

Corporate Social Responsibility, Business Opportunities and States' Fragility or Failure: Colombia and DR Congo

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ABSTRACT: The recurring allegations of human rights violations directly or indirectly caused by the activities of M.N.Es. pose many challenges and particularly affect developing States in contexts of fragility and conflict. In such situations, transnational corporate structures, limited liability veils, fragmented jurisdictions and unwilling or unable States are overwhelmingly quoted as the main obstacles for a fairer globalization. This article is aimed at shedding some light on the last of these factors: why some States seem to be unable or unwilling to protect human rights, in general terms and with regard to transnational corporate activities. A proper and pertinent Corporate Social Responsibility can help break this vicious circle, but companies need a paradigm shift to reasonably operate in those difficult circumstances.

KEYWORDS: *Corporate Social Responsibility; Fragile and Failed States; Sustainable Development Goals; Colombia; Democratic Republic of Congo*

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1. CORPORATE ACTIVITIES IN FRAGILE AND FAILED STATES: RISKS AND OPPORTUNITIES

1.1. INTRODUCTION

It is commonplace to observe that economic globalization is not a zero-sum phenomenon: there are advantages and opportunities along with deficiencies and adverse effects. States have historically been the most responsible for human rights violations and tensions have traditionally been present between populations and States' power.¹ However, globalization has increased the importance of non-State actors, in particular multinational enterprises (hereinafter M.N.Es.), generating a triangle of tensions between States, economic actors and societies. Globalization has also led to the multiplication of asymmetric transnational (but not always international) conflicts.² International Law (hereinafter I.L.) faces a number of challenges such as piracy, terrorism, transnational crime and massive streams of refugees. To some extent,

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¹ I.H.R.L. is, in origin, a way to alleviate the tension between societal expectations and States' power, limiting the latter to a precise framework. It was traditionally assumed that States were the major – and, at a time, almost the only – human rights' violators so the historically most important tension was between States and Societal Expectations. Globalisation has added new tensions and corporate activities are able to cause as many violations of human rights as States. Moreover, in the words of Prof. Carrillo Salcedo, the government's treatment of its own nationals is no longer an "internal matter", but has become a concern under contemporary I.L.:

[S]i el trato que un Estado diera a sus nacionales era en el derecho internacional tradicional un cuestión de jurisdicción interna (ya que el Derecho internacional no regía esta cuestión y se limitaba a regular la posición jurídica de los extranjeros), en el Derecho Internacional contemporáneo ocurre lo contrario como consecuencia de . . . los derechos humanos. [If in traditional international law the treatment that a State gave its citizens was a matter of internal jurisdiction (since international Law has not governed this problem and has limited itself to regulating the legal position of foreigners), in contemporary International Law the opposite happens as a consequence of . . . human rights]

see JUAN ANTONIO CARRILLO SALCEDO, SOBERANÍA DE LOS ESTADOS Y DERECHOS HUMANOS EN DERECHO INTERNACIONAL CONTEMPORÁNEO 19 [SOVEREIGNTY OF STATES AND HUMAN RIGHT IN CONTEMPORARY INTERNATIONAL LAW] (1995).

² See Rafael Calduch Cervera, *Procesos de cooperación y conflicto en el sistema internacional del siglo XXI [Processes of cooperation and conflict in the international system of the XXI century]*, in HISTORIA DE LAS RELACIONES INTERNACIONALES CONTEMPORÁNEAS [HISTORY OF CONTEMPORARY INTERNATIONAL RELATIONS] 701, 709–713 (Juan Carlos Pereira Castañares ed., 2009).

there is a need to “rethink jurisdiction” in light of recent developments after which the “idea of jurisdiction as purely an expression of the rights and powers of sovereign States requires reconceptualization”,³ since problems are ever more interconnected. The concept of sovereignty has always moved between “autonomy and responsibility”,⁴ but these developments tend to increase the relative weight of the latter. This has to come with the understanding that there are no self-contained regimes under I.L., so that international trade and investments do not take place in a legal vacuum or in a totally separate legal bubble.⁵

Moreover, both individuals and transnational companies (hereinafter T.N.Cs.) have gradually become partial legal subjects of contemporary I.L. For instance, International Human Rights Law (hereinafter I.H.R.L.) has greatly contributed to the recognition of a limited locus standi of individuals in some regional subsystems (the Inter-American Court of Human Rights and the European Court of Human Rights) and through some United Nations (hereinafter U.N.) Committees (in a quasi-jurisdictional manner).⁶ Then, Criminal I.L. might also turn against individuals. In parallel, business enterprises can

³ See Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT’L L. 187, 218-19 (2014) (“This development suggests the need to rethink the idea of jurisdiction in international law. To the extent that States have agreed to individually enforceable rights for foreign investors which extend to a right of access to civil or administrative remedies . . . they have apparently agreed that they owe jurisdictional obligations not only to foreign States but also to individuals. It is true that these rights may be considered as products of State consent through treaties or even (more controversially) customary international law, suggesting that the individual rights thus created can be accommodated within the existing framework of jurisdictional rules. It can nevertheless also be argued that through the recognition of individuals as positive actors and jurisdictional rights-bearers, the idea of jurisdiction as purely an expression of the rights and powers of sovereign States requires reconceptualization.”).

⁴ T. GAMMELTOFT-HANSEN and T. E. AALBERTS: “Sovereignty at Sea: The Law and Politics of saving lives in the Mare Liberum”, in *Working Papers of the Danish Institute for International Studies*, No. 18, Copenhagen 2010, 31 pp., at pp. 8-13.

⁵ See Ralph Alexander Lorz, *Fragmentation, Consolidation and the Future Relationship between International Investment Law and General International Law*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 482, 482-493 (Freya Baetens ed., 2013).

⁶ To date, eight of the human rights treaty bodies receive individual communications (under certain admissibility criteria): the Human Rights Committee, the Committee on Elimination of Discrimination Against Women, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.

also sue and be sued under International Investment Law (arbitration procedures established in multilateral and bilateral investment treaties or, more simply, in international contracts).

In this context, social demands target both States and T.N.Cs. In summary, globalization has deepened the imbalances between States' power, markets' influence and social expectations in terms of human rights, with tragic consequences in contexts of fragility and conflict, which deserve specific attention. The initiatives of Corporate Social Responsibility (hereinafter C.S.R.), with its lights and shadows, may help alleviate these tensions.

In a globalised world, opportunities and risks are two sides of the same coin: one of the most illustrative examples precisely regards the impact of corporate activities on human rights in high risk areas, usually rich in natural resources and in need of opportunities for economic development. The recurring allegations of human rights violations directly or indirectly caused by the activities of M.N.Es. pose many challenges. In such situations, transnational corporate structures, limited liability veils, fragmented jurisdictions and unwilling or unable States are overwhelmingly quoted as the main obstacles for a fairer globalization. This article is aimed at shedding some light on the last of these factors: why some States seem to be unable or unwilling to protect human rights with regard to transnational corporate activities and, in general terms, how C.S.R. can help break this vicious circle and how companies should analyse the situation to reasonably operate in those difficult circumstances. From an empiric⁷ and consensual⁸ approach to I.L. and

⁷ To understand today's defies of the international system it is utterly important to keep close to the material reality, since international norms and other international political initiatives generally follow an empirical-inductive path. See CARLOS JIMÉNEZ PIERNAS, INTRODUCCIÓN AL DERECHO INTERNACIONAL PÚBLICO. PRÁCTICA DE ESPAÑA Y DE LA UNIÓN EUROPEA [Introduction to Public International Law. Practice of Spain and the European Union] 50, 65-66 (2nd ed., 2011).

⁸ This approach is guided by pragmatism and built upon the understanding that a certain level of consensus is difficult but necessary within the international society to address its current challenges and for I.L. to progress. See JAUME FERRER LLORET, EL CONSENSO EN EL PROCESO DE FORMACIÓN INSTITUCIONAL DE NORMAS EN EL DERECHO INTERNACIONAL [The consensus in the process of institutional training of rules in International Law] (María Teresa De Gispert Pastor et al. eds., 2006). See also Carlos Jiménez Piernas, *El derecho*

International Relations, this article also proposes two study cases: a scenario of post-conflict fragility under control (Colombia) and one of clear institutional failure (Democratic Republic of the Congo, hereinafter D.R.C.).

As a preliminary warning, it should be borne in mind that some “business and human rights” cases are actually *epiphenomena* where the conflicts against companies hide an instrumentalization of wider problematics between social agents, affected communities and government officials. That’s also why it is utterly important to properly take into account the institutional terrain.

1.2. UNDERSTANDING FRAGILE AND FAILED STATES

Besides the population of these States, which is the first victim of instability and violence, T.N.Cs. and other business enterprises also suffer from States’ fragility, mainly because of the abundant misunderstandings or misinterpretations of this phenomenon. Fragile and failed States represent a real challenge for the international system at many levels because they numb economic exchanges and threaten stability and security. At the same time, this phenomenon causes serious humanitarian crisis. The consequences derived from fragile and failed States firstly affect punctual regions of the world, while they are amplified as a result of globalization. Hence this phenomenon produces undesirable effects at different scales: from regional subsystems to the global system. The core of this problem is mainly political and historical. However, taking into consideration some I.L. issues may decisively contribute to its clarification.

This phenomenon, intensified since the end of the Cold War, requires some transversal research, especially cautious in using terminology so as to avoid neo-colonialist, imperialist and hegemonic

internacional contemporáneo: una aproximación consensualista [Contemporary international law: a consensualist approach], in XXXVII CURSO DE DERECHO INTERNACIONAL [XXXVII INTERNATIONAL LAW COURSE] 1, 24-31 (2011).

discourses. For this reason it is crucial to explain what we understand by fragile and failed States:⁹ we are not characterizing these States ontologically; we just allude to their current situation of fragility and failure depending on the case. States in a situation of fragility and failure are unable to put into effect their functions. Despite the multiplicity of actors in international affairs, the U.N. Charter still identifies States as the stem cell of the international system. But not all States are able to satisfactorily comply with their obligations: ad intra, they stagnate in political and economic underdevelopment; and ad extra, the uncertainty around their international engagements is manifest. Even though these States have been suffering several political and humanitarian crises since their independence, the international society started paying more attention to their failing situation only when their various problems acquired international dimensions damaging wider political and economic interests.

