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**HUMAN RIGHTS VIOLATIONS COMMITTED BY CERTIFIED COMPANIES: ASSESSING THE  
ACCOUNTABILITY OF THIRD-PARTY CERTIFIERS**

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# **HUMAN RIGHTS VIOLATIONS COMMITTED BY CERTIFIED COMPANIES: ASSESSING THE ACCOUNTABILITY OF THIRD-PARTY CERTIFIERS**

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## **ABSTRACT**

The role of private entities in certifying the respect of human rights and social standards by business enterprises has gained considerable importance in recent times. However, cases involving textile companies especially shed a light on the fact that the release of certifications do not always correspond to effective prevention and application of human rights standards by certified companies. In this framework, a full accountability of auditing companies for poor auditing standards is far from being established in practice. The paper will try to answer the question of whether it is about the time to hold accountable certifiers for contributing to corporate abuses. This is not only supported by recent domestic case-law, but also by soft law instruments such as OECD Guidelines for MNEs, and required by the most recent version of the Zero Draft Treaty.

**KEYWORDS:** Supply chain – human rights — third-party certifiers – social accountability standards – UN Guiding Principles – OECD Guidelines

# HUMAN RIGHTS VIOLATIONS COMMITTED BY CERTIFIED COMPANIES: ASSESSING THE ACCOUNTABILITY OF THIRD-PARTY CERTIFIERS

Elena Corcione\*\*

## 1. Introduction

This paper argues that business and human rights standards require third-party certifiers to be held liable for negligent auditing activity towards the victims of human rights violations perpetrated by certified companies.

The main obstacle still lies in the fact that international human rights law and international labor standards impose hard obligations to respect human rights primarily on States. Therefore, multinational enterprises are still able to take advantage of legislative gaps in human rights protection between different legal systems, by outsourcing their production in third countries with low human rights standards and poor enforcement mechanisms. Furthermore, nowadays the respect of human rights and minimum labor standards in industrial production is not (most of the times) a compulsory requisite to put goods in the market, contrary to what happens with technical requisites of products.<sup>1</sup> However, obtaining certificates attesting a company's respect of social or sustainability standards has become of clear importance, since it is *de facto* necessary to enter certain (western) markets.<sup>2</sup> This, in turn, transformed most of the major certifiers in "gatekeepers".<sup>3</sup>

The activity of third-party certifiers has therefore gained considerable importance in all business sectors, especially those involving long supply chains in the production cycle, such as the food or textile sectors.<sup>4</sup> Further elements concur to make social accountability certifications a necessity and, as a consequence, to confer such a prominent role of certifiers in the global market. Long supply chains ask for controls that cannot be managed directly from the top of the supply chain,

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<sup>1</sup> In some sector even regulated, see within the EU the use of harmonized standards and the role of private entities SCHEPEL, *The new approach to the new approach: the juridification of harmonized standards in EU law*, Maastricht Journal of European and Comparative Law, 2013

<sup>2</sup> Certification is *de facto* imposed by western retailers when outsourcing production phases in third countries, see TERWINDT, SAAGE-MAASS, *Liability of Social Auditors in the Textile Industry*, 2016, p. 12.

<sup>3</sup> DE BRUYNE, *A Conceptual and Comparative Analysis of the Obligations of third-party Certifiers*, Ohio Northern University Law Review, 2018, p. 204

<sup>4</sup> The latter has been recently examined by Clean Clothes Campaign in the report *Fig Leaf for Fashion: how social auditing protects brands and fails workers*, 2019.

unless it is possible to trust third parties on the reliability of business partners. On the other hand, third-party certifiers offer a service (the release of a certification) which is paid by the company requesting the certification, therefore creating a conflict of interests where auditing companies have no incentives to increase their auditing standards. Finally, it is a fact that the last layers of the supply chains are located in countries where usually the respect for human rights is mostly at risk and where State authorities' controls and capacity to prevent human rights violations are mostly lacking, thus increasing the necessity of private forms of control.

Despite its growing importance, the shortcomings of the certifications mechanism have become especially apparent in two recent cases concerning the textile and garment sector. First, on 24 April 2013, the famous collapse of the Rana Plaza building in Dhaka, Bangladesh, happened. Besides the media coverage of the issue due to the involvement of suppliers of major western garment businesses, the case was one of the first accidents shedding a light on the role of certification companies and their possible liability. Indeed, the company Phantom Apparel Ltd. operating in the Rana Plaza building was audited by the certifying body TÜV India shortly before the accident. The certifier was operating on the basis of private regulatory standards elaborated by standard-making bodies, which in this case was the BSCI (Business Social Compliance Initiative).

