



ICT and Human Rights: Towards a Conceptual Framework of Human Rights Impact Assessments

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The practice of developing Human Rights Impact Assessments (HRIA) has a relatively recent history and is carried out by individuals from diverse backgrounds without a clear consensus on what drives it, its methodology, or even its core goals.¹ While HRIAs emerged as one of the tools recommended by the United Nations for human rights accountability in the business world, particularly from the framework and guiding principles of John Ruggie,² their effectiveness and modes of implementation are in dispute.

Understanding the history of the origin of HRIAs, as well as knowing their main critics and defenders, is useful to frame the practice in the context of a problem that does not have a definitive solution: that of the link between transnational companies and the human rights of those populations affected by their activities. This link is complex and faces various dilemmas. So far, proposals have wavered between promoting binding treaties and voluntary self-regulatory business initiatives. The use and promotion of HRIAs imply, in part, the triumph of this second model.

This work is motivated by having observed the deployment of HRIAs in the ICT sector in recent years. As a research center committed to freedom of expression, human rights impact assessments seem relevant to an industry that decisively influences the flow of information in a modern and interconnected society. This

¹ J. Harrison, «Human Rights Measurement: Reflections On The Current Practice And Future Potential Of Human Rights Impact Assessment», *Journal of Human Rights Practice*, vol. 3, 2, 2011, Retrieved from <https://academic.oup.com/jhrp/article/3/2/162/2188745>, «Establishing A Meaningful Human Rights Due Diligence Process For Corporations: Learning From Experience Of Human Rights Impact Assessment», *Impact Assessment and Project Appraisal*, vol. 31, 2, 2013, Retrieved from <http://www.tandfonline.com/doi/abs/10.1080/14615517.2013.774718>.

² J. Ruggie, «Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises». Human Rights Council, Geneva. A/HRC/8/5. April 7, 2008, «Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework». Human Rights Council. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, New York. HR/PUB/11/04. 2011.

industry includes telecommunications companies that are in charge of infrastructure development, those that provide interconnection services, and those that offer home connections. Together, these companies form a dynamic and relevant industry whose actions have a decisive impact on rights that are central to the functioning of democratic institutions, such as freedom of expression and the right to privacy. ICTs, then, are great candidates to deploy corporate practices that evaluate the impact of their commercial activities on the rights of citizens. The global nature of these companies also justifies this type of evaluation: they tend to consider how local contexts affect business practices and how these affect—in turn—the people whom their services are intended to serve.

The work proceeds as follows. The first part traces the history of the relationship between business and human rights, with a special focus on how the United Nations approached the issue. Two models clashed: one sought to establish a binding treaty with legal obligations and responsibilities at the head of transnational companies; the other sought to create a voluntary protection framework, based on collaboration and the development of principles and good practices. The second model is the one that has advanced the most and has received the most global support from both corporations and states, first with the adoption in 2000 of the *United Nations Global Compact* (UNGC) and then with the framework of *Protect, Respect and Remedy* promoted by the Secretary-General.³ In the second part, three different but related trends are reviewed, which seem to have impacted how HRIAs are today: environmental laws, those that establish civil liability for what local companies do abroad, and—more recently—that impose reporting obligations or *due diligence*. These legislative trends of domestic law present a different model of *compliance* outside of international human rights law and can be seen as a response to the weaknesses of the current model at the international level or to the impossibility of obtaining a binding treaty. The third part presents the general guidelines of what, according to established practice, an HRIA should be. The fourth part analyzes the potential of HRIAs for the ICT sector and explains why it makes sense for this sector to pay attention to the impact of its services and products on human rights. A brief provisional conclusion is offered and a future research path is outlined.

³ J. Ruggie, “Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, cit.

A. Corporations and international law

The status of companies in international law is uncertain. On the one hand, the central actors are clearly the states: they are the ones who, through the signing of treaties, shape international law and international and regional human rights systems.⁴ For this model, transnational companies raise doubts regarding the place they occupy in the framework of binding obligations and available remedies to human rights violations.⁵ Many of these companies are incredibly powerful and carry out high-impact activities in the most diverse corners of the world.⁶ That power, which has expanded in recent decades, in a certain sense poses a challenge to the state-centric conception of international law that—nevertheless—has shown surprising stability.

Two models dispute the possible solution to the challenge. On the one hand, there is a legal vision of *hard* law proposing to establish specific obligations for companies through a binding treaty. On the other, a vision based on *soft law* solutions, which, through declarations of principles, compilations of good practices, and voluntary models, achieve a higher level of respect for human rights from multinational corporations. Both models have been developed at the same time, and their history begins in the 1970s when, on the one hand, the United Nations began to discuss a Code of Conduct for corporations and the OECD launched—in 1977—a Guide for transnational companies of a voluntary nature.⁷

1. Towards an international treaty

The push towards a binding international treaty of “hard” law was marked by numerous marches and countermarches and deep disagreements marked by the geopolitics of the respective decades. This story, already long and complex, can

⁴ S. KHOURY, *Corporate Human Rights Violations: Global Prospects for Legal Action*, 1, Routledge, 2016, p. 6 Retrieved from <https://www.taylorfrancis.com/books/9781315620145> («... the theory and practice of international human rights law is actually based on the doctrine of sovereignty.»); D. Kinley; J. Tadaki, «From Talk To Walk: The Emergence Of Human Rights Responsibilities For Corporations At International Law», *VIRGINIA JOURNAL OF INTERNATIONAL LAW*, vol. 44, 4, 2003, Retrieved from <https://heinonline.org/HOL/P?h=hein.journals/vajint44&i=941>.

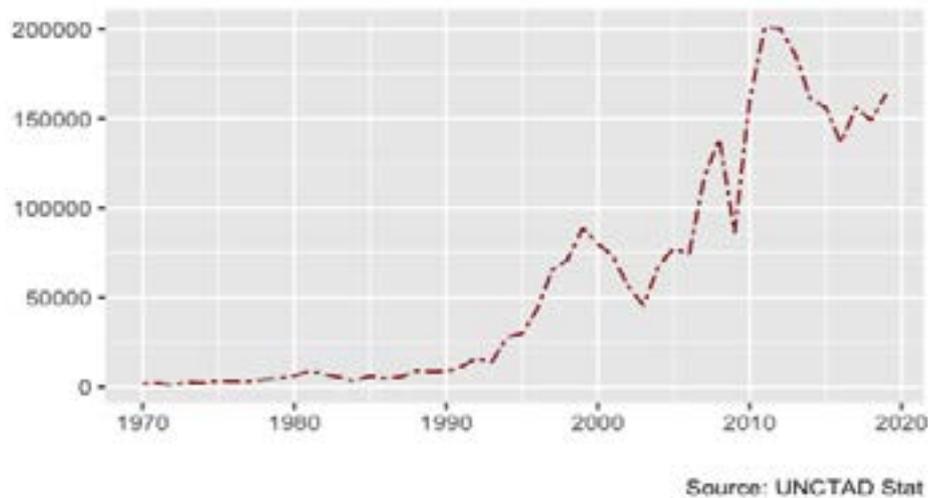
⁵ On this point, see in general the way in which the Inter-American Court approached the issue in its system and in other systems compared in Corte IDH, *Titularidad de derechos de las personas jurídicas en el Sistema Interamericano de Derechos Humanos*, Serie A 22. Opinión Consultiva (Feb. 26, 2016).