A fragile State lives a political and economic deterioration process that considerably weakens its authority and reduces its capacity to provide the essential public services, generally expected from a State based on the rule of law. Without entering a paralysis situation, the fragile States functions are bogged down and insufficient. Two exemplary cases are the Republic of Mexico and Colombia, that face a hard-fought war against organised criminality and illegal drugs trade, which profits from a slow and dysfunctional justice and police administration. A fragile State may get worse and even become a failed State; however, it does not necessarily follow this evolution. Actually, a failed State is completely unable to warrant the rule of law because of its institutional collapse and due to its political fragmentation, which frequently degenerates into serious violence within the framework of non-democratic traditions. In

⁹ See a rigorous systematization and, in particular, a typology to distinguish fragility from failure at Carlos Jimenez Piernas, *Estados Débiles y Estados Fracados*, 65 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL [R.E.D.I.], no. 2, 2013, at 11, 17-28. See also GOVERNANCE AND SOCIAL DEVELOPMENT RESOURCE CENTRE (G.S.D.R.C.), <http://www.gsdr.org>. See also, C. Mcloughlin, Topic Guide on Fragile States, August 2009, pp. 8-15 & 28-30 and H. HAIDER and FRAGILE STATES FORUM, www.fragilestates.org.

fact, it is very common as well that the territory of a failed State partly or totally falls outside the government control. D.R.C. and Somalia are perfect examples, where the government has evidently lost the monopoly on the use of force. All in all, the most noticeable difference between a failed and a fragile State is possibly that the latter rarely creates a threat to international peace and security.

Various sources suggest there could be 30 to 50 States in a situation of fragility and failure in the world, with chronic cases in Sub-Saharan Africa. In 2016, the Organization for Economic Co-operation and Development (hereinafter O.E.C.D.) defined it as “the combination of exposure to risk and insufficient coping capacity of the State, system and/or communities to manage, absorb or mitigate those risks”, eventually leading to “violence, the breakdown of institutions, displacement, humanitarian crisis or other emergencies”.¹⁰

The causes of this phenomenon are extraordinarily complex. To get an approximate idea of these causes, we should not forget the colonial inheritance. For example, the artificial borders in Africa have been at the origin of many conflicts, both international and internal (like civil wars). In this regard, we need to point out that a State in civil war is not a synonym for a failed State, as a civil war does not automatically lead to failure albeit the furtherance of such a conflict is likely to do so. In other cases the emphasis should be placed on the contradictions between western political institutions and a traditional political culture which privileges a multiplicity of religious and ethnic communities, as well as tribes and clans. All these circumstances frequently overlap with an exceptional richness in natural resources, or with big investment projects aimed at developing infrastructures, essential to improve their human rights records. However, such investment projects may have social and environmental adverse effects. Very particularly within the framework of authoritarian and corrupt regimes, many companies are sort of put

¹⁰ O.E.C.D. Publishing, p. 16, O.E.C.D.: States of Fragility 2016: Understanding Violence, Paris (2016), O.E.C.D. Publishing, p. 16, <http://dx.doi.org/10.1787/9789264267213-en>.

between a rock and a hard place, as if they had to choose between human rights standards and some kind of loyalty towards the Government contracting their services.

Studying causes may help to elaborate a typology or classification of fragile and failed States as there are different phases of fragility and failure. The Fragile States Index Score, a Fund for Peace (N.G.O.) proposal annually published by Foreign Policy review, is a good starting point to the extent it offers a list to work with. There are however, ambiguous cases; for example, north Korea which could be considered a fragile State but probably not a failed one.¹¹ In North Korea, despite most western indexes, the obvious lack of economic development and respect for human rights does not imply that institutions are weak, nor does it question the effectiveness of State functions. Similarly, China's alleged fragility is probably overestimated in most indexes (listed as being in a "warning" situation according to the Fund For Peace Index),¹² in the same way that Belgium's institutional stability is probably overrated just because of its E.U. membership and economic prosperity.¹³

This analysis will only include a fragile and a failed State (Colombia and D.R.C.), keeping aside those that bring up very different kinds of problems to the international scenario (such as the so-called "rogue States"). It goes without saying that a classification proposal should be theoretically and methodologically preceded by a discussion on which quantitative and qualitative factors should be taken into account, besides their order of preference, but this is not the priority of the present article.

¹¹ *Id.* at 28.

¹² FRAGILE STATES INDEX, <http://fundforpeace.org/fsi/wp-content/uploads/2018/04/951181805-Fragile-States-Index-Annual-Report-2018.pdf>.

¹³ Abundant corruption scandals, the irreconcilable ethnic division between Flemish and Walloons, with its reflection in the judiciary system, and its inefficacy dealing with the latest terrorist attacks make of Belgium a more than discussable option for international investments, if Brussels was not the E.U. capital and N.A.T.O. headquarters. The international newspapers have abundantly reported in this sense, see for example, how The New York Times ridiculed Belgium describing it as the "world's most PROSPEROUS failed States": A. HIGGINS, *Terrorism Response Puts Belgium in a Harsh Light*, NEW YORK TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/25/world/europe/its-capital-frozen-belgium-surveys-past-failures-and-squabbles.html>.

The diverse degree of fragility and failure of these States is a focal point for the development of organised criminality like terrorism (frequently mixed up with insurgency, like in Afghanistan) and piracy (a recent case is the Horn of Africa in the Indian Ocean benefiting from Somalia's situation). In contact with terrorism and piracy we cannot ignore illegal drugs, arms and art trafficking. Those illegal activities constitute a real threat to international peace and security, damaging the global economy as well (e.g. Red Sea and the Suez Canal). The challenges derived from fragile and failed States cause the serious humanitarian crisis as this phenomenon destabilizes the whole system, often via non-conventional and asymmetric conflicts.

On the other hand, we shall consider what the reaction to this socio-historical phenomenon has been. For the time being, the international society has not offered very original or creative attempts at finding a solution. The U.N. Charter consecrates the sovereign equality of States and this Principle has been interpreted in terms of sovereignty and territorial integrity, which has led to more or less virtuosic diplomatic cynicism. In reality, although States in a situation of failure cannot either comply either with their internal or international obligations, particularly for what concerns the maintenance of peace and international security, these States are nonetheless recognised as subjects with full rights in the international stage. More concretely, the U.N. practice (of the Secretary-General and of the Security Council)¹⁴ has highlighted the necessity to formally safeguard the sovereignty and territorial integrity of failed States, above any empirical proof of their collapse (it does not apply to fragile States). The international system has faced the challenges originated by failed States promoting decentralisation (i.e. from U.N. to regional organisations such as the European Union (hereinafter E.U.) and the African Union). This finally regionalises any attempt at resolving the

¹⁴ Along with the abundant documentation issued by the E.U., the African Union, the International Maritime Organisation, the World Bank, the O.E.C.D., the Secretary-General Reports and the U.N.S.C. Resolutions are also indispensable sources of information, all of which go beyond the scope of this article.

problem, with initiatives that the U.N. Charter has certainly always incorporated under Chapter VIII (on Regional Arrangements). We may recall the E.U. leadership against piracy in the Horn of Africa; as it will be explained, we miss a similar proactive role in D.R.C.. To what extent has the international society been doing its best in selecting the most adequate solutions to the challenges arisen by fragile and failed States, remains an open question.

1.3. THE S.D.GS.: A NEW MOMENTUM FOR A PROPER C.S.R. IN HIGH-RISK AREAS

C.S.R. is an interdisciplinary area under development and its detailed analysis is outside the scope of this article. But many of its defining elements are becoming clear by now, most notably its difference with corporate philanthropy. In 2001 the European Commission (hereinafter E.C.) considered it as the “concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”;¹⁵ ten years later, the E.C. proclaimed it had simply become the “responsibility of enterprises for their impacts on society”,¹⁶ which seems a better version. The O.E.C.D. speaks of the “private efforts to define and implement responsible business conduct”;¹⁷ for the O.E.C.D., *responsible business conduct*

entails above all complying with laws, such as those on human rights, environmental protection, labour relations and financial accountability, even where these are poorly enforced . . . [and] responding to societal expectations communicated by channels other than the law, e.g. inter-governmental

¹⁵ Commission proposal for a European Framework promoting Corporate Social Responsibility, at 6, C.O.M. (2001) 366 final (Jul. 18, 2001).

¹⁶ Commission Proposal for a Renewed E.U. Strategy 2011-14 for Corporate Social Responsibility, at 6, C.O.M. (2011) 671 final (Oct. 25, 2011). The documentation of the E.U. is studied in detail in chapters III and IV.

¹⁷ Organisation for Economic Co-operation and Development [O.E.C.D.], *O.E.C.D. Guidelines for Multinational Enterprises*, at Para. 7 of the preface (May 25, 2011).

organisations, within the workplace, by local communities and trade unions, or via the press.¹⁸

The O.E.C.D. further clarifies that “[p]rivate voluntary initiatives addressing this latter aspect of R[esponsible] B[usiness] C[onduct] are often referred to as corporate social responsibility”.¹⁹ For the U.N., C.S.R. is simply defined as “the corporate responsibility to respect human rights.”²⁰

Interestingly enough, even I.S.O. 26000 standard on C.S.R., which is a private non-governmental initiative, takes the trouble to underline the difference between philanthropy and responsibility, very commonly confused by companies both in developed and developing States: “Philanthropy (in this context understood as giving to charitable causes) can have a positive impact on society. However, it should not be used by an organization as a substitute for integrating social responsibility into the organization”.²¹ I.S.O. 26000 has become, within the private sector, an unavoidable cornerstone. This is in contrast with most private initiatives that tended to avoid, at the beginning, a strong human rights’ language. For example, the private-led World Business Council for Sustainable Development defined C.S.R. as “the continuing commitment . . . to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large”.²² The Global Reporting Initiative (hereinafter G.R.I.), also private,²³ tends to focus on sustainability and economic development.