Second, in 2012, a building collapsed in Karachi, Pakistan, killing and injuring hundreds of workers. Shortly before the accident, Ali Enterprises was granted the SA8000 Certificate, a private standard of virtuous businesses elaborated by SAI.<sup>5</sup> SA8000 is a social certification standard “*that helps certified organizations demonstrate their dedication to the fair treatment of workers across industries and in any country*”. It is applicable to several industry sectors and it covers a wide range of human and social rights (from child labor to forced labor, remuneration, freedom of association), allegedly based on international standards such as ILO Conventions and the UN Declaration of Human Rights.<sup>6</sup> The certificate was issued by a subsidiary of the Italian auditing company RINA Services S.p.A., an accredited certification body under the Social Accountability Accreditation System, notwithstanding the unsafe working conditions in the building and the possible human rights violations in Ali Enterprises working environment.

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<sup>5</sup> SOCIAL ACCOUNTABILITY INTERNATIONAL. According to their official website: “*Social Accountability International (SAI) is a global non-governmental organization advancing human rights at work. SAI’s vision is of decent work everywhere – sustained by an understanding that socially responsible workplaces benefit business while securing fundamental human rights. SAI empowers workers and managers at all levels of businesses and supply chains, using its multi-industry SA8000® Standard, as well as Social Fingerprint®, TenSquared, and other training and capacity building programs*” on <http://www.sa-intl.org> (last access on 18 August 2019).

<sup>6</sup> See *ibid.* on <http://www.sa-intl.org> (last access on 18 August 2019).

Despite the shortcomings in the activity carried out by the social auditors, both TÜV and RINA Services S.p.A. to date have not been held accountable for the human rights harms suffered by the victims of the accidents in Rana Plaza and in Ali Enterprises, since the certified companies are primarily responsible to provide all the conditions to a safe working environment and the compliance with relevant human rights norms.<sup>7</sup> Assessing the responsibility of social auditors beyond the responsibility of the non-compliant company is therefore crucial to guarantee the prevention of similar accidents in the future, especially by establishing the due diligence standard in carrying out the auditing process and the consequent release of the certification.

The described scenario shows that great powers not always come with great responsibilities. Notwithstanding the crucial role and the potential positive (and, consequently, also negative) impact that the activity of the certifiers may have on the respect of human rights by business enterprises, the width of the possible liability of the certifiers themselves vis-à-vis victims of business accidents within certified companies has not grown accordingly.<sup>8</sup> The difficulties to raise liability claims, making the certifier accountable for negligent social auditing, has resulted so far in impunity, which disincentives the raise of controlling standards by social auditors.<sup>9</sup>

However, something is moving forward. In 2017, in the case *Elisabeth Schmitt v. TÜV Rheinland*, the Court of Justice of the EU opened the door to the acknowledgement of the liability of certifiers, leaving it up to member States to decide whether to allow such a liability, subject to conditions established in domestic law. More recently, in the case *Lungowe v. Vedanta*,<sup>10</sup> the UK Supreme Court admitted the liability of a company towards the victims of violations committed by another subject in the context of parent-subsidary relationship, providing a new reading of traditional liability theories that may be positively read also to move forward in finding the liability of certifiers. Furthermore, international instruments on business accountability provide a real push towards a change in the issue. International soft instruments, such as the OECD Guidelines for Multinational Enterprises, or hard law, such as the evolving ‘Zero Draft’ Treaty, are paving the way in positive law for an obligation for States to recognize the liability of third-party certifiers

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<sup>7</sup> However, several NGOs together with the victims of such accidents tried to sue the auditing companies as well, for not having act with the required diligence especially under the OECD Guidelines for Multi-National Enterprises, both before the German and the Italian National Contact Point. The Final Statement of the German NCP can be found at <https://www.bmwi.de/> (last access 22 August 2019), while the procedure before the Italian NCP is still ongoing at the time of writing.

<sup>8</sup> On the accountability of social auditors in the textile industry especially see VAN HO, TERWINDT, *Assessing the Duty of Care for Social Auditors*, European Review of Private Law, 2019; TERWINDT, SAAGE-MAASS, *Liability of Social Auditors in the Textile Industry*, 2016.

<sup>9</sup> TERWINDT, SAAGE-MAASS, *Liability of Social Auditors in the Textile Industry*, 2016, p. 9.

<sup>10</sup> UK Supreme Court, *Vedanta Resources PLC and others v. Lungowe and others*, Judgement, 10 April 2019.

towards victims of human rights violations and accidents that should have been prevented through diligent auditing.

Building on the latter argument, this paper argues that liability of certifiers should not be excluded by referring to traditional understanding of civil liability. Current international standards require each company to avoid contributing to human rights harms, even by third parties, and to use the necessary leverage, where possible, to prevent such harm. Therefore, civil responsibility of the certifiers towards the victims of business accidents should be assessed considering whether and to what extent certifiers may be responsible for contributing to such harm and whether they have a duty to use the leverage they can exercise on each specific business activity they are auditing. In this light, it appears that what has been left to the will of States until now, will may soon become a hard duty under the Zero Draft Treaty.