⁶ C. Jochnick, «Confronting The Impunity Of Non-State Actors: New Fields For The Promotion Of Human Rights», *HUMAN RIGHTS QUARTERLY*, vol. 21, 1, 1999, Retrieved from http://muse.jhu.edu/content/crossref/journals/human_rights_quarterly/v021/21.1jochnick.html; D. inley; J. Tadaki, “From Talk to Walk”, cit.

⁷ OECD, «OECD Guidelines for Multinational Enterprises». OECD, Paris, France. 2011.

be summarized in two moments in which solutions were proposed that—in the end—would not be accepted.

First, in 1974 the *Commission on Transnational Corporations* and the *United Nations Center on Transnational Corporations* (UNCTC) were created. The latter made it a priority to develop a code of conduct for transnational corporations. For almost thirty years, the code of conduct was intensively debated within the United Nations but it never reached the necessary consensus to be adopted.⁸ It was a period marked by the “politicization of votes in the United Nations ... by the Cold War and post-colonial divisions ...”⁹ These divisions questioned the type of solution to be adopted and also expressed a profound disagreement, which would be resolved around the 1990s after the fall of the Soviet Union and the imposition of the so-called “Washington Consensus.” The code of conduct never went beyond its “draft” status, while at the global level bilateral treaties aimed at promoting and protecting foreign direct investment multiplied, a process in which TNCs played a leading role (Figure 1).¹⁰



In 1998 the idea of a code of conduct resurfaced: a Working Group was created within the framework of the UN Sub-Commission on the Promotion and Protection of Human Rights that produced a draft known as the *Draft Norms*, which was approved in 2003 [12]. The *Draft Norms* implied a strong commitment to a

⁸ S. KHOURY, *Corporate Human Rights Violations*, cit., pp. 29-31.

⁹ D. Coleman, «The United Nations And Transnational Corporations: From An Inter-Nation To A “Beyond-State” Model Of Engagement», *GLOBAL SOCIETY*, vol. 17, 4, 2003, p. 339, Retrieved from <http://www.tandfonline.com/doi/full/10.1080/1360082032000132135>.

¹⁰ *Ibid.*, p. 347.

system that created direct obligations to TNCs and that established an enforcement mechanism that included monitoring by non-governmental agents.¹¹ Like voluntary strategies, it emphasized the *due diligence* responsibility of corporations and created the obligation to assess impacts on human rights.

Despite the initial support of certain companies and governments and a large part of civil society, the *Draft Norms* were strongly rejected once they were presented for debate.¹² Critics considered that they were not limited to new codifications of existing human rights norms, but developed them in new directions. Furthermore, they disagreed with the important legal role it assigned to TNCs and with the lack of clarity about new concepts such as “spheres of influence” adapted from the world of corporate social responsibility (CSR).¹³ The *Draft Norms* were permanently abandoned in 2005 when John Ruggie was named *Special Representative on Human Rights and Transnational Corporations* and the work of regulating the accountability of TNCs was transferred to other United Nations bodies.¹⁴

Although after the abandonment of the *Draft Norms*, the voluntary model seems to have been imposed, in 2013 a group of states led by Ecuador—most of them developing countries—asked the Human Rights Council to relaunch the process of creation of a treaty.¹⁵ This led to the creation of a Working Group in 2014 that has been working on a draft for a new binding treaty. The most recent version was presented at the end of 2019 and several regional consultations were organized in 2020.¹⁶ So far, the working group has carried out six discussion sessions in which various contributions have been received and progress has been made in the production of a *zero draft* of a “mandatory legal instrument” and an optional protocol.¹⁷ In any case, and taking into account the precedents of the 1970s and the non-aligned countries, it is not clear how this process could avoid the fate of the *Draft Norms* as a consequence of the lack of support from the corporate world and the central countries.

¹¹ P. P. Miretski; S.-D. Bachmann, «The UN “Norms On The Responsibility Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights”: A Requiem», *DEAKIN LAW REVIEW*, vol. 17, 1, 2012, Retrieved from <https://ojs.deakin.edu.au/index.php/dlr/article/view/68>.

¹² The rejection even came from the previous UN Human Rights Commission that declared that it had not requested this type of document and that it clarified that it had no legal power. Read more at P. P. Miretski; S.-D. Bachmann (*ibid.*), 17.

¹³ *Ibid.*

¹⁴ *Ibid.*, 8.

¹⁵ H. Cantú-Rivera, «Regional Approaches In The Business & Human Rights Field», *L'OBSERVATEUR DES NATIONS-UNIES*, vol. 35, 2013, p. 59.

¹⁶ Retrieved from: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>.

¹⁷ Retrieved from: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

2. The voluntary model

The voluntary model began as a standardization process of good practices and common criteria. One of the main milestones in that direction was the OECD's *Guidelines for Multinational Enterprises*, which was published as an annex to its *Declaration on International Investment and Multinational Enterprises in 1976*.¹⁸ The Guide was a significant document to shape the principles and standards that made the “responsible corporate conduct” of transnational companies. An analysis carried out at that time stated that the process followed gave it significant strength: although it was still a voluntary scheme, the fact that it is the OECD countries that recommend these standards could not be easily ignored by companies, for reasons of “good public and governmental relations.”¹⁹ It asserted the importance of *due diligence* as a way to assess the negative impacts of productive activities and the risks involved, and offered specific guidelines for sectors where risks were most prevalent, such as the extractive industry, agriculture, finance, and clothing.

“In sum, the Guidelines impose some significant de facto obligations on companies doing business abroad. Most are fairly reasonable, some could be confusing and others could possibly become quite onerous. In the context of the broader package, however, it certainly will be more difficult for countries to build new barriers to foreign trade or investment, and provide a basis for rebuilding relations between multinational companies and the public.”²⁰

This model continued to expand the following year when the International Labor Organization (ILO) published the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. The declaration was intended to guide member countries, employers and workers regarding “good practices in the workplace.”²¹ Like the OECD guidelines, the ILO declaration was also voluntary, but both had “implementation mechanisms that allowed scrutiny of corporate behavior.”²² Thus, for example, the OECD model was based on the establish-

¹⁸ OECD, “OECD Guidelines for Multinational Enterprises,” cit.

¹⁹ D. J. Plaine, «The OECD Guidelines For Multinational Enterprises», *INTERNATIONAL LAWYER*, vol. 11, 2, 1976, p. 343.

²⁰ *Ibid.*, p. 345.

²¹ ILO, «Tripartite Declaration of Principles concerning Multinational Enterprises and Social PolicyPolicy.» International Labor Office, Geneva. 1977.

²² D. Kinley; J. Tadaki, “From Talk to Walk”, cit.

ment of *National Contact Points for Responsible Business Conduct (NCPs for RBC)*, which are agencies established by governments that should promote the guidelines and guide companies in their *due diligence* evaluations. In addition, they are in charge of a “non-judicial” mechanism for receiving complaints.