¹⁸ O.E.C.D., *Policy Framework for Investment User’s Toolkit*, at Chp. VII (2011) (2015 edition of the same is available at <http://www.oecd.org/investment/toolkit/>).

¹⁹ *Id.*

²⁰ Special Representative of the Secretary-General, *Protect, respect, and remedy: a framework for business and human rights*, O.H.C.H.R. Doc. A/H.R.C./8/5 (Apr. 7, 2008).

²¹ Int’l Organization for Standardization [I.S.O.], *I.S.O. 26000:2010 Guidance on social responsibility* (2010–11).

²² LORD R. HOLME & P. WATTS, *CORPORATE SOCIAL RESPONSIBILITY: MAKING GOOD BUSINESS SENSE* (2000) www.wbcds.ch.

²³ Founded in Boston in 1997, G.R.I. is one of the earliest purely private initiative, initially centred on environmental business sustainability, comprising periodic reports, and later expanded to more general “human rights and corruption” objectives. It has issued up to four updates of their own guidelines. GLOBAL REPORTING INITIATIVE (G.R.I.), www.globalreporting.org.

In line with the U.N. Guiding Principles and the EC, non-profit and non-Governmental Organizations (hereinafter N.G.Os.), like Amnesty International and Human Rights Watch, early emphasised the need to analyse “corporate behaviour through human rights lens”,²⁴ correctly putting the accent on the human rights dimension of C.S.R. For Transparency International, there is a “missing link” with anti-corruption and it should include, beyond “the management of economic, social and environmental impacts”, also the “relationships within the workplace and marketplace, along the supply chain, in communities and among policymakers.”²⁵ Corruption requires two parties: the corrupter and the corrupted, which brings us back to the institutional terrain of fragile States.

The most common mistake in contexts of fragility and conflict can be expressed more crudely: C.S.R. does not consist of building a hospital or a school in exchange for polluting a river. Despite the diversity of definitions of C.S.R., three basic characteristic elements can be deduced, taken as categories or as an approximation to Weberian ideal types:²⁶ 1) the close connection of C.S.R. with the type of business and its inherent operations in the field (the criterion of relevance that distinguishes it from philanthropic actions); 2) a sustainability criterion, i.e., to prioritise long-term preventive effects in social and environmental issues, leaving aside circumstantial, reactive and contingent approaches; and 3) a solid vocation to respect human rights, which is its specific legal basis.

Clearly, C.S.R. seems to have lost considerable *momentum*, mainly as a result of the upsurge of the new U.N. development agenda, the

²⁴ Human Rights Watch [H.R.W.], *Corporate Accountability: A Human Rights Watch Position Paper*, (Sept. 8, 2005), <https://www.hrw.org/news/2005/09/08/corporate-accountability-human-rights-watch-position-paper>.

²⁵ Transparency International, *Corporate Responsibility and Anti-Corruption: the Missing Link?*, at 2, (Apr. 6, 2010).

²⁶ Alberto Jiménez-Piernas García, *La definición de la responsabilidad social corporativa a la luz de los principios rectores: una perspectiva de derechos humanos [The definition of corporate social responsibility in the light of the guiding principles: a human rights perspective]*, in *EMPRESAS Y DERECHOS HUMANOS [COMPANIES AND HUMAN RIGHTS]* 67-86, 82-83 (Carlos Ramón Fernández Liesa & María Eugenia López-Jacoiste Diaz eds., 2018).

Sustainable Development Goals (hereinafter S.D.Gs.) for 2030.²⁷ A good part of the private sector has enthusiastically welcomed the S.D.Gs. because they easily fit their emotional marketing strategies and, again, they leave room for companies to pursue philanthropic social actions hiding the lack of a proper C.S.R. Many enterprises just choose which S.D.Gs. better serve their public image needs without analysing their concrete impact and supply chains. This trend reflects an attempt to extinguish C.S.R. when, in fact, the S.D.Gs. constitute an end and C.S.R. is one of the means to achieve them. Without corporate respect for human rights, business enterprises will “contribute” to the S.D.Gs. only with difficulty, among which international institutions should prioritise No. 16 and 17 that precisely refer to strong institutions, democracy, rule of law and public-private partnerships (hereinafter P.P.Ps.).²⁸

Further still, most S.D.Gs. actually refer to procedural aspects of human rights,²⁹ mainly economic and social rights (water and sanitation, food, health, protection of the environment and climate change) but also some civil and political rights (very prominently, access to justice and non-discrimination).

If properly designed as the responsibility to minimise adverse corporate impacts, it is precisely in least-developed countries (hereinafter L.D.Cs.) and developing countries that the external or global dimension of C.S.R. converges even more closely with the S.D.Gs., reinforcing each other. In this sense, it can be stated that the S.D.Gs. could

²⁷ G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Sept. 25, 2015).

²⁸ Alberto Jiménez-Piernas García, *Importancia y características de los planes nacionales de empresas y derechos humanos en relación con el desarrollo sostenible [Importance and features of national business plans and human rights in relation to sustainable development]*, in *OBJETIVOS DE DESARROLLO SOSTENIBLE Y DERECHOS HUMANOS: PAZ, JUSTICIA E INSTITUCIONES SÓLIDAS / DERECHOS HUMANOS Y EMPRESAS [OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS: PEACE, JUSTICE AND SOLID INSTITUTIONS/ HUMAN RIGHTS AND COMPANIES]* 289 (Diana Marcela Verdiales López, Cástor Miguel Díaz Barrado & Carlos Ramón Fernández Liesa eds., 2018).

²⁹ The new S.D.Gs., at the end of the day, “seek to realize the human rights of all”. In this development agenda, it is acknowledged that the “[p]rivate business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creations” so that the U.N. “call[s] upon all businesses to apply their creativity and innovation to solving sustainable development challenges”. U.N. Doc. A/RES/70/1, supra, preamble and para. 67 (quotes).

mark a turning point or a new *momentum* for a pertinent C.S.R. in developing countries.

1.4. C.S.R. AND BUSINESS OPPORTUNITIES IN FRAGILE AND FAILED STATES

As explained before, State fragility is measured by combining qualitative and quantitative factors, from institutional legitimacy to social inequalities and economic indicators. That said, one cannot affirm that there is a priori, a direct correlation between fragility and economic underperformance. In practice, however, different degrees of State fragility often correspond to L.D.Cs. and developing countries, which suffer from high public debt and low income rates, so that their economic needs tend to shadow their I.H.R.L. obligations.

With respect to M.N.Es., it would be manichaeian and inaccurate to lay all blame on them, as if companies felt at ease or were eager to operate in fragile States or in conflict zones. Indeed, quantitative studies have begun to question previous assumptions and prejudices in this respect, such as the “symbiotic relationship between repressive governance and foreign capital.”³⁰ While it is certainly true that corporate behaviour is more likely to *adapt to undesirable situations* so as not to put at risk investments and benefits,³¹ it would also be dangerous to ignore the growing reputational and even operational consequences of corporate misbehaviours. It is evident that companies do not necessarily and always feel at home in authoritarian or repressive States, but “rhetoric has exceeded empirical research.”³² Many authors have enthusiastically started to conduct quantitative analysis in search of mathematical models to investigate eventual C.S.R. returns on benefits.³³ It is called the C.S.R.

³⁰ Shannon L. Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. POL. 143, 145 (2007).

³¹ This explains, by the way, why C.S.R. should not be left purely to self-regulatory schemes.

³² Concerning, foreign investment, Blanton’s research would show that mathematical models refute the “dominant traditional perspective [assuming] F.D.I. and human rights to be inherently incongruous”. *Id.* p. 152.

³³ Maria F. Izzo, *Bringing Theory to Practice: How to Extract Value From Corporate Social Responsibility*, 5 J. GLOBAL RESP, 22 (2014).

“business case”; for better or worse, business finds its way through. Among other results, theories of “shared value”³⁴ emerged to point out that C.S.R. could create value for both companies and stakeholders, being measurable in terms of “social performance”. In sum, it can contribute to reduce business risks and, even, increase benefits by creating value for both the enterprise and society.

Critics claim that such reasoning leads to a merely instrumentalist or utilitarian perspective. From this point of view, C.S.R. and human rights respect would become a simple management issue of “goodwill-nomics”:³⁵ violations would be read as a risk and, sometimes, this approach can treat violations as unavoidable costs of production, while the word *stakeholders* could end up hiding victims, i.e. rights-holders. This cost-effective way of thinking has an additional problem as far as it would “allow corporations to prioritise some human rights”³⁶ (those more costly, for example). All these quantitative manias may reflect a certain “dissemination of the corporate form of thinking”.³⁷

It is not so difficult to avoid confusing stakeholders with right-holders and the above-mentioned risk of permitting a “private-led prioritization or marketization of human rights”. For that, companies should first ensure that C.S.R. is really aimed at addressing the impact of their operations in the field and do not constitute arbitrary donations to social causes, which can be tricky and a double-edged sword in countries with factionalised elites and institutional weaknesses (unless they really want to meddle in politics). Secondly, companies should accept that C.S.R. is only partially quantifiable and, more importantly, that C.S.R. is not automatically profitable: sometimes it is, but not always and necessarily.

³⁴ Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism – and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.-Feb. 2011, at 1, 63–70.