## **2. Identifying third-party certifiers and their role**

The growing request for big enterprises to respect fundamental rights in their activity and ensure the sustainability of their supply chains, both at the international level and in the civil society, has led transnational corporations to rely on auditing activity of their business partners to demonstrate their attention to the human and social sustainability of their business activity. In absence of hard law imposing companies to respect human rights, enterprises who wants to show their interest in a certain way of making business are forced to obtain certifications attesting the compliance with human rights and labor standards of their suppliers.

Auditing activity may be conducted on three levels, namely by the company internally (so-called first-party auditing) or by the buyer or the client of that company (i.e. second-party auditing).<sup>11</sup> Third-party auditing are instead those controls which are outsourced to an independent body, which is (most of the times) another company that contractually undertakes to carry out the necessary inspections and interviews to certify that the requesting company complies with a given standard.

The standards and requirements that a company may want to be certified to can be of different nature. Some technical and safety product standards are required and positively regulated, as in EU law, and they are necessary to allow the product to be marketed in certain countries. The respect of human rights and social standards, related to the production process rather than to product characteristics, are usually not necessary for goods to circulate. However, the

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<sup>11</sup> DE BRUYNE, *A Conceptual and Comparative Analysis of the Obligations of third-party Certifiers*, 2018, Ohio Northern University Law Review, p. 203.

commitment to respect certain social standards is voluntarily accepted by companies wishing to enter the market. Indeed, certifications are so important to be a *de facto* pre-requisite to enter certain markets or getting into the supply chain of certain major retailers, even though respect for human rights and international labor standards lies outside the compulsory regulatory framework. In other words, no respect for human rights and international labor standards is directly imposed over companies to market their products; as such, compliance to such standards is mainly voluntary and the requirements are usually drafted by private bodies.<sup>12</sup> The claimed source of inspiration of social standards are the most widely endorsed instruments of international human rights protection, such as the UN Declaration of Human Rights and the ILO Conventions on labor standards. For instance, taking into account the abovementioned SAI standard SA8000, it is stated that “*the intent of SA8000 is to provide an auditable, voluntary standard, based on the UN Declaration of Human Rights, ILO and other international human rights and labour norms and national labour laws*”.<sup>13</sup>

Therefore, companies enter into services contracts whereby certifiers, bodies who are specialized in auditing, carry out auditing activities on the basis of such private standards and award the requesting company with the certificate attesting its compliance with the standards. However, the service carried out by the certifier is nothing more than a business activity and, as such, competition may imply softer controls over standards of compliance in order to release the certificate.<sup>14</sup> Against this framework, the absence of possible sanctions, namely the difficulties in holding the auditing firm accountable for lack of due diligence, may be one of the driving factors of such mechanism. On the other hand, obtaining the certification creates the presumption that the certified company acts in compliance with the standards contained in the certification itself. The presumption is such because of some intrinsic limits of the activity of the certifier, which is necessarily based on the information and permits provided by the certified company and it is stuck to the situation certified in a given moment in time of a given company’s activity. As a consequence, it must be assumed that third-party audits and certifications cannot eliminate the risk of non-compliance by the requesting entity, giving rise to a so-called “obligation of conduct”. It is therefore necessary to look at certifying bodies under a different lens at this point. Besides the contractual relationship they enter into with companies requesting certifications, third-party certifiers must be considered as business enterprises themselves, subjected to the business and human rights standards and their activity evaluated accordingly. The necessity to end the impunity

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<sup>12</sup> Such as Social Accountability International, see above, Introduction.

<sup>13</sup> Social Accountability 8000 (SA8000), 2014, I. Introduction, 1. Intent and scope.

<sup>14</sup> VAN HO, TERWINDT, *Assessing the Duty of Care for Social Auditors*, European Review of Private Law, 2019, p. 381.



of third-party certifiers towards liability claims would not only help to raise their standards of conduct, but it is also coherent with business and human rights international instruments. The obligations and responsibility of certifiers must therefore be viewed under this light in the following paragraphs.