This voluntary model should be located within the more general framework of *corporate social responsibility (CSR)*, a concept that also expanded in the 1980s and 1990s and that seeks to lead companies to adopt good practices on a voluntary basis, generally as a consequence that these actions result in benefits of different types (reputational, which are eventually expressed in profits) or “ethical” conceptions regarding the role of private corporations in a modern society.²³ Voluntary models for transnational corporations grew in parallel with the expansion of this concept: in 1977 the *Sullivan Principles* aimed to prevent western corporations from being complicit in the *apartheid* system in South Africa, and the McBride principles sought to avoid discriminatory practices between Catholics and Protestants in Northern Ireland.²⁴

In these cases, the agencies that “create” the rules that apply globally to an industry act as normative beacons, which enjoy a certain authority—reputational or derived from the advanced process—to impose those norms as the standard to rule in the industry in question.²⁵ Over time, these practices spread especially in high-profile sectors like the extractive industries. Although companies tend to invest considerable resources in these types of internal processes, the main difficulty in evaluating their impact was always related to the lack of external review mechanisms and a unified criterion regarding what corporate responsibility, accountability and *due diligence* actually mean. In this sense, Bittle and Snider recall that in study that analyzed 96 complaints processed by the OECD’s NCP system in a period of ten years, only five resulted in genuine changes in corporate behavior.²⁶

Another practice derived from and linked to HRIAs is the so-called Privacy Impact Assessment (PIA), which became popular after the UK *Information Commissioner Officer* produced a guide in 2007 and the European Commission

²³ On the different theories of corporate social responsibility, see E. Garriga; D. Mele, «Corporate Social Responsibility Theories: Mapping The Territory», *JOURNAL OF BUSINESS ETHICS*, vol. 53, 2004.

²⁴ D. Kinley; J. Tadaki, “From Talk to Walk”, cit.

²⁵ K. ABBOTT; D. SNIDAL, «The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State», in Walter Mattli, Ngaire Woods (eds.) *The politics of global regulation*, Princeton University Press, Princeton, 2009, p. 56 (where he spoke of «entrepreneurs» of norms, to refer—especially—to international NGOs that have led similar processes).

²⁶ S. Bittle; L. Snider, «Examining The Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?», *CRITICAL CRIMINOLOGY*, vol. 21, 2, 2013, p. 185, Retrieved from <https://doi.org/10.1007/s10612-013-9177-4>.

issued a similar recommendation in May 2009.²⁷ This model seems especially useful to think about HRIAs in the digital field because they are presented as a reduced version but with a clear presence in the telecommunications and computer services industry and which is promoted by state data protection agencies that operate under regulatory legal mandates. The adoption of the GDPR in May 2018 validated these previous advances and made PIAs a central tool in the European data protection scheme.

3. The triumph of the voluntary model: the UN Global Compact and the Ruggie Report

Towards the end of the 1990s, the Secretary-General of the United Nations, Kofi Annan, promoted a different approach to the “code of conduct” that had already failed to advance in the United Nations system for more than two decades. Thus, in 2000 it launched the so-called *Global Compact* (UNGC),²⁸ which raised ten very general principles, based on the Universal Declaration of Human Rights, the ILO Declaration of Fundamental Principles of Labor Law, the Rio Declaration on Environment and Development and the United Nations Convention against Corruption. The first two principles refer to human rights: companies must respect human rights and must not be complicit in their violation.²⁹ This *voluntary* model was clearly preferred and even actively supported by multinational companies, and as a matter of fact the mere existence of the UNGC, as well as the OECD guidance, were invoked as “reasons” to reject “hard” law approaches,³⁰ which—at that time—were still in force in the form of the *Draft Norms*.

In this sense, the voluntary model seems to have arisen within the framework of a more general concern in the United Nations regarding the possibility of establishing efficient regulatory frameworks in the changing context marked by globalization, the processes of political and economic liberalization, and the ac-

²⁷ D. WRIGHT; P. DE HERT (EDS.), *Privacy Impact Assessment*, Springer Netherlands, Dordrecht, 2012, p. 4 Retrieved from <http://link.springer.com/10.1007/978-94-007-2543-0>.

²⁸ S. KHOURY, *Corporate Human Rights Violations*, cit., p. 45 («... this initiative emerged at precisely the same time as the Draft Norms; a very different initiative that sought to impose standards upon corporations whether they signed up to them or not. To put it bluntly, what is significant about the Global Compact is that it offered an entirely different—non-binding or “soft”—approach to the more ambitious aims of the UN Sub-Commission on the Promotion and Protection of Human Rights»).

²⁹ United Nations, *The Ten Principles: UN Global Compact*, INSTITUTIONAL, 2000, retrieved from <https://www.unglobalcompact.org/what-is-gc/mission/principles> Last access: June/25/2020.

³⁰ S. KHOURY, *Corporate Human Rights Violations*, cit., p. 42.

celerated technological changes.³¹ The recommendation that there were global actors—such as NGOs and transnational companies—that should participate in a global process seems to have been behind the triumph of the voluntary model.³²

When John Ruggie was appointed *Special Representative on Human Rights and Transnational Corporations* to the Secretary-General of the United Nations in 2005, the *Draft Norms* model was explicitly rejected.

“...the Norms exercise became engulfed by its own doctrinal excesses... Its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers—... [Thus, he concluded] the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights.”³³

Ruggie’s push for a model based on the *will* of corporations was given by a mixture of “legal formalism and pragmatism,”³⁴ and by the belief that only such a model could garner support in the Human Rights Council. In a sense, the previous history of the Code of Conduct seemed to support Ruggie’s pragmatic perspective, and the UNGC’s “voluntary” model began to prevail as the only possible solution.”

After an extensive consultation process that included field studies and private sector interventions, Ruggie issued two documents that—from our point of view—frame where HRIAs are situated today.³⁵ In 2007, he published a paper on methodological issues on HRIAs³⁶ and in 2008 he published his most important report:

³¹ On this point, see W. H. REINICKE; F. M. DENG; J. M. WITTE, *Critical choices: the United Nations, networks, and the future of global governance*, International Development Research Centre, Ottawa, 2000.

³² *Ibid.*, p. 22 («States and international organizations can no longer afford to bypass the concerns of transnational actors who have successfully politicized many global issues and have strengthened their bargaining positions with significant financial and ideological resources»).

³³ Quoted by S. KHOURY, *Corporate Human Rights Violations*, cit., p. 53.

³⁴ *Ibid.*, p. 58.

³⁵ According to Miretsi and Bachtman, Ruggie strategically prioritized the participation of states and members of the business world that he knew were crucial for the acceptance of the new model, while limiting the role of representatives of civil society. See P. P. Miretski; S.-D. Bachmann (“The UN «Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights»”, cit.)

³⁶ J. Ruggie, «Human rights impact assessments --- resolving key methodological questions». Human Rights Council, Geneva, Switzerland. A/HRC/4/74. 2007.

*Protect, Respect and Remedy: a Framework for Business and Human Rights.*³⁷ There, Ruggie presented his proposal for a response to the issue of corporations and human rights: a framework marked by three fundamental principles: respect, protect and remedy (PRR).³⁸ While the first concept clearly applies to states, as ultimately responsible for the protection of the human rights of their citizens and inhabitants, the second is an obligation designed for corporations.³⁹ The Ruggie report has offered—since then—a focal point of discussion for the future, while at the same time appearing to be the ultimate triumph of the “voluntary” model.⁴⁰

B. Regulatory background

The voluntary model of the PRR starts from a fundamental premise that seems descriptively correct: to point out and identify certain governance gaps that the weakening of power generates between multinational companies and the poor or developing states in which the former carry out their activities.⁴¹ This is due to certain dynamics that trigger international capital flows. As countries compete with each other for foreign investment, problematic incentives are generated that can lead—for example—to lower regulatory barriers to favor the domestic “business climate” and thus gain those funds perceived as essential to development.⁴² These structural inequalities

³⁷ J. Ruggie, “Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, cit.

³⁸ *Ibid.*, para. 9.

³⁹ *Ibid.*, p. 1.

⁴⁰ Some countries insist, however, on the “hard model”: in 2013 Ecuador proposed a Convention that did not have support within the United Nations.