³⁵ SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS. HUMANIZING BUSINESS 139 (2012).

³⁶ Robert McCorquodale, *Pluralism, Global Law and Human Rights: Strengthening Corporate Accountability for Human Rights Violations*, 2 GLOBAL CONST. 287, 307 (2013).

³⁷ S. E. MERRY, *Measuring the World: Indicators, Human Rights and Global Governance: with C.A. Comment by John M. Conley*, 52 Current Anthropology S3, (Supplement to April *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*, edited by D.J. PARTRIDGE, M. WELKER and R. HARDIN), pp. S-83–S-95, at p. S-83.

In other occasions, it will simply reduce risks, which are only dramatically quantifiable when they materialize. Credible due diligence protocols are an essential part of this work.³⁸

That said, if companies find out that their economic results are improved thanks to C.S.R., there should not be anything wrong with that. The problem only arises when you put the cart before the horse, i.e., when marketing motivations shape and distort C.S.R. The trap of marketing motivations can be summarised in some simple questions that C.E.Os. and executive directors should ask their marketing departments: why build a hospital and not a school? Is it not a rather political choice alien to our corporate role? Would it not be better to assign that money to reduce our concrete impact on the environment or to improve working conditions, for example? Why spend 100,000€ to reduce our negative impact and 1,000,000€ in the marketing department to communicate it, and not the other way round, now that communication costs are lesser thanks to the internet and social media? This is exactly what we mean by putting the cart before the horse. This is not thought to totally deny the importance of communication and marketing departments, but we urgently need to rethink their creeping predominance in the Boards of Directors of companies. The excessive weight of marketing departments generate multitude of misunderstandings, with companies repeatedly tripping over the same stones: the overreliance on philanthropic and emotional marketing strategies will only accentuate the lack of awareness on institutional, regulatory and socio-historical risks in fragile contexts.

Western, marketing-based and self-referential C.S.R. strategies are generally (and erroneously) oriented to rich societies and built upon the self-perceived interest of companies (the so-called *business case*), where philanthropy and responsibility are usually mixed up. Being also inadequate in developed countries, it is crystal clear that such C.S.R. falls short of the challenges in fragile or failed States and results in the

³⁸ For information purposes, see O.E.C.D., O.E.C.D. DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), <http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>.

companies falling into the same traps again and again. In those scenarios, the key is the institutional terrain where business operations take place and the best way to deal with it is avoiding both undue cynicism and excesses of idealism.

Moving to the perspective of policy-makers, studies on China's economic penetration into the African Continent have revealed that European conditionalities have led to some fatigue and frustration amongst many African governments. China has taken advantage of western "credibility gaps as development partners".³⁹ The "language of South-South cooperation",⁴⁰ "explicitly rejecting Afro-pessimism",⁴¹ continues to inspire Chinese post-Tiananmen and post-Darfur foreign policy. At the same time, its "categorical support for non-intervention in domestic affairs"⁴² is still valid, but has been slightly balanced and nuanced since the 1990s, now less reluctant towards international cooperation through regional and international organizations.

In other words, it takes two to tango: policy makers should know that the punitive approach is losing ground against more constructive hybrid pressures. On the other hand, company directors should realise that a proper C.S.R., integral and integrated, could become a crucial comparative advantage in many developing countries, where there are plenty of opportunities in terms of natural resources and infrastructures. This approach may also help western companies to avoid politics, regain credibility and to better face growing competition from China and India.

³⁹ Deborah Brautigam, *The Dragon's Gift* 311 (1st ed. 2009).

⁴⁰ Gerald Segal, *China and Africa*, 519 *Annals Am. Acad.* 115, 125 (1992).

⁴¹ *China returns to Africa* 7 (Chris Alden, Dan Large & Ricardo Soares de Oliveira eds., 2008).

⁴² *Id.*, p. 22.

2. STUDY-CASE (1): POST-CONFLICT C.S.R. IN COLOMBIA

2.1. THE SITUATION IN COLOMBIA AND THE PEACE AGREEMENT WITH F.A.R.C.

The negative outcome of the referendum held in October 2016 triggered concerns regarding the future of Colombia, after so many efforts to reach an agreement between the government and the Revolutionary Armed Forces of Colombia (hereinafter F.A.R.C.) Up to 50 articles of the first text (rejected by the electorate) were amended in an attempt to address the lack of consensus, after which the then-President Santos still decided to adopt the agreement through a legislative act by the end of 2016. We have seen in different scenarios the “referenda curse”, ranging from Brexit to Colombia, or the secessionist Catalan region in Spain: what they all share is a variety of situations where institutional legitimacies are under pressure.

The most polemic points of the Peace Agreement concerned its provisions on transitional justice (a special tribunal and a partial amnesty that finally excluded major crimes), together with a sort of political insurance by virtue of which F.A.R.C. are guaranteed for the next two electoral periods 5 seats in the Congress and 5 seats in the Senate (including security and financial support to compete in the elections). After 50 years of open armed confrontation, most Colombians judged it to be excessively conciliatory and saw the 2018 elections as a second opportunity to express their discontent. In June 2018, the majority voted for the right-wing Duque, now President of Colombia, who had fiercely opposed the Peace Agreement and even brought it before the Constitutional Court.

However, the Constitutional Court has ruled that only a President has the faculty to negotiate and close peace agreements, therefore backing outgoing President Santos, who has received more international than internal support. The Congress is then obliged to remain within the framework of the spirit of the agreement, although it has some room for

manoeuvre during its implementation: “[E]l ámbito de regulación del Congreso respecto de la implementación del Acuerdo Final radica en la presentación de diferentes opciones de regulación, pero todas ellas deben estar dirigidas a facilitar dicha labor de implementación del Acuerdo.”⁴³

From an international perspective, article 3 common to the four Geneva Conventions of 1949, has deliberately been used to give the peace agreement a broader base of legitimacy and even some “legal resiliency”⁴⁴ to handle the vicissitudes of national politics. In this sense, I.L. interestingly connects with Constitutional Law: the agreement is presented as “internationally binding” and, actually, the separation between its international legal life and its internal one is artificial,⁴⁵ not to say a fiction intended to protect it from the vagaries of forthcoming governments. This smart use of I.L. could be a source of inspiration for other conflict-affected regions.

In more general terms, taking into consideration the active engagement of Norway, Cuba, the Holy See, Venezuela and Chile, the Peace Agreement can also be interpreted as a success for multilateralism. In a speech at the headquarters of the E.U. in Brussels, the Executive Secretary of the U.N. Economic Commission for Latin America and the Caribbean, Alicia Bárcena, said that the negotiation process showed “in this uncertain time the tangible value of multilateral endeavours.”⁴⁶

In the meantime, the U.S., a traditional ally in the fight against drugs, has taken a tougher line. President Donald J. Trump has “considered designating Colombia as a country that has failed demonstrably to adhere to its obligations under international

⁴³ Colombian Constitutional Court: *Judgement C-332/17*, 17 May 2017, available at: <http://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm>.

⁴⁴ Carlos R. Fernández Liesa, *El Derecho Internacional en el Acuerdo de Paz*, [International Law in the Peace Agreement], in *El Acuerdo de Paz entre el gobierno de Colombia y las F.A.R.C. [The Peace Agreement between the Colombian government and the F.A.R.C.]* 39, 48 (Carlos R. Fernandez Liesa et al. eds., 2017).

⁴⁵ *Id.* p. 45.

⁴⁶ Press Release, U.N. Economic Commission for Latin America and the Caribbean, Alicia Bárcena, Peace Process is Achievement of Colombians, Demonstrating Relevance of Multilateralism and Value of the Region’s Constructive and Respectful Support (May 31, 2018) <https://www.cepal.org/en/pressreleases/alicia-barcena-peace-process-achievement-colombians-demonstrating-relevance>.

counternarcotics agreements due to the extraordinary growth of coca cultivation and cocaine production over the past 3 years, including record cultivation during the last 12 months.”⁴⁷ For now, Colombia has not been included in the list of non-complying countries. But such statement is all the more poignant when one realises that it was issued just a year after the entry into force of the Peace Agreement. Hence, it casts a serious shadow over its effective implementation and explicitly poses a threat, which had previously been expressed only sotto voce.

The difficulties of Colombia have become more apparent due to the flows of people that cross the border fleeing from Venezuela. Beyond the present humanitarian crisis, the long Colombian boundary line with Venezuela, Ecuador, Peru, Panama and Brazil constitutes a real hub of organized criminality, mainly linked to illegal arms trade and drug cartels. In sum, the State finds itself in big difficulties in exercising an effective control of the territory. Furthermore, the problematic presence of the Ejército de Liberación Nacional (hereinafter E.L.N.) persists and is “further complicated by the internal division within the E.L.N., unlike F.A.R.C.”⁴⁸ In the event of a similar agreement with this rebel group, dissidents are more than foreseeable. Against this background, it goes without saying that the achievement of an agreement with F.A.R.C. should not be over estimated.

Still, it is not all bad news. In May 2018 O.E.C.D. member States invited Colombia to become a full member of the Organization, after talks and negotiations since 2013. The signing ceremony took place on the 30th of May.⁴⁹ After satisfying the national or internal procedure to that effect, accession will become effective once Colombia deposits its instrument of accession with the French government, the depositary of the Convention.

⁴⁷ Memorandum from the Presidential memoranda, Presidential Determination No. 2017-12 (Sept. 13, 2017) <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-2/>.

⁴⁸ INT’L INST. FOR STRATEGIC STUDIES, THE ARMED CONFLICT SURVEY 335 (Routledge ed., 2018).

⁴⁹ Press Release, O.E.C.D., O.E.C.D. countries agree to invite Colombia as 37th member (May 25, 2017) <http://www.oecd.org/countries/colombia/oecd-countries-agree-to-invite-colombia-as-37th-member.htm>.

