected from companies in order to face the negative impacts on human rights of pandemic-like situations.

VII. Conclusions: actors, responsibilities and rights in the post-pandemic society

The COVID-19 pandemic is destined to change both the structure of the contemporary international society and the conceptual categories that the social sciences have used until now to explain and interpret it.[49] The pandemic has highlighted the environmental and social unsustainability of the contemporary wealth production and distribution system, the "accountability gaps" of the supply chain model, the incapacity of private sectors entities to ensure respect for human rights, and the limited usefulness of voluntary standards to address corporate violations of human rights. In particular, the spread of COVID-19 highlights, if necessary, the inadequacy of the conceptual categories used to

[48] From this perspective, enacting the EU legislation may be a push factor for latecomer Member States to establish their own National human rights institutions.

[49] As to how the COVID-19 crisis may affect different areas of the contemporary international legal order, see the special issue on *The International Legal Order and the Global Pandemic* published by *The American Journal of International Law* (for a general review of the problems raised from this perspective, C.A. Bradley, L.R. Helfer, *Introduction to "The International Legal Order and the Global Pandemic"*, in *American Journal of International Law*, 2020, p. 571 *et seq*.

understand current dynamics occurring within the international community, and the need, also in relation to the international system of protection of human rights,[50] for their reformulation. As I already noted elsewhere, the "multidimensionality" of human rights norms, from a duty-bearers perspective[51] invite us to consider that today human rights violations often occur in a context characterized by *joint* and *coordinated*, rather than independent, actions from different duty-bearers, who through their conducts "participate"[52] in various ways in assuring, or not, the protection of human rights. This *dynamic aspect* from a *ratione personae* perspective is not adequately captured by the classic approach on State responsibility. Indeed, the very same focus on the State's duty to protect offers little help by itself since governments may be, for different reasons, unwilling or unable to act against corporations. It is thus precisely in such situations that integrating the State-individual matrix of human rights obligations with the corporate-individual matrix makes sense:[53] indeed, in the victim's eyes the nature of the violator, be it a public body or a private company, matters little. It is precisely here that human rights obligations of States and corporations co-exist and they may be regarded as giving rise to complementary and "shared",[54] or even "circular",[55] responsibilities.[56]

In the post-pandemic society it will be necessary to address and systematize these processes. Accordingly, the challenge that is facing us today is to reflect on how to reformulate notions, such as subjects, responsibilities, normative production, etc., that

[50] See K. BENNOUNE, *"Lest We Should Sleep": COVID-19 and Human Rights*, in *American Journal of International Law*, 2020, p. 666 *et seq.*, at p. 673-674, arguing the necessity to constructing holistic human rights responses to the pandemic encompassing also the responsibilities of nonstate actors, from international financial institutions to transnational corporations.

[51] See M. FASCIGLIONE. *A Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?*, in M. BUSCEMI, N. LAZZERINI, L. MAGI, D. RUSSO (eds), *Legal Sources in Business and Human Rights*, cit., p. 40.

[52] R. HIGGINS, *Problems and Process International Law and How We Use It*, Oxford: Oxford University Press, 1995, p. 39 *et seq*.

[53] For a recent analysis on how to conceptualize corporate accountability in current international legal system, especially with regard to the ongoing BHR treaty negotiation process, see: N. BERNAZ, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty*, in *Human Rights Review*, 2020, p. 1 *et seq*.

[54] For an interesting and far-reaching analysis of the theoretical (and practical) implications of "shared responsibilities" of corporations and States in such situations, see: A. NOLLKAEMPER, D. JACOBS, *Shared Responsibility in International Law: A Conceptual Framework*, in *Michigan Journal of International Law*, 2013, pp. 359 *et seq.*; M. KARAVIAS, *Shared Responsibility and Multinational Enterprises*, in *Netherlands International Law Review*, 2015, p. 91 *et seq*.

[55] See C. MACCHI, *We Will not Survive Pandemics and Climate Change Without a Shift from Corporate Capture to Circular Responsibility*, in *Cambridge Core Blog*, 4 April 2020, www.cambridge.org.

[56] From this perspective, the pandemic has the potential to subvert some principles of the state responsibility for intentionally wrongful acts, in favour of a "communitarian shift" as to how state responsibility norms are understood and implemented (see M. PAPARINSKIS, *The Once and Future Law of State Responsibility*, in *The American Journal of International Law*, 2020, p. 621).

will have to be used in order to "decodify" the phenomenal reality of the *future*. From this point of view, COVID-19, like any crisis, constitutes, for the international order, a danger, of course, but also an opportunity to be seized in order to restore centrality to the value of human dignity and to realize a "world order producing and distributing those values"[57] alongside economic values.

[57] M. Reisman, S. Wiessner, A.R. Willard, *The New Haven School: A Brief Introduction*, in *The Yale Journal of International Law*, 2007, p. 582.