⁴¹ Cf. J. Ruggie (“Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, cit.), para. 14. A critical view points out that the problem does not lie in the “gaps” caused by globalization, but in “the profit-maximizing imperatives of corporate capitalism.” See S. Bittle; L. Snider (“Examining the Ruggie Report”, cit.), 181; K. Abbott; D. Snidal (“The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State”, cit.), 57-58 (noting that states vary widely in their regulatory capacity)

⁴² In addition, there are other aspects of the *status* of corporations in international law that complicate the scenario. Ruggie gives several examples in his 2008 report: thanks to bilateral investment protection treaties, many companies can bring States to international arbitration instances for violation of these agreements as a result of the exercise—by the states—of normal and reasonable legislative powers, such as those that seek to improve the social or environmental conditions of their countries (para. 12); The TNCs are not unique entities, but are “legally diverse” entities, which makes the parent companies not obviously liable for the damages caused by their subsidiaries (para. 13). See also R. Shamir («Between Self-Regulation And The Alien Tort Claims Act: On The Contested Concept Of Corporate Social Responsibility», *LAW & SOCIETY REVIEW*, vol. 38, 4, 2004, retrieved from <http://onlinelibrary.wiley.com/doi/abs/10.1111/j.0023-9216.2004.00062.x>), 637 (“At stake, therefore, is the widening gap between the transnational character of corporate activity and the availability of both national and transnational regulatory regimes that may be invoked to monitor and restrain corporations irrespective of the territory in which they happen to operate. On the one hand, individual countries find it increasingly impossible or undesirable to tame the activities of MNCs. Impover-

explain why the most serious cases of human rights violations related to corporate actions occurred, predictably, where the “governance challenges were most intense ... in low-income countries, which were or had recently emerged from conflicts, in countries where the rule of law is weak and levels of corruption high ...”⁴³

This dynamic excludes from the universe of possible solutions to the relationship between companies and human rights other alternatives, based not on international human rights law but on the regulatory powers of national states. These alternatives are worth considering, however, for at least two reasons. First, because they provide a clear background on the practice of HRIAs. Second, because they allow us to imagine an alternative regulation that could influence how HRIAs develop in the future.

4. Environmental regulations and impact studies

Environmental impact assessments (EIAs) are an obvious precursor to HRIAs. These were born in the United States with the enactment of the *National Environmental Policy Act* (NEPA) and the creation—in 1970—of the *Environmental Protection Agency*.⁴⁴ This federal agency is in charge of protecting the environment from potential damage from industrial practices and other economic activities. NEPA established federal standards that could be enforced—sometimes through litigation—and established a federal bureaucracy in charge of enforcing them.⁴⁵

As a precedent it is important because the model of environmental impact studies spread all over the world: it was adopted in the United Kingdom and by the European Union as a way to negotiate private investments and industrial developments with public standards on environmental matters.⁴⁶ Initially as a subcat-

ished countries, often desperate for foreign investment, are unable or unwilling to introduce legal measures that may inhibit corporate investment or may cause MNCs to relocate to more hospitable countries”).

⁴³ J. Ruggie, “Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, cit., para. 15.

⁴⁴ J. GLASSON, *Introduction to Environmental Impact Assessment*, Taylor & Francis Ltd., Hoboken, 1998, pp. 26-27.

⁴⁵ *Ibid.*, pp. 27-28.

⁴⁶ Environmental impact studies seem like clearly precursors to HRIAs. The evolution of EIAs is indicative of a possible trajectory for HRIAs: it was pioneering legislation in the United States in the 1970s that began to influence corporate practices, then a 1985 European directive and a UK regulation of 1988 “settled” the practice. The regulations of national states and regional bodies appear to be relevant to promote this type of corporate responsibility practices. See J. Glasson {Smallcaps},* *Introduction to Environmental Impact Assessment*, *Cit.*, 2-3. *It is also interesting to note how in the mid-1990s EIAs in the US began to include a dimension of “environmental justice”, due to the disproportionate impact that pollution had on traditionally discriminated minorities, something that led to the Executive Order on Federal Actions to Address 1994 Environmental Justice in Minority Populations and Low-Income Populations. See* Ibid.*, 34-35.”

egory of EIAs and later as an independent practice, social impact assessments (SIAs) are also an important precedent for HRIAs as they sought to predict a wide range of social impacts of infrastructure and extractivism projects.⁴⁷ HRIAs are not regulated in the same way as EIAs, but some of their characteristics respond directly to this model.⁴⁸ In this sense, we must point to the *Convention on Environmental Impact Assessments* of 1991, which was signed by 44 countries and the European Union and which requires the production of impact studies under certain circumstances, especially when the environmental impact has the potential to affect the environment of neighboring countries.

5. National laws for corporate conduct abroad: ATCA, due diligence, and reporting models

The *Alien Tort Claim Act* (ATCA) is a domestic law of the United States that has extraterritorial scope, and which allows companies in that country to be held responsible for human rights violations committed abroad.⁴⁹ Unlike other laws, both in the United States and in other countries, ATCA can be invoked exclusively by foreign actors in civil actions before the federal courts of the United States.⁵⁰ It was not used for that purpose until the 1980s,⁵¹ when dozens of multinational companies were involved in lawsuits “for alleged violations of human rights occurring in conjunction with their operations in developing countries or in places governed by repressive regimes.”⁵² A 2004 case significantly narrowed down the type of issues that can be encompassed by this rule and limited it only to “universally recognized civil and political rights violations such as summary executions.”⁵³

⁴⁷ See A. M. Esteves; D. Franks; F. Vanclay, «Social Impact Assessment: The State Of The Art», *IMPACT ASSESSMENT AND PROJECT AL*, vol. 30, 1, 2012, retrieved from <https://doi.org/10.1080/14615517.2012.660356>.” “in” “[^45]: See A. M. Esteves; D. Franks; F. Vanclay, «Social Impact Assessment: The State Of The Art», *IMPACT ASSESSMENT AND PROJECT APPRAISAL*, vol. 30, 1, 2012, retrieved from <https://doi.org/10.1080/14615517.2012.660356>.”

⁴⁸ See A. M. Esteves; D. Franks; F. Vanclay, «Social Impact Assessment: The State Of The Art», *IMPACT ASSESSMENT AND PROJECT APPRAISAL*, vol. 30, 1, 2012, retrieved from <https://doi.org/10.1080/14615517.2012.660356>; J. Ruggie, “Human rights impact assessments --- resolving key methodological questions”, cit., para. 3 (pointing out this connection).

⁴⁹ D. Kinley; J. Tadaki, “From Talk to Walk”, cit.

⁵⁰ R. Shamir, “Between Self-Regulation and the Alien Tort Claims Act”, cit.

⁵¹ C. Arevalo, «Is An International Corporate Human Rights Liability Framework Needed? An Economic Power, Business And Human Rights, And American Extraterritorial Jurisdiction Analysis», *OPINIÓN JURÍDICA*, vol. 12, 2013; R. Shamir, “Between Self-Regulation and the Alien Tort Claims Act”, cit., p. 639 (“ATCA had hardly been invoked until 1980 when a Paraguayan man used it to sue a Paraguayan policeman who had tortured his son to death in Paraguay and who had later immigrated to the United States”).

⁵² R. Shamir, “Between Self-Regulation and the Alien Tort Claims Act”, cit., p. 638.

⁵³ USSC, *Sosa v. Alvarez-Machain*, U.S. 542:692 (Jun. 29, 2004).