This may explain why Colombia does not even figure in the O.E.C.D. fragile States Index, despite its obvious institutional fragilities. Similarly, Mexico should also figure in the list of fragile States of the O.E.C.D., but it does not because it is a full member of the Organization.

2.2. C.S.R. CLAUSES IN THE COLOMBIAN PEACE AGREEMENT WITH F.A.R.C.

As is logical, C.S.R. is far from being the top priority of the Peace Agreement between Colombia and F.A.R.C. However, a careful reading of its provisions reveals that economic aspects are critical in helping the government re-establish control of remote rural areas, where the social fabric is used to obey a variety of rebels, warlords and drug cartels. The promotion of the formal economy and an effective control of the territory are therefore closely intertwined. The Peace Agreement is additionally right in its combination of regulation and policies; the text is peppered with legislative plans and appropriate accompanying policies. The common axis is built upon their complementarity, since laws do not suffice on their own without enabling policies.

Specifically, it acknowledges that the State needs the private sector to take root in remote areas. Even though the English translation does not reflect it, the Spanish original uses the verb “*adelantar*” (literally, “advance”) in art. 1.1.8: to create mechanisms to facilitate that “*las empresas del sector privado que adelanten su actividad económica en los territorios rurales*” [the companies in the private sector that advance the economic activity in rural areas]. The temporal nuance is not without significance, even more so as organised crime groups and drug dealers are quickly filling the power vacuum left by F.A.R.C.’s demobilisation.⁵⁰ The most famous example is the Gulf Clan, which has expanded its influence and now has now consolidated in 142 municipalities, even though minor

⁵⁰ International Institute for Strategic Studies: *The Armed Conflict Survey 2018*, July 2018, Routledge Ed., p. 329.

drug cartels have also profited from the relative slowness of State institutions in filling the gap left by F.A.R.C..

Without idealising its role, the private sector is certainly quicker than public institutions and could act as the spearhead of a long-term stabilisation process. That is where P.P.Ps. make more sense than ever. Moreover, the private sector can further help in the promotion of formal economy and the formalisation of labour relations.

A corollary of State control is one of the strict requirements foreseen in the agreement to revise private security licences (art. 3.4.10), “placing an emphasis on the prohibition of the privatisation” of functions typically performed by the State (mainly, military and intelligence activities). As for public services, the agreement accepts that private companies may “provide domiciliary public services” but within a general framework of “accountability” (art. 2.2.5).

At this point, it is worth citing at length the C.S.R. clauses present in the Peace Agreement.

(See table in the next page)

Table 1: C.S.R. clauses in the Colombian Peace Agreement with F.A.R.C.

C.S.R. Dimensions	Clauses of the Peace Agreement
Business role in affected rural areas; Public-Private Partnerships; Institutionalised dialogue and cooperation	Art. 1.1.8: “Set up mechanisms for social dialogue between national, regional and local authorities, small-scale farmer communities and also indigenous, black, afro-descendent, raizal and palenquero communities, in addition to other communities where different ethnic and cultural groups coexist, and private sector companies doing business in rural areas , with a view to creating formal spaces for discussion between actors with diverse interests, which allow the promotion of a common development agenda focusing on socio-environmental sustainability, the well-being of rural populations and economic growth with equity ”.
Gender gaps	Art. 1.3.3.5: “Promoting the recruitment of women in non-traditional areas of production”.
Labour relations (in agriculture); Capacity building; Formal economy	Art. 1.3.3.5: “ Training agricultural workers and businesses in the area of employment rights and obligations , and promoting the culture of formalisation of the labour market”.
Public services and accountability	Art. 2.2.5: “Strengthen the mechanisms for accountability of . . . and companies providing domiciliary public services ”.

Private Security Forces	Art. 3.4.10: “Strengthen . . . territorial supervision and inspection of private security and surveillance services . . . placing an emphasis on the prohibition of the privatisation of military, police or intelligence functions . . . ; it shall ensure that they do not perform state military, police or security functions”.
Control of the economic production; Illicit drugs; Mix of hard and soft law measures	Art. 4.3.3: “Review and establish strict State controls on the production, import and selling of chemicals precursor and input require for the production of illicit drugs. . . . It shall put in place rules and mechanisms to engage companies who produce, import and sell the above to adopt measures of transparency and control”.

2.3. THE POTENTIAL OF THE PRIVATE SECTOR IN RURAL COLOMBIA

It is well-known that State institutions need some time to consolidate. If adequately guided by public policies, the private sector can serve as a catalyst for institutional stability. A usual problem in these situations is the over-abundance of well intended but vague public policies or, *sensu contrario*, the absence of concrete policies to meaningfully assist business enterprises in the field. Of course, the Peace Agreement does its job and one should not ask it to be more concrete (it could be worse for the negotiating strategy); more concrete accompaniment of the private sector will be decisive, however, in the implementation policies that will follow. Companies' role, in summary, is to take over the private functions previously fulfilled by what we might call “illegal private actors”. In this manner, the social tissue gradually recovers from mafia-style loyalties and tensions. Formal economy and formal labour relations are a crucial aspect of this post-conflict transition.

Nonetheless, local communities need to feel comfortable with this transition period: in particular, they should not fear an abrupt end of their traditional lifestyle, nor a threat to their natural environment. Otherwise, the risk is that they end up missing previous informal powers and illicit activities. In view of the above considerations, each economic actor has an intrinsic responsibility depending on the concrete activities carried out. For example, when the Spanish oil company, *Repsol*, congratulates itself on promoting cacao production instead of coca plantations in rural Colombia. In doing so, this company is assuming an improper role for which it has not been instructed, nor for which it has been trained. A foreign company does not have the legitimacy to promote cacao instead of other crops (the question could be: why cacao and not coffee?). On the contrary, as indicated by its Head of Relations with Communities and Human Rights in America, it seems more relevant to channel its C.S.R. through mechanisms of “socio-environmental monitoring in collaboration with the neighbouring Guarani populations”, as done in Bolivia.⁵¹ This is the most pertinent way of involving local communities in sustainable rural development and favouring the country’s institutional stability. P.P.Ps. are not meant to be a private bypass of State functions, but a complementary help and coordination process during which each actor must remain in his respective place. An oil company faces many challenges before worrying about what is the best crop to replace coca cultivation, and by doing that assumes unnecessary legitimacy risks in its relationship with the local communities.

It should not be deduced that the role of the private sector is underestimated. In fact, in the era of globalization, companies function as important pollinators of regulatory and political options in the territories where they operate. A certain degree of “private legal transplant of E.U. Law”⁵² is already detected in the extractive industry and, in general, in

⁵¹ Examples taken from a special issue of a Spanish newspaper: Supplement *Responsabilidad Social Corporativa [Corporate Social Responsibility]*, EL PAÍS, Nov. 29, 2017, at 80.

⁵² Tomaso Ferrando, *Codes of conducts as private legal transplant: the case of European extractive M.N.Es.*, in EUR. L. J. 779, 809 (2013).

standards and codes of conduct. It consists of a private horizontal policy and legal transfer: indeed, Codes of Conduct and good practices can have a de facto extraterritorial reach through T.N.Cs.' activities. Of course, it is necessary to adapt these codes of conduct to the particularities of fragile or conflict-affected States: for instance, in Colombia it would be a mistake not to contract with any company or individual that had been involved in illegal activities, given that in certain areas it would practically mean not hiring anyone.

3. STUDY-CASE (2): RECURRENT VIOLENCE AND NATURAL RESOURCES IN D.R.C.

3.1. OVERVIEW OF THE SITUATION IN D.R.C.: NOT A SIMPLE GOOD-EVIL PLOT

The commonly used and cited Fragile States Index (2018) lists D.R.C. as the 6th most fragile country in the world, with all indicators situated at the upper limit of the alarm range. This index particularly highlights group grievances, factionalised elites, lack of State legitimacy and safety, human rights violations and forced displacements. Thus, it does not come as a surprise that D.R.C. has started 2018 with Ebola and polio outbreaks,⁵³ extending the alarm beyond its borders. That contrasts markedly, as usual in Sub-Saharan Africa, with its richness in natural resources, ranging from sawn wood, crude petroleum and diamonds to cobalt (including its ores), raw and refined copper, in order of importance.

Power vacuum is evident in the eastern provinces (Ituri, North and South Kivu and Tanganyika), where ethnic divisions appear to be the perfect place for the proliferation of militia and armed groups, by the way, increasingly politicised on the murky expectation that future elections

⁵³ A new polio vaccine is being tested and, according to the World Health Organization, the Ebola outbreak seems to be "largely contained" after two months of alarm. See the latest press release, U.N. NEWS, *Ebola Outbreak in Democratic Republic Congo is "largely contained"*: W.H.O. (June 26, 2018), <https://news.un.org/en/story/2018/06/1013122>.

may change the political chess-board. The region of Tanganyika constitutes a paradigmatic example, where the confrontation between Luba and Twa communities has led to massacres and, ultimately, to approx. 50,000 forcibly displaced persons.

In this context, we have to reject simplistic analyses of goodies and baddies. But the classic story comes first, no matter how well-known it is. Of course, Sub-Saharan presidents have good friends in the extractive industry and the other way round, heavyweights of mining T.N.Cs. are usually close to, at least, one President in the region: Kabila (D.R.C.) and the Israeli businessman Dan Gertler, Kagame (Rwanda) and the Swiss Chris Huber, Museveni (Uganda) and Dubai-based Belgian businessman Alain Goetz.

This includes some expectable links to arm dealers (and warlords): for example, to get the ore out of Rwanda during 1998-2003 war, Huber used the same aircraft as the Russian Viktor Bout (now in a US prison for selling arms to terrorists).⁵⁴ Additionally, independent research suggests that Goetz gold supply chains are financing conflicts and that important amounts of gold are smuggled out from the eastern provinces of D.R.C. into Uganda and Rwanda, where Goetz also enjoys a predominant position.⁵⁵ The porosity of D.R.C. eastern border further contributes to the division of local communities, not to mention the economic losses for the State. Then, the lack of effective control of the territory makes it possible for rebel groups to finance themselves through the exploitation of minerals.

So far, the classic story; now, we shall add some nuances. One cannot understand why Goetz paid for the cocktail party at the end of the

⁵⁴ *Clashes Over "Clean Coltan"* AFR. CONFIDENTIAL, May 18, 2018. All articles of this review are available under subscription at: AFRICA CONFIDENTIAL, <https://www.africa-confidential.com>.

⁵⁵ Dubai, the home of Goetz, has become "the most important trading partner [of Rwanda] and gold far outstrips Rwanda's other staple exports, like coffee and tea". As for Uganda, it surprisingly exports 5 tonnes more of gold than it produces, coinciding with a spike of activity of Goetz controlled companies. In the overall, Goetz could be involved in the smuggling of approx. 20 tonnes of conflict-gold out of eastern Congo into Rwanda and Uganda. See: "The Great Lakes Gold Rush", *Africa Confidential*, Vol. 59 No. 6, 23rd March 2018.

International Conference of the Great Lakes Region, held in July 2017 and sponsored by the U.N. Special Envoy for the Great Lakes, Saïd Djinnit. The U.N. should be rather more cautious, especially after some deadly attacks against M.O.N.U.S.C.O. and its lack of popular support.

On the other side, artisanal mining in D.R.C. should not be idealised: it is generally organised through cooperatives that sharply reflect tribal divisions, with regular spikes in ethnic violence, which cannot always be attributed to corporate-related causes (although, we may consider the historic role of the Belgian colonial administration exacerbating and using ethnic divisions). This is why we warned in the introduction that sometimes “business and human rights” issues are just *epiphenomena* of wider latent problematics.

Besides, cooperatives are often accused of stealing mineral to launder it through other concessions and some companies are, in turn, accused of illicit exports to neighbouring countries. But even local small-scale miners illegally export raw minerals, incurring non-negligible risks to their personal safety. One of the most recent outbreaks of violence took place in Kivu after the closure of Bibatama coltan mine, which led to the reappearance of serious Hutu-Tutsi tensions (many miners are ex-combatants who kept their weapons).⁵⁶ In the province of Ituri, rich in gold, Lendu and Hema ethnic groups have also clashed since December 2017.

In 2016, President Kabila and the opposition reached an agreement to hold elections by 2017 (the so-called Saint Sylvester Agreement) but the President is delaying its implementation. In principle, the Constitution prevents Kabila from running for a third term, but the uncertainty around his own future was a source of concern. In the meanwhile, the first opposition party (Union for Democracy and Social Progress) is widely divided after the death of its historic leader Tshisekedi on 1st February 2017, especially because many members of the party do not look favourably upon the leadership of his son Felix Tshisekedi.

⁵⁶ *Africa Confidential*, *supra* note 54, at Vol. 59 No. 10.

Before the elections, some Ministers of the Government started raising the tricky question of whether next “elections could possibly take place in a situation of war”.⁵⁷ The President even saw an opportunity in this crisis to “sell himself” as the guarantor of unity and public safety, through an alleged “professionalization” of security forces,⁵⁸ while he had increased government repression of public demonstrations and protests. Joseph Kabila, President since 2001 when he succeeded his father, has also played it well in the relations with neighbouring countries emphasizing the ideas of south-south solidarity and sovereignty. This does not apply to the relations with Rwanda and Uganda, which are not exactly going through their finest moment, since they benefit from smuggled minerals and, in particular, due to Rwanda’s support to rebel group M-23.

Only after a visit to D.R.C. of the U.S. Ambassador to the U.N., Nicki Haley, the pressure became more tangible and Kabila announced a concrete electoral calendar. Elections were held on 23 December 2018.⁵⁹ Felix Tshisekedi is the new President of D.R.C. with the unexpected support of Kabila, since the latter’s coalition still controls the Parliament. Some media have suggested that Kabila and Tshisekedi agreed on a “backroom deal over the disputed poll”. For the time being, social unrest and political instability raise doubts about the near future of D.R.C. while ebola outbreaks persist.

3.2. THE PRECEDENT OF THE KIMBERLEY PROCESS: C.S.R. IN THE U.N. SECURITY COUNCIL

Illicit diamond trade, particularly associated with Sierra Leone but affecting the Great Lakes region, led to an unprecedented engagement of the U.N. Security Council (hereinafter U.N.S.C.). In a totally unexpected way, corporate behaviour was placed at the top of the U.N.S.C. agenda, but there were plenty of reasons to do so: the virulence of the conflict had

⁵⁷ *Kabila’s survival strategy*, AFR. CONFIDENTIAL, Mar. 9, 2018.

⁵⁸ International Institute for Strategic Studies: *The Armed Conflict Survey 2018*, July 2018, Routledge Ed., pp. 172-173.

⁵⁹ *Id.* at 171-172.

destabilized Sierra Leone and the entire Great Lakes region. The highest executive body of the U.N. went well beyond its usual resolutions in terms of international peace and security. On the assumption that the conflict was fueled by illicit trade in diamonds, in 2000 the U.N.S.C. called upon the private sector to establish “an effective Certificate of Origin regime” to cut off the financing of the armed conflicts, while “welcoming” the cooperation of the diamond industry, the World Diamond Council and N.G.Os. and experts.⁶⁰

This represented a turning point in the usual strategies since it was the first time that P.P.Ps. were backed at such a high political level in order to address the crosscutting challenges of fragile and failed sub-Saharan States, with ramifications in a multitude of institutional, political, economic and human rights’ issues.

To the satisfaction of the U.N.S.C., the certification scheme started to deliver results only one year after, making it possible for Sierra Leone to gradually overcome violence.⁶¹ The initiative was then extended to Guinea and, in 2003, to D.R.C. . By the end of 2002, the U.N.S.C. began to support a private-led initiative for the co-regulation of diamond trade. Apart from certificates of origin established by law in the producing countries, the industry got involved in the so-called Kimberley Process (hereinafter K.P.), described by the U.N.S.C. as a “significant progress.”⁶² Quite exceptionally, the U.N.S.C. issued a Resolution with the sole purpose to back the K.P., explicitly expressing its “strong support”⁶³ and praising the fact that it was a “voluntary system of industry self-regulation.”⁶⁴ But over time, it has evolved into a mix of self- and co-regulation. Illicit trade in diamonds and Kimberley Certification Scheme provides us with an excellent example of the crucial role of the institutional terrain where business operations take place, on how C.S.R. can make a distinctive

⁶⁰ See generally S.C. Res. 1306, U.N. Doc. S/RES/1306 (June 5, 2000).

⁶¹ See S.C. Res. 1385, para. 2, U.N. Doc. S/RES/1385 (Dec. 19, 2001).

⁶² See S.C. Res. 1446, recital 6, U.N. Doc. S/RES/1446 (December 4, 2002).

⁶³ S.C. Res. 1459, para 1, U.N. Doc. S/RES/1459 (January 28, 2003).

⁶⁴ *Id.* at 2.

contribution including “carrots and sticks.”⁶⁵ The relative success of the K.P. is explained by the combination of compulsory elements (hard law) and complementary voluntary actions (soft law): on the one hand, certificates of origin were incorporated in the national legislation of producing countries; on the other hand, the world industry engaged in frank negotiations with States, N.G.Os., Civil Society Organisations (hereinafter C.S.Os.) and other producers in order to clean their supply chains. To make it work, all subjects and actors must have a proven legitimacy: States should be preferably democratic and have strong and reliable institutions; N.G.Os. and C.S.Os. have to demonstrate a legitimate interest and be representative of the stakeholders on behalf of which they act; and the industry should have agreed a viable starting point (to begin with, a strong commitment to minimise the adverse effects of the exploitation of resources).

The institutionalisation of these processes is the key for moving C.S.R. from rhetoric to concrete actions.⁶⁶ As said before, D.R.C. joined the Kimberley certification system in 2003. In the long run, K.P. data show that D.R.C. annual rough diamond exports have significantly decreased between 2006 and 2016,⁶⁷ from over 30 million carats (more than 679 million USD in value) to almost 15 million carats (worth 229 million USD). Conflict diamonds now represent around 1% of total trade in diamonds, which is a pronounced improvement. In the short term (the last two years), data are also influenced by the fact that the market “has trended towards smaller stones and lower qualities”, due to its higher global demand, according to the Gemological Institute of America.⁶⁸ Another problem in D.R.C. is the accuracy of statistics themselves, given

⁶⁵ See Franziska Bieri & John. Boli, *Trading Diamonds Responsibility: Institutional Explanations for Corporate Social Responsibility*, 26 Soc. F. 501, 507 (2011).

⁶⁶ *Id.* at 502.

⁶⁷ See 2016 is the latest year data has been available; check figures at: KIMBERLY PROCESS, <https://www.kimberleyprocess.com/en/democratic-republic-congo#2007>.

⁶⁸ See Russell Shor, *Diamond Producers Aim for Lower Qualities in Today's Market*, GIA.EDU (Sept. 18, 2017), <https://www.gia.edu/gia-news-research-diamond-producers-aim-lower-qualities-todays-market>.

that extensive alluvial diggings and state-owned exploitations are more likely to provide imprecise data.