Other models of local liability for extraterritorial actions have emerged in recent years. For example, efforts to combat human trafficking and the use of slave labor in global supply chains led to legislation that requires companies to report their policies in this regard. One of the first laws in that sense was the *California Transparency in Supply Chains Act* of 2010 (CATSCA), which requires *retail* companies to publish on their websites the policies they implemented to identify and fight against slave labor in their supply chains.⁵⁴ While CATSCA was hailed as an important step towards corporate accountability through greater transparency towards consumers, in practice it has operated more as a tool for *soft law* that is difficult to invoke against companies that choose not to comply. Companies must report if they have policies against human trafficking, but there are no specific requirements on the level of information or the effectiveness of the tactics used, nor is there any mechanism or authority to evaluate that information. The norm does not extend to subcontractors and as it prevents any type of legal action by private citizens, it only allowed the extraction of useful information for claims under other mechanisms.⁵⁵

The UK established a similar mechanism through the *Modern Slavery Act* of 2015. Although the rule consolidated and increased offenses related to “modern slavery,” the provisions related to corporate conduct in section 54 on “Transparency in the Supply Chain” are *soft law* standards: they require companies with annual profits of more than 36 million pounds to produce an annual report on “slavery and human trafficking.”⁵⁶ The document must include the steps taken so that there is no slave labor or human trafficking in its supply chains, but there are no penalties for non-compliance with the obligation unless the Secretary of State decides to expressly require compliance with the norm.

Finally, a different model is given by a 2018 French law on the “duty of vigilance.” The norm establishes substantive obligations to identify and prevent human and

⁵⁴ B. T. Greer, «Opaque Transparency: Why California’s Supply Chain Transparency Act Is Unenforceable», OÑATI SOCIO-LEGAL SERIES, vol. 8, 1, 2017, p. 36, retrieved from <http://opo.iisj.net/index.php/osls/article/view/899>.

⁵⁵ Two California cases alleged that the defendant companies had failed to take action on human rights violations in their supply chains, under the terms of consumer protection laws, CATSCA and anti-monopoly laws. These cases were *Sud v Costco Wholesale Corp.*, 15-cv-03783, US District Court, Northern District of California (San Francisco); *Barber v Nestle USA Inc.*, 15-cv-01364, US District Court, Central District of California (Los Angeles). See R. McCorquodale; L. Smit; S. Neely; R. Brooks («Human Rights Due Diligence In Law And Practice: Good Practices And Challenges For Business Enterprises», BUSINESS AND HUMAN RIGHTS JOURNAL, vol. 2, 2016.), 203; M. Koekkoek; A. Marx; J. Wouters («Monitoring Forced Labour And Slavery In Global Supply Chains: The Case Of The California Act On Transparency In Supply Chains», GLOBAL POLICY, vol. 8, 4, 2017, retrieved from <https://onlinelibrary.wiley.com/doi/abs/10.1111/1758-5899.12512>), 525

⁵⁶ V. Mantouvalou, «The UK Modern Slavery Act 2015 Three Years On», THE MODERN LAW REVIEW, vol. 81, 6, 2018, p. 1039, retrieved from <http://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12377>.

environmental rights abuses in its supply chains.⁵⁷ It applies to large companies in France (approximately one hundred in total) and establishes a legal obligation not only for the controlling companies but also for the companies they control, subcontractors, and suppliers.⁵⁸ The rule stands out because it allows the judiciary to intervene to determine whether corporate plans are complete and comply with the obligations derived from the rule.⁵⁹ Although the sanctions included in the norm were rejected by the Constitutional Council, it is possible to sue companies before the French civil justice.⁶⁰

In 2018, the Senate of the Netherlands adopted a *due diligence* law, but in this case, focused on child labor. This rule would require companies operating in that country to identify and prevent child labor in their supply chains.⁶¹ The norm introduced the “duty of care” to prevent human rights violations, which creates a general duty of *due diligence* different from the duty of care that governs civil liability. The rule cannot be invoked by victims or consumers to sue a company, but they can file a complaint with a regulatory authority if the company does not respond to an initial complaint. The rule is in any case significant because it is the first to establish criminal sanctions (a fine in principle symbolic that can be increased if there is no compliance in five years) for failing to exercise this analysis of human rights *due diligence*. The regulation was to take effect in 2020 but was delayed by the Dutch government to develop complementary *enforcement* mechanisms. Switzerland is considering similar rules to the French.⁶²

The ATCA is a curious model. It enables individual action, something that *reporting* and *due diligence* models generally do not do. Furthermore, it is limited

⁵⁷ Cf. G. LeBaron; A. Rühmkorf, «The Domestic Politics Of Corporate Accountability Legislation: Struggles Over The 2015 UK Modern Slavery Act», *Socio-Economic Review*, vol. 17, 3, 2019, p. 719, retrieved from <https://academic.oup.com/ser/article/17/3/709/4683730>.

⁵⁸ ECCJ, «The French Duty of Vigilance Law - Frequently Asked Questions». European Coalition for Corporate Justice, Brussels. 2017.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ A. Hoff, *Dutch child labour due diligence law: a step towards mandatory human rights due diligence*, OHRH, 10/06/2019, retrieved from <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/> Last access: July/30/2020.

⁶² Cf. MVO Platform, *Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law*, MVO PLATFORM, 03/06/2019, retrieved from <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> Last access: July/30/2020. For a list of other due diligence and reporting laws around the world, see the list on: <https://www.business-humanrights.org/en/examples-of-government-regulations-on-human-rights-reporting-due-diligence-for-companies>.

only to foreign citizens, which greatly restricts the possibility of being activated as an effective mechanism of accountability. In this sense, it requires an important mobilization of resources that is very difficult for peripheral actors to achieve if they do not have the support of powerful local allies.⁶³ The cases discussed by Khoury and Whyte suggest that this mobilization is essential to use laws like the ATCA in an effective way.⁶⁴ Likewise, the *reporting* and *due diligence* models may work differently, because they start from the principle of imposing certain special obligations on companies and include some type of regulatory supervision by state agents, although this supervision seems to be minimal: nowhere near the kind of strict regulation envisaged by environmental regimes. These standards are still too new, and they lack clear or effective implementation mechanisms. It remains to be seen whether these mechanisms will develop in the future.

The fundamental difference between NEPA and the models of liability for extraterritorial actions is that in the first case, the main interest of the regulation is the safeguarding of public goods of the country in which the regulation originates. Conversely, on the second, the interest of the legislator seems to be the protection of the interests of third parties, people who—by definition—are not represented by the political system. This explains, perhaps, why the first model is effective in terms of substantive standards and *enforcement* mechanisms and the second is just beginning to move in that direction. As long as these types of regulations do not provide adequate implementation mechanisms or do not facilitate—for example—the direct demand of victims to the responsible companies, they will remain in a *normative* world that seems quite similar to that of voluntary *soft law* that we discussed in the previous section.

C. The HRIA: minimum contents and standards

Our preliminary analysis of HRIAs as mechanisms of accountability, *due diligence*, and *corporate responsibility* places them as the instrument of choice for promoters of the *voluntary* model that has prevailed at the UN and internationally. However, its minimal contents, characteristics, and processes seem to be developing in an obscure way. Ruggie's 2007 report on the methodological problems of HRIAs is revealing in this regard: his study is mostly a “conceptual”

⁶³ R. Shamir, “Between Self-Regulation and the Alien Tort Claims Act”, cit., p. 638.

⁶⁴ See S. KHOURY, *Corporate Human Rights Violations*, cit., pp. 94-97 (discussing several cases in the United States, which were supported by established, well-funded players in the human rights legal field).

analysis because, although he had detected numerous impact evaluation exercises, he could not evaluate their operation in detail because the relevant documents had not been published by the companies.⁶⁵

The triumph of the voluntary model then places HRIAs halfway between two other possible models that we have described. On the one hand, it is evident that environmental and social impact studies, based on national laws that impose obligations, establish implementation procedures, and create regulatory authorities, have inspired impact studies on human rights. But the latter, insofar as they inhabit the voluntary framework of the Ruggie model, lack the differential component offered by domestic law: adequate *enforcement* mechanisms, regulatory authorities with the capacity to act, and the possibility that victims of damage sue companies for the damages caused. HRIAs clearly do not have any of those elements. On the other hand, the voluntary model that began in the OECD and expanded to the United Nations is not totally innocuous from a regulatory point of view: it generates business practices that—framed within *corporate social responsibility*—can operate as true “norms” of the sector.⁶⁶ But, due to their voluntary nature, this type of norms cannot participate in the democratic legitimacy enjoyed by norms of hard law, a clear legitimacy in domestic law—given certain conditions—and derived in international law.⁶⁷ Furthermore, these norms lack a distinctive element to operate as legal norms: their mandatory nature.

It is doubtful that the voluntary model has had a decisive impact on business practices. As Bittle and Snider explain, much of the support from transnational corporations has been “purely rhetorical—a not uncommon situation in neo-liberal times whereby corporate claims of adhering to voluntary, non-binding principles are long on praise but short on evidence and/or action.”⁶⁸ This point of view allows a better understanding of the contents of Ruggie’s reports: they

⁶⁵ J. Ruggie, “Human rights impact assessments --- resolving key methodological questions”, cit., paras. 6-9.

⁶⁶ On the point, see K. Dingwerth, «The Democratic Legitimacy Of Public-Private Rule Making: What Can We Learn From The World Commission On Dams?», GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INTERNATIONAL ORGANIZATIONS, vol. 11, 1, 2005, p. 70, retrieved from https://brill.com/view/journals/gg/11/1/article-p65_6.xml («If we conceptualize rules as consciously devised and relatively specific commands for behavior whose normative authority is such that a certain level of compliance can reasonably be expected, then the guidelines developed by the WCD [World Commission on Dams] can be regarded as a set of such rules»).

⁶⁷ J. G. S. Koppell («Global Governance Organizations: Legitimacy And Authority In Conflict», JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY, vol. 18, 2, 2008, retrieved from <http://academic.oup.com/jpart/article/18/2/177/941886>) (for an interesting discussion on different types of legitimacy and their potential application in the international arena). However, see also K. Dingwerth (“The Democratic Legitimacy of Public-Private Rule Making”, cit.), 78-79 (arguing that we still do not have a clear criterion to determine the “legitimacy” of processes that escape the logic of the sovereign state, including agreements between states).

⁶⁸ S. Bittle; L. Snider, “Examining the Ruggie Report”, cit., p. 182.

are efforts to *encourage* companies to act in certain ways, in certain directions. His 2007 report on the “methodological” problems of HRIAs is revealing in that regard: it seeks to describe what impact evaluation studies should focus on. According to Ruggie, they should:

1. Describe the proposed business activity, analyzing the “full business life cycle, for example from construction through closure for large infrastructure projects, or from new market entry for information and communications businesses.”⁶⁹
2. Catalog “the minimum legal, regulatory and administrative criteria to which the activity is subject”⁷⁰ and describe “the area surrounding the business activity—the boundaries which should be agreed through consultation and initial scoping—before significant activity begins. Engagement of human rights experts and local stakeholders is critical to this step.”⁷¹ It is also necessary to expose those aspects that “are likely to change due to business activity.”⁷² On this point, the Ruggie report offers different alternatives, from elaborating multiple possible scenarios to predicting results based on “different degrees of intervention.” Finally, it is important to assess risks and “propose practical solutions to counteract such dangers.”⁷³
3. Generate a management plan that includes “provisions for monitoring the baseline indicators and revisiting the issues raised during the HRIA process. The management plan should include regular consultation with affected parties.”⁷⁴ Furthermore, “best practices that could be applied, for example, in the same business sector or region, or from similar situations in other industries or areas” should be “analyzed.”⁷⁵

⁶⁹ J. Ruggie, “Human rights impact assessments --- resolving key methodological questions”, cit., para. 11.

⁷⁰ J. Ruggie (*ibid.*), para. 12. The genealogy of HRIAs differ from their predecessors in that the normative source of the former (the environmental and social impact reports) have—in general—clear legal definition. But for Ruggie this does not represent an obstacle: HRIAs should take, as evaluation standards, international human rights law, and relevant local norms. See J. Ruggie (*ibid.*), para. 23. In this sense, the Abrahams and Wyss guide also considers that although there may be “overlap” with other studies (EIA and SIA, among others), this should promote coordination, since the HRIA encompasses aspects that other studies do not cover. See D. Abrahams; Y. Wyss («Guide to Human Rights Impact Assessment and Management». International Business Leaders Forum, International Finance Corporation & UN Global Compact, Washington D.C. 2010.), 20.”

⁷¹ J. Ruggie, “Human rights impact assessments --- resolving key methodological questions”, cit., para. 13.

⁷² *Ibid.*, para. 14.

⁷³ *Ibid.*, para. 15.

⁷⁴ *Ibid.*, para. 16.

⁷⁵ *Ibid.*, para. 17.

4. HRIAs should incorporate experts “on the local and human rights context” who are “heavily consulted,” and consideration should be given to bringing in third parties “who are independent.”⁷⁶
5. The HRIAs should be published in their entirety, but if there are risks in doing so, one could “publish only part or a summary of the assessment.”⁷⁷ The process can be “as or even more important than a final report. An impact assessment can serve as a convening mechanism to bring representatives of the company, community, and government together in dialogue. It is critical that HRIAs are based on consultations carried out in a manner that promotes genuine dialogue and relationship-building.”⁷⁸

Since then, this model has continued to build detailed descriptions of what a good HRIA should be. Take, for example, the *Guide to Human Rights Impact Assessment and Management* from the International Business Leaders Forum, International Finance Corporation and the United Nations Global Compact.⁷⁹ It is a detailed “practical” systematization of what it means to perform an HRIA. Its seven-stage model (Figure 2) is a detailed guide that companies interested in developing this type of study should follow.⁸⁰

⁷⁶ *Ibid.*, para. 18.

⁷⁷ *Ibid.*, para. 19.

⁷⁸ *Ibid.*, para. 20.

⁷⁹ D. Abrahams; Y. Wyss, “Guide to Human Rights Impact Assessment and Management,” cit.

⁸⁰ Other initiatives deserve to be mentioned. The *International Center for Human Rights and Democratic Development — closed in 2013 by the Government of Canada—created, in 2011, a 25-step, six-part guide to developing an HRIA, including preparation, the study of the legal framework, the adaptation of the guide to the findings, the investigation, the analysis, the report and the involvement with relevant actors and the monitoring of action plans. See* International Center for Human Rights and Democratic Development («Human Rights Impact Assessments». International Center for Human Rights and Democratic Development, Montreal, Canada. 2011.). On the other hand, the *Danish Institute for Human Rights* has a human rights project and companies that have developed multiple tools. Among them, it is worth highlighting the “sector” report carried out in 2015 regarding the ICT sector in Myanmar, which discussed—specifically—the potential impacts of the development of the ICT sector on the right to freedom of expression, non-discrimination, privacy, cybersecurity issues, etc. See Myanmar Center for Responsible Business; Institute for Human Rights and Business; Danish Institute for Human Rights («Myanmar ICT Sector Wide Impact Assessment». Myanmar Center for Responsible Business, Yangon, Myanmar. September 2015.), 122-213.”