Among the lessons to be learned from the K.P. , we shall highlight a general commitment to put into practice more proactive pressures instead of traditional sanctions, which end up punishing civil population without delivering structural improvements. Then, even regardless of its actual effectiveness, the K.P. has become a useful forum for dialogue between all subjects and actors, a place for coordination and harmonization of mining fiscal regimes within the Sub-Saharan region. Nevertheless, it should be recalled that diamonds only represent 8.4% of D.R.C. exports.⁶⁹

3.3. TIN, TANTALUM, TUNGSTEN AND GOLD: THE MERIT OF THE NEW E.U. REGULATION. AN APPROPRIATE POLICY BALANCE.

The E.U. has recently made a move to extend the control of conflict minerals, including tin, tantalum, tungsten, their ores, and gold. Back in 2010 the European Parliament (hereinafter E.P.) asked the Commission to imitate the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (in this case, Section 1502),⁷⁰ built upon the O.E.C.D. Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

The Commission prepared a proposal that consisted of a hard norm, which would serve as a framework for self-regulation (certifications and good practices) so as to foster responsible supply chains. The public competent authorities would help implement self-certifications and provide the structures for review, reporting and claiming, being thus a relatively daring initiative. The Commission

⁶⁹ OBSERVATORY OF ECONOMIC COMPLEXITY (O.E.C.), *Democratic Republic of Congo*, ATLAS.MEDIA.MIT.EDU, <https://atlas.media.mit.edu/en/profile/country/cod/>.

⁷⁰ See generally *Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-regulation of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high risk areas*, recital 7 at 3, C.O.M.(2014) 111 Final (March 5, 2014).

advocated for a mixed *hard* and *soft law* approach, in which companies partly manage self-certificates as “responsible importers” but, once in, they must fully comply with the O.E.C.D. guidelines and accept supervision and reporting.

Another option would have been to make it compulsory to join the system, so that the number of Companies would be higher, but the requirements would eventually persuade them to leave certain risk areas looking for an alternative sourcing, to make it easier to comply with the standards. This would probably generate serious market distortions when abandoning already weak countries, in which companies would not source anymore. What is more, with these conflict-affected or high-risk areas abandoned, at the end, nothing would point to improvements on the ground.

Since 2010, after the approval of Dodd-Frank Act, D.R.C. has undergone it has been assessed a drastic reduction of exports and increase of informal trade networks in and neighbouring countries of the Great Lakes Region where, again, we face the problem of failed States (D.R.C.). This negative impact, according to the Commission,⁷¹ could be minimised if the Regulation maintains the half-voluntary character of this self-certification system, so as to avoid worsening the problems at source by simply abandoning these areas.

The fact is that the E.P. called on the Commission to regulate this matter in 2010 but the proposal was only drafted and published in 2014. The outcome was unclear for a long time and constitutes an interesting example of the regulatory process chemistry. Politically speaking, the Commission united to the High Representative of the E.U. for Foreign Affairs and Security Policy to put pressure on the Council and the Parliament, stressing the development and human rights coherence of adopting such a regulation, in the exposed terms, consistently with the

⁷¹ See Commission Staff Working, *Executive Summary of the Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Setting Up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict-Affected and High-Risk Areas*, S.W.D. (2014) 52 final (Mar. 5, 2014).

values that should inform E.U.'s external action.⁷² For instance, the Parliament reacted with a profusion of amendments adopted on 20 May 2015, even asking for a tougher regulation and accentuating the human rights aspects.⁷³

The E.P. ignored that a too strict regulation would stimulate companies to leave these countries at their own mercy, thereby raising economic and social problems. Although the negotiations seemed to be delayed sine die, this E.U. Regulation was finally adopted in May 2017.⁷⁴ Its most positive aspect is precisely this balance between the necessary requirement of responsible imports and the development needs of those areas.

In conclusion, both policy makers and T.N.Cs. should know that States' fragility is only worsened if we just encourage companies to abandon high-risk areas: it is necessary to design more imaginative strategies. The K.P. and the smart mix of hard and soft law of this E.U. regulation are good examples, even if the latter could be improved as we will see next. We will have to wait until 2021 before it enters into full force and be vigilant on the concrete criteria, guidelines, lists of countries and companies.

3.4. MISUNDERSTANDINGS OF THE PRIVATE SECTOR AND INCONSISTENCIES OF THE E.U. ROLE: REGULATORY LACUNAE, COBALT AND LAST ELECTIONS IN D.R.C.

As explained above, Saint-Silvester Agreement foresaw an electoral process in 2017 that has been put off several times. The escalation of the

⁷² See Joint Communication to the European Parliament and the Council, *Responsible Sourcing of Minerals Originating in Conflict-affected and High-Risk Areas. Towards an Integrated E.U. Approach*, J.O.I.N. (2014) 8 final (Mar. 5, 2014).

⁷³ See also Eur. Parl., *Amendments adopted on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importer of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas*, P8_TA-PROV(2015)0204 (May 20, 2015).

⁷⁴ European Parliament and Council Regulation 2017/821 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, 2017 O.J. (L 130/1) (E.U.).

crisis may help President Kabila to hold on to power. In this context, a new U.S. Executive Order has established severe actions against a variety of global “malign actors”. One of these actors is the Israeli Dan Gertler, who has benefited from his friendship with President Kabila, thus diverting from D.R.C. “over 1.36 billion in revenues from the underpricing of mining assets that were sold to offshore companies linked to Gertler”; for example, “in 2013, Gertler sold to the D.R.C. government for \$ 150 million the rights to an oil block that Gertler purchased from the government for just \$ 500,000, a loss of \$ 149.5 million in potential revenue.”⁷⁵ Being close to Kabila, Gertler has become almost an indispensable partner for many T.N.Cs. operating in D.R.C. U.S. sanctions comprise companies doing business with Gertler. In the wake of this U.S. Executive Order, Glencore directors find themselves in an awkward position trying to desperately break the ties with Gertler, to whom they have pending payments for royalties and other concepts (as explained, he is an indispensable “facilitator” of the extractive industry in D.R.C.).

Shamingly enough for the E.U., Glencore may have found a way to bypass U.S. sanctions: make payments to Dan Gertler in euros, amid the silence of European institutions. At the same time, the N.G.O. Global Witness reports that Glencore has also settled another possible dispute originated by U.S. sanctions, but in this case with State-owned companies, “agreeing to pay hundreds of millions to opaque Congolese State-owned Company Gécamines.”⁷⁶ These funds may end up financing Kabila’s strategy to remain in power. The E.U.’s silence could be explained by the fact that some E.U. member States have strong economic interests in the Sub-Saharan country. Indeed, Belgium, Luxembourg and Spain are respectively the fourth and fifth top export destinations of D.R.C. , while France is the fifth among the top import origins of D.R.C. (amounting to

⁷⁵ Press Release, U.S. Department of the treasury, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec 21, 2017), <https://home.treasury.gov/news/press-releases/sm0243>.

⁷⁶ Margot Mollat Du Jourdin, *What Price Will Glencore Pay For Its Murky Deals in D.R. Congo?*, GLOBAL WITNESS (June 22, 2018), <https://www.globalwitness.org/en/blog/what-price-will-glencore-pay-its-murky-deals-dr-congo/>.

261 million dollars).⁷⁷ By the way, diamonds are the top import of Israel,⁷⁸ which brings us back to Dan Gertler. Given this complex constellation of interests, it is rather inconvenient that the E.U. is the Chairmanship of the K.P. in 2018.⁷⁹

According to some analysts,⁸⁰ the lack of funds eventually caused by U.S. sanctions could have motivated a recent important reform of the D.R.C. Mining Code, which includes a considerable rise in taxes in a clear confrontation with the seven most important T.N.Cs. operating in D.R.C. Kabila probably hopes that the strength of global demand of copper and cobalt will neutralize the boycott announced and headed by Glencore and Randgold.⁸¹ In any case, if declared a strategic mineral, royalties for cobalt could amount to 10% so that it would be difficult to defend its confiscatory character before an Arbitration tribunal. In such hypothetical arbitration, the State can reasonably argue its right to regulate and that such measures are not discriminatory (i.e., applicable to all investors) and proportionate. Moreover, “the expectation of the investor to receive certain treatment is opposed to the State’s expectation to freely conduct its legitimate activities”, and “arbitral tribunals presume that the investor is an experienced and savvy businessman who has carried out adequate due diligence about the business and country

⁷⁷ See OBSERVATORY OF ECONOMIC COMPLEXITY (O.E.C.), *supra* note 69.

⁷⁸ See Latest data from 2018 of the World Integrated Trade Solutions, an initiative of the World Bank in collaboration with the U.N. Conference on Trade and Development and in consultation with organizations such as the International Trade Center, the U.N. Statistical Division and the World Trade Organization. See Israel’s trade profile at: WORLD INTEGRATED TRADE SOLUTION (W.I.T.S.), *Israel Trade at Glance: Most Recent Values*, WITS.WORLDBANK.ORG, <https://wits.worldbank.org/CountrySnapshot/en/ISR>.

⁷⁹ It is remarkable that the E.U. External Action Service website cites projects in Côte d’Ivoire, Guinea, Liberia and Sierra Leone, but completely forgets D.R.C. *But cf.* EUROPEAN UNION EXTERNAL ACTION, *E.U.Engagement in Kimberley Process: A Pledge to More Sustainable Livelihoods of Mining Communities*, EEAS.EUROPA.EU (June 19, 2018), https://eeas.europa.eu/headquarters/headquarters-homepage/46605/eu-engagement-kimberley-process-pledge-more-sustainable-livelihoods-mining-communities_en.

⁸⁰ See International Institute for Strategic Studies: *The Armed Conflict Survey 2018*, July 2018, Routledge Ed., p. 178.