Stages model from Abrahams and Wyss's Guide (2010: 12)

The main characteristics of these stages are the following:

- 1. Preparation.** It begins with adequate *due diligence*, which means the adoption of policies, processes, and evaluations aimed at safeguarding human rights in the normal development of company activities. HRIAs should start as a consequence of certain “enabling” factors (*triggers*) such as the context and nature of the human rights risks involved.”⁸¹
- 2. Identification.** It is about evaluating not only the risks but the applicable legal and judicial framework, the company’s culture, etc.⁸² It is an exhaustive mapping stage, not only with respect to the company and the country where it is going to carry out its activity, but also in relation to the potentially

⁸¹ D. Abrahams; Y. Wyss, “Guide to Human Rights Impact Assessment and Management”, cit., pp. 18-19.

⁸² *Ibid.*, p. 25.

affected actors, the suppliers, contractors, the industrial sector in which it will operate, and so on.

3. *Involvement*. HRIAs require questioning various actors, including future employees, local governments, vulnerable groups, NGOs, etc.⁸³
4. *Evaluation*. Primarily, evaluation of the risks, the context, and the different actors whose actions are relevant to the actions of the company.⁸⁴
5. *Mitigation*. This stage is about mitigating risks, starting with efforts to prevent the damage, reduce it, restore the situation as it was prior to the damage once it occurs, and compensate for the damage caused.⁸⁵
6. *Administration*. In this sense, the implementation or “administration” of the HRIA is a fundamental step in the Abrahams and Wyss methodology,⁸⁶ since it allows us to see how the previous evaluation and study work should be implemented by agents duly funded by companies, with access to sufficient resources and in compliance with specific and concrete goals.
7. *Evaluation*. The HRIAs should be—of course—subject to a permanent evaluation that allows reviewing what has been done and undertaking improvements.”⁸⁷

Both the PRR framework and this type of “clarification” of what HRIA should be could lead to “industry standards” if a sufficient number of companies adopt this type of criteria or practices as the “usual way of doing business.” But it is a very different model from alternative models, based on the regulatory capacity of the states, the imposition of substantive standards to be respected, and the establishment of effective monitoring and accountability mechanisms.”

D. HRIA and ICTs: problems, challenges, and questions

The triumph of the *soft law* model over the binding treaty model at the United Nations explains the popularity of HRIAs, even though there is little consensus

⁸³ *Ibid.*, pp. 35-41.

⁸⁴ *Ibid.*, p. 45.

⁸⁵ *Ibid.*, pp. 48-49.

⁸⁶ *Ibid.*, p. 53.

⁸⁷ *Ibid.*, p. 57.

on how, by whom, and for what they are carried out.⁸⁸ At the same time, different approaches to local law allow us to imagine alternative regulatory models, not based on international human rights law but rather on the sovereign decisions of the countries “of origin” of multinational corporations, which may—or may not—decide to impose obligations on their companies related to their extraterritorial actions. The unexpected activation of the ATCA in this regard in the 1980s in the United States is a possible model, which the *reporting* and *due diligence* laws of the United Kingdom, France, and the Netherlands seem to follow broadly. On the other hand, we believe that we should not lose sight of the environmental laws that created the “impact assessment” mechanisms that predate HRIAs: countries could well implement similar mechanisms but would face the *governance gap* that Ruggie identified and that—we believe—is empirically sustained as the core of the challenge that the PRR framework seeks to solve. Still, that framework has problems that Bittle and Snider identified with precision.⁸⁹

We would highlight one problem as fundamental: the PRR model does not foresee any *enforcement* mechanism and assumes that companies will take on the duty to “respect” human rights voluntarily, even when it goes against their commercial interests.⁹⁰ Indeed, ignoring “the structural contradiction between corporate legal obligations to maximize profits for its shareholders and its non-binding human rights obligations is a huge weakness of Ruggie’s work: corporations are legally bound to uphold the ‘laws market ... not human rights standards’”.⁹¹ Note that this flaw derives almost exclusively from the voluntary nature of the framework, which *can* exercise some kind of regulatory role in some industries or regarding some companies if they wish, but which does not *guarantee* that this will occur. This guarantee is what domestic law offers, either in its extraterritorial application (such as the ATCA model and similar) or in its local application, as is the case of environmental laws. It is a guarantee offered, although perhaps to a lesser extent due to problems of *enforcement*, by international law.

Given this scenario, it is worth asking what the potential of HRIAs in the ICT sector may be. As is known, HRIA practices have expanded—especially—in sectors with high impact at the local level and potential harm to human rights, such as, for example, the extractive industries sector. The expansion of HRIAs to the ICT sector

⁸⁸ J. Harrison, “Human Rights Measurement,” cit.

⁸⁹ S. Bittle; L. Snider, “Examining the Ruggie Report,” cit.

⁹⁰ *Ibid.*, p. 187.

⁹¹ *Ibid.*, p. 188.

makes sense because in recent years the impact that these types of companies can have on human rights has become clear. There are precedents in this regard.

For example, in November 2018 Facebook published an HRIA by *Business for Social Responsibility* (BSR) on the impact of its services in Myanmar, an assessment that was precipitated by the violence that broke out in that country using—it is assumed—the communication technologies that Facebook offers.⁹²

The report identified impacts on issues of security, privacy, freedom of expression, the right to assembly, children's rights, non-discrimination, living standards, and access to culture. It did not find that Facebook had “caused or contributed” to negative impacts on any of them but was indirectly linked to violations of rights to security and freedom of expression by the actions of users that violated its “Community Standards,” as well as government actions requiring content removal. Still, Facebook acknowledged that “it had not done enough to prevent the platform from being used to foment division or incite violence offline.”⁹³ In May 2020, Facebook also conducted environmental impact studies for its presence in Cambodia, Indonesia, and Sri Lanka, but this time it only published executive summaries on the assessments.

The HRIA model also seems to have been embraced by relevant actors in the sector such as the *Global Network Initiative* (GNI), in particular through the *GNI Principles on Privacy and Freedom of Expression*, which calls on member companies of the GNI to “identify the circumstances in which freedom of expression and privacy may be threatened or may be promoted” and to “integrate these Principles into its decision-making processes.”⁹⁴ These analyses can be carried out by internal teams or external experts,⁹⁵ and the GNI insisted that the results of the *due diligence* and impact assessments be published. The initiative is interesting for several reasons. On the one hand, by embracing a multi-stakeholder model, the GNI seeks to be a separate governance and rule-making mechanism from the states, both at the local level—in the exercise of state rule-setting pow-

⁹² A. Stevenson, «Facebook Admits It Was Used to Incite Violence in Myanmar», THE NEW YORK TIMES, 6/11/2018, retrieved from <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html> Last access: July/30/2020.

⁹³ A. Warofka, *An Independent Assessment of the Human Rights Impact of Facebook in Myanmar - About Facebook*, ABOUT FACEBOOK, 05/11/2018, retrieved from <https://about.fb.com/news/2018/11/myanmar-hria/> Last access: July/30/2020.

⁹⁴ GNI, «GNI Principios de Libertad de Expresión y Privacidad», 2020, retrieved from <https://globalnetworkinitiative.org/gni-principles> Last access: August/14/2020, *Increasing Transparency on Human Rights Due Diligence and Impact Assessments by GNI Company Members*, GLOBAL NETWORK INITIATIVE, 15/05/2020, retrieved from <https://globalnetworkinitiative.org/increasing-transparency-on-human-rights-due-diligence-and-impact-assessments-by-gni-company-members/> Last access: August/13/2020.

⁹⁵ GNI, “Increasing Transparency on Human Rights Due Diligence and Impact Assessments by GNI Company Members,” cit.

ers—and at the international level.⁹⁶ On the other hand, it incorporates specific accountability mechanisms that allow overcoming—at least in part—the limits of access to information of the voluntary models indicated above. In this sense, the GNI is presented as a model specifically aimed at the ITC sector that needs to be closely followed, along with other multi-stakeholder initiatives such as the Freedom Online Coalition Advisory Network, the GSM Association (GSMA), the European Telecommunications Network Operators (ETNO) and the Reform Government Surveillance (RGS) coalition.⁹⁷

We bring up these examples from GNI, Facebook, and the production of HRIA for two reasons: first, because they reveal the potential use of the tool in the ICT sector, and—second—because they expose at least some of its limits. Indeed, one of the main criticisms raised about HRIAs is that the lack of adequate information on this type of process prevents measuring their effectiveness. To what extent are HRIAs based on acceptable or valuable methodologies? How do you arrive at conclusions? When these reports are not made public, such an assessment is outright impossible. On the other hand, HRIAs can identify shortcomings that other practices such as SIA do not recognize,⁹⁸ but how to know that they lead to changes in corporate practices? These shortcomings seem to be closely related to the *voluntary* nature of the PRR framework that places HRIAs as one of the central tools: without an external regulatory authority that can review impact studies—as happens at the local level with environmental laws—the public is left without an adequate *enforcement* mechanism on the standards they seek to respect. This lack of a central authority could be replaced—for example—by strict monitoring of HRIAs or corporate practices by civil society agents with adequate resources, but we doubt that this role could be similar to that of the regulatory authorities.⁹⁹

⁹⁶ Cf. GNI, «The GNI Principles at Work». Global Network Initiative, Washington D.C. 2019. pp. (“GNI was launched in 2008. Its mission is to protect and advance freedom of expression and privacy rights in the information and communications technology (ICT) sector by setting a global standard for responsible decision making and serving as a multistakeholder voice in the face of government restrictions and demands. GNI brings together ICT companies, civil society (including human rights and press freedom groups), scholars, academic institutions, and investors from around the world to provide a framework for responsible company decision making, foster accountability by member companies, offer a safe space for shared learning, and provide a forum for collective advocacy in support of laws and policies that promote and protect freedom of expression and privacy”).

⁹⁷ This model seems to be quite close to the mixed regulation proposals of Abbott and Snidal, which identify four key competencies that the effective regulator must possess: independence, representativeness, expertise, and operational capacity. The GNI seems to be heading in that direction. See K. Abbott; D. Snidal (“The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State,” cit.), 46-47

⁹⁸ A. M. Esteves; D. Franks; F. Vanclay, “Social impact assessment,” cit.

⁹⁹ About this, see e.g. <https://rankingdigitalrights.org/>.

These problems do not yet have a definitive answer. In a follow-up report, we will assess the potential of HRIAs in the ICT sector, but we will do so based on some of the questions that this report raises. To what extent does the voluntary nature of HRIAs limit their scope? What conditions should be fulfilled for HRIAs—even within the limited voluntary framework of the PRR model—to be a useful or at least positive tool for the protection and safeguarding of human rights? What is the role of “external evaluators” and what kind of relationship should they have with the companies that hire them? Are there parameters that regulate this relationship in some way? In particular, the future report will describe the substantive contents that HRIAs must have according to the model of good practices, standards, and guiding principles and will try to bring them closer to the specific challenges of the telecommunications sector.

In this sense, we present a significant problem: how is it possible to evaluate the impact of complex communications services without a proper understanding of “how they operate” those services in the field? Facebook’s impact study in Myanmar is revealing in this regard: it finds “links” between the service and rights violations, but the latter are the responsibility of users (who violate the *Community Guidelines*) and the government (which requires downloading content). This result is somewhat “to be expected” in the sector at least as far as intermediaries are concerned: the immunity or *safe harbor* model that created Section 230 of the *Communications Decency Act* of 1996 continues to be—as of today—the model in force throughout the world and that international human rights standards have adopted. If so, what different conclusions or significant contributions can an HRIA make if the ultimate responsibility for human rights violations does not lie with the companies that provide a service but with the users who abuse it? What role can an HRIA play in “modifying” corporate behavior if—by definition—it could not identify cases in which abuses were caused by companies? We believe it is relevant to closely follow the evolution of the practice because it seems to us that it is inserted in a time of global change in which the main intermediary platforms are under increasing pressure to change their behavior. Regulatory models, in that sense, are not completely off the table.

Perhaps, the future will hold a new form of regulation, which will reject the pure models described here but—at the same time—will incorporate elements of all of them. The ICT sector seems to be particularly positioned for this: it is a sector in which the voluntary self-regulation model was more clearly imposed thanks to the *Terms of Service* and the *Codes of Conduct* that multiple platforms for the creation and circula-

tion of content created since the rise of the Internet.¹⁰⁰ But this self-regulatory model is being challenged in recent times, which is why Marsden, Meyer, and Brown proposed the *co-regulation* model adopted in the European Union that could mix elements of “hard” and “soft” law.¹⁰¹ This model could take different forms, but it is basically a system in which the authority that effectively regulates is independent of the government and the regulated companies, but a large part of the actual work falls on them.

The model includes voluntary elements as those described in this work, such as—for example—the development of standards and guides for a certain industry, but they are evaluated and approved by a legislative authority (in this case, the European Union) to determine whether or not these standards effectively represent good practices in the industry.¹⁰² This allows them to imagine a different form of regulation, which, far from opting for two strict models—the *soft* model of self-regulation or the *hard* one of state regulations—mixes them.¹⁰³ For the technology companies sector, they imagine five different possibilities: (a) the preservation of the *status quo* of self-regulation; (b) self-regulation “coordinated” with governments; (c) formal self-regulation, recognized by the authorities and with financing external to the industry; (d) a co-regulation led by the European Union; and (d) legislative regulation by states.”¹⁰⁴

We bring up these regulatory perspectives because the ICT sector—especially through the GNI—seems to be heading in that direction. In this context, HRIAs could play a relevant role in the future. For the moment, they seem caught between the entirely voluntary world in which they were born and the regulatory models that could influence their future. Perhaps the chips fall into some intermediate option in which case HRIAs could become an effective risk management tool and assessment of the impacts that technology companies have on the human rights of the citizens they seek to serve.

¹⁰⁰ On this particular point, see L. LESSIG, *Code*, Version 2.0, Basic Books, New York, 2006, Ch. 6 (where he describes how the different «communities» of the web were creating their own rules and codes of conduct, a practice that—at the beginning of the 20th century—was adopted by the large content platforms and today effectively regulates much of the content that circulates on the Internet).

¹⁰¹ K. ABBOTT; D. SNIDAL, “The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State,” cit., p. 44; C. Marsden; T. Meyer; I. Brown, «Platform Values And Democratic Elections: How Can The Law Regulate Digital Disinformation?», *COMPUTER LAW & SECURITY REVIEW*, vol. 36, 2020, p. 9, retrieved from <http://www.sciencedirect.com/science/article/pii/S026736491930384X>.

¹⁰² C. Marsden; T. Meyer; I. Brown, «Platform Values And Democratic Elections: How Can The Law Regulate Digital Disinformation?», *COMPUTER LAW & SECURITY REVIEW*, vol. 36, 2020, pp. 9-10, retrieved from <http://www.sciencedirect.com/science/article/pii/S026736491930384X>.

¹⁰³ *Ibid.*, p. 10.

¹⁰⁴ *Ibid.*, pp. 10-11.