⁸¹ See *Making The Miners Sweat*, 59 AFRICA CONFIDENTIAL, June 15, 2018.

conditions and how they may change, including how they may be affected by forthcoming political changes.”⁸²

Against the new mining code and taxes, a C.E.O. of Randgold has expressed his bitter disappointment recalling that they have “invested \$3 billion over eight years, [and] built three hydropower plants.”⁸³ Precisely at this point it is worth underscoring that Randgold main business does not consist of building hydropower plants for the State, but extracting minerals. It would have been better to consecrate those financial resources to improve its social and environmental performance in D.R.C. , thereby convincing local authorities that the company does its best – in its field of activity – to contribute to the countries’ sustainable development and stability. When a company sticks to its concrete social and environmental impacts, it will more easily avoid being drawn into conflict-ridden political scenarios and will possibly reduce the risk of arbitrary government decisions against its investments. Even from a merely cost-effective perspective, a proper C.S.R. designed in conjunction with public authorities is surely less expensive than three hydropower plants.

Finally, even though the E.U. regulation on some minerals maintains an apparently positive balance between voluntary and compulsory aspects, it also has some negative points. For instance, final consumers, small-scale importers (for example, for dentistry), intermediaries, transporters and secondary or recycled products are all outside the control of this regulation. Of course, it goes without saying that many other “conflict-minerals” fall beyond the scope of the European regulation, such as copper and cobalt, which actually represent the most important exports of D.R.C. (56% refined or raw copper and 17% cobalt).⁸⁴ The final paradox is that the E.U. is actively promoting electric cars for environmental reasons but rechargeable batteries use between 6

⁸² Andres Rigo Sureda, *Investment Arbitration: Judging under Uncertainty* 78, 80 (1st. ed. 2012).

⁸³ *Kabila Squeezes The Miners*, AFR. CONFIDENTIAL, Feb. 23, 2018.

⁸⁴ See OBSERVATORY OF ECONOMIC COMPLEXITY (O.E.C.), *supra* note 69.

and 15 kg. of cobalt per car and D.R.C. has around two-thirds of the global mine resources of cobalt (reportedly using child labour).⁸⁵

Cobalt and governmental deals with T.N.Cs. will determine the near future of the country and the credibility of last elections. President Kabila could find new ways of financing his offshore corporate structures in order to remain in power. In an interview with *Radio France* before the elections, the opposition leader Felix Tshisekedi suggested again that they might not take place “*ou à défaut d’élections crédibles*” [in the absence of credible elections]. At the same time he promised that if he would have won the general election he would have not planning any “*chasse aux sorcières*” [witch-hunt] meaning that Kabila should not fear a judicial prosecution: “*Au nom de la stabilité de l’État, je crois qu’il faut fermer les yeux sur certaines choses*” [in the name of national stability I believe it is necessary to turn a blind eye on certain things.]⁸⁶ The situation remains extremely fluid even after the post-electoral coalition Kabila-Tshisekedi.

What is clear is that some companies have misinterpreted their role in the country, deliberately influencing local politics. Companies’ own actions have partly contributed to increase political and regulatory risks, in a totally unnecessary way: in different statements, the Swiss firm Glencore had reassured shareholders saying that the new Congolese mining code would be amended to include a ten-year grace period before new taxes affect the already established mining companies. None of that happened of course; on the contrary, Glencore received a subpoena from the U.S. Department of Justice to investigate their deals in D.R.C., for suspected corruption and money laundering. A bribery probe is also being considered in the United Kingdom. Glencore is certainly aware that the U.K.’s Bribery Act has extraterritorial reach including foreign companies

⁸⁵ See ZANDI SHABALALA, *Cobalt to be declared a strategic mineral in Congo*, REUTERS.COM (Mar. 14, 2018), <https://www.reuters.com/article/us-congo-mining-cobalt/cobalt-to-be-declared-a-strategic-mineral-in-congo-idUSKCN1GQ2RX>.

⁸⁶ See generally CHRISTOPHE BOISBOUVIER, *Félix Tshisekedi: «Je n’ai ni l’intention ni l’ambition de me mesurer à ce qu’a été mon père»* [I have neither the intention nor the ambition to measure myself against what my father was], LES VOIX DU MONDE [THE VOICES OF THE WORLD] (Apr. 5, 2018), <http://www.rfi.fr/emission/20180405-felix-tshisekedi-je-ai-intention-ambition-me-mesurer-ete-pere>.

with operations in the U.K., creating a backdrop which is anything but rosy. Glencore's stock lost 13 % in London in a single day and a group of shareholders considers bringing an action against the company.⁸⁷

4. THE POTENTIAL OF A PROPER C.S.R.: SOME RECOMMENDATIONS

The objective of this article was not to provide a rosy view, and all subjects and actors involved have a share of responsibility. For example, the blame is frequently assigned to T.N.Cs. but we do not pay enough attention to the institutional terrain. It goes without saying that, in many occasions, it is the governments themselves that are interested in maintaining endemic corruption, by imposing opaque royalties, forced partnerships with State-owned companies and extraordinary taxes, which irregularly finance the ruling political party. Precisely in these situations it is justified that M.N.Es. exercise the less friendly side of their power of influence, threatening to withdraw investments or to source in other countries, as a mean of exerting pressure to ensure that the State does not request companies to perform tasks which are not part of the private sector duties.

Under I.L., human rights obligations fall on States; companies should not be asked to make social investments which have no relation with the impact of their daily activities. Companies must be clear in this regard: the private-sector contribution should be limited to responsibly conduct its operations, including human rights. This is predominantly a preventive task: to reduce the negative impact of business activities and, to the extent possible, to clean supply chains for the sake of sustainable economic development. If done, that is no small contribution. To go beyond that would risk putting companies on a slippery slope, in this sort

⁸⁷ Emily Gosden, *Shareholders Could Sue Glencore amid U.S. Inquiry*, *TIMES* (July 13, 2018), <https://www.thetimes.co.uk/article/shareholders-could-sue-glencore-amid-us-inquiry-wz295xsqb>.

of externalization of State functions, which is particularly dangerous in conflict-affected or post-conflict scenarios with factionalised elites.

In terms of risks and opportunities, the criterion of relevance applied to C.S.R. can significantly reduce both operational and reputational risks if companies concretely prove how their business project contributes to the country's economic development. In order to do so, public-private dialogue is needed to design a relevant C.S.R. (not philanthropic and paternalistic actions). From a public image perspective, the government of these States will have great difficulties to explain to the public opinion that they fire a foreign company that just wanted to responsibly conduct its concrete business, in cooperation with public authorities, but did not want to meddle in politics (not paying improper taxes for the ruling party, or building infrastructures only in regions that support the government). Glencore would not be so bitterly disappointed in D.R.C., when, in return for building three hydropower plants, it received new mining code that increased taxes and, if it was not enough, found itself in the spotlight of the judicial authorities of the U.S. and the U.K. for possible corrupt practices.

Western companies can overcome traditional reluctances and more probably avoid arbitrary regulatory changes against their investments. In this line of work, responsible business conduct and P.P.Ps. can "provide a common reference point for constructive engagement in conflict-affected and high-risk areas, as opposed to divestment."⁸⁸ At this point it becomes clear to what extent the private sector and policy makers must prioritise S.D.G. No. 16⁸⁹ if we make the effort to design long-term strategies for sustainable and successful businesses.

⁸⁸ GLOBAL COMPACT: *Guidance on Responsible Business in Conflict-Affected and High Risk Areas: a Resource for Companies and Investors*, New York, 2010, p. 6.

⁸⁹ See generally, GLOBAL COMPACT: *STATEMENT: "GOAL 16: HARNESSING THE POWER OF RESPONSIBLE BUSINESS TO PROMOTE SUSTAINABLE DEVELOPMENT"*, New York 2015, (2015) (last visited Nov 30 2018).

SURIA DEVA, *supra* note 35, at 208.

Table 2: Recommendations for the private sector and policy makers

Recommendations for the private sector	Recommendations for policy makers
<p>Paradigm shift from risk management to responsible management, from philanthropy to responsibility. The S.D.Gs. are an end; C.S.R. is one of the means.</p>	<p>Promote and design P.P.Ps., especially in areas where the State's effective control is under question, because the private sector is quicker (while public institutions root).</p>
<p>Move "from policies to processes" through due diligence protocols: <i>a)</i> Understand the context (legal and economic framework, without underestimating the socio-historical terrain); <i>b)</i> direct impact; <i>c)</i> indirect impact; <i>d)</i> follow-up.</p>	<p>Less information and vague guidelines and more concrete and active accompaniment of business enterprises in difficult scenarios. Work on common formats (codes of conduct) and avoid the multiplication and privatisation of certification schemes (lack of credibility and cost for companies).</p>
<p>Avoid maximalisms that are only viable in rich countries (example: "never contract with people who had contact with F.A.R.C. in the past") but also reject undue cynicism.</p>	<p>Balance policies and correctly understand the complementarity of soft law and hard law. Too rigid legal requirements can lead companies to leave risk areas, condemning them to poverty and violence. Only voluntary self-regulation also falls short.</p>

<p>Reduce marketing based strategies and increase research development and innovation (hereinafter R.+D.+i.) for the sustainability of the operations in the field. An effective C.S.R. is technical and interdisciplinary.</p>	<p>Multilateral endeavours and international institutionalised cooperation. Use International Law as an umbrella to protect initiatives from changing internal politics. New forms of proactive hybrid pressures must be considered before resorting to traditional sanctions.</p>
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In contexts of fragility and conflict, almost never a risk will be turned into an opportunity, at least in the long term; only if we change the paradigm from managing risks to managing responsibilities, companies will be able to responsibly foster business opportunities in high-risk areas. Finally, it is crucial to highlight the positive effects of regional integration and, in more general terms, of institutionalised cooperation to alleviate internal tensions within some States – as it is even the case within some E.U. member States such as Belgium.

The potential of a proper C.S.R. is quite evident in conflict-affected and high-risk areas. If adequately designed, it can enable synergies with the S.D.Gs. Western companies need a paradigm shift to regain credibility, in their relationship with governments and with the population, and there is an opportunity to make C.S.R. a comparative advantage in the global economy. Reality shows more and more that, thanks to R.+D.+i., economic development and sustainability can be compatible.