### 3. **The possibility to hold certifiers accountable: the position of the Court of Justice of the European union**

In assessing the liability of third-party certifiers, the Court of Justice of the EU recently had the opportunity to take a first step in the right direction, by recognizing that the involvement of a certifier in a procedure related to medical devices creates rights upon end users and the possible liability of the former vis-à-vis the latter. More specifically, the case referred to the certification by a notified body of some medical devices made up of silicone. The use of low-quality silicone led to several cases being brought by the victims of defective breast implants to claim compensation from the manufacturer. The latter, however, went bankrupt; the victims therefore relied on the product certifier, to obtain compensation. A German court raised some interpretative questions to the Court of Justice of the EU related to the liability and the due diligence owed by certifiers. The preliminary ruling in the case *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH* therefore became a first interesting step shedding a light on the complex issue of the certifiers' liability.<sup>15</sup> The specific case originated from the request for damages brought by Mrs. Schmitt against the certifier TÜV for the harm caused by defective silicone breast implants. Mrs. Schmitt asked for the recognition of the liability of the certifier for not having fulfilled its obligations according to the standard of diligence allegedly required in carrying out the inspections.<sup>16</sup> After dismissing the case in first instance and before the appeal Court, the German Federal Court of Justice referred the case to the Court of Justice of the EU for a preliminary ruling, considering that in order to recognize the liability of the third-party certifier it was necessary to establish either the violation of a rule conferring legal protection or the breach of a contractual obligation.<sup>17</sup> The referring judge raised three issues. The second and third questions concerned the content of the obligations imposed upon the notified body, such as the obligation to carry out

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<sup>15</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*. For a brief comment of the case see RIZZI, *The Court as Pontius Pilate: Reflecting on Missed Opportunities in the PIP Decision*, EPLR 2017 and more recently on medical devices certifiers GLINSKI, ROTT, *Regulating Certification Bodies in the Field of Medical Devices: The PIP Breast Implants Litigation and Beyond*, European Review of Private Law, 2019.

<sup>16</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 28.

<sup>17</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 36.

unannounced inspections or the examination of the devices and business records.<sup>18</sup> According to the Court, TÜV was not under such obligations, but more generally under the obligation to take all the necessary steps to ensure that it fulfils the requirements under Article 16(6) and Annex II of the Directive 93/42.<sup>19</sup>

Most importantly, with the first question, the referring judge asked the Court to ascertain whether the involvement of the certifier in the procedure is aimed to protect end users and whether an infringement of the obligations can give rise to liability of the certifier itself towards the public.<sup>20</sup> The Court first recognized that the protection of end users was to be intended as one of the aim of the Directive, where it provided for the involvement of the notified body.<sup>21</sup> However, the Court did not reach as far as to declare that the provisions of the Directive were such as to require member States to confer end users the right to claim civil liability of the certifiers: this is something that has to do with national laws.<sup>22</sup> In the case at stake, the Court therefore identified Directive 93/42 as amended by Regulation no. 1882/2003 as the source of the obligation of due diligence incumbent on the certifier; in particular, the Court interpreted these provisions as allowing the certifier to be liable vis-à-vis end users of the defective medical devices, even though the conditions to ascertain liability are governed by national law, subject to the principle of equivalence and effectiveness.

Despite the resistance still existing among national courts, in this case the Court of Justice of the EU did not exclude the possibility to claim the certifiers' liability, leaving the domestic courts with the task of setting the conditions upon which such liability may be established. The Court of Justice of the EU therefore left States to solve the problem of the liability of private certifiers, even in cases where the intervention of the notified bodies is imposed by EU laws and is not merely a voluntary certification obtained by companies.

If EU law is not the source in which the accountability of certifiers can find its legal basis, it is necessary to turn elsewhere to find such a duty, or at least some hints in this direction. As it will be shown in the next paragraphs, the possibility to establish the liability of third-party certifiers

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<sup>18</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 38.

<sup>19</sup> COUNCIL DIRECTIVE 93/42/EEC of 14 June 1993 concerning medical devices. Article 16(6) reads as follows: “Where a notified body finds that pertinent requirements of this Directive have not been met or are no longer met by the manufacturer or where a certificate should not have been issued, it shall, taking account of the principle of proportionality, suspend or withdraw the certificate issued or place any restrictions on it unless compliance with such requirements is ensured by the implementation of appropriate corrective measures by the manufacturer. In the case of suspension or withdrawal of the certificate or of any restriction placed on it or in cases where an intervention of the competent authority may become necessary, the notified body shall inform its competent authority thereof”.

<sup>20</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 49.

<sup>21</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 53-54

<sup>22</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 57, 59

may be read between the lines of recent innovative case-law of UK Courts, to be further interpreted in the light of international law instruments.

#### 4. Recent evolutions in domestic case-law

In carrying out their task of auditing the company before releasing the requested certificate, certifying companies must respect obligations stemming from law, whether national or supranational.<sup>23</sup> Traditional civil liability therefore must be grounded on the violation of an obligation stemming from the contract or an obligation stemming from the general law. As the referring judge said in the abovementioned case before the Court of Justice of the EU, the certifier may be liable only in case it violates a norm conferring legal protection or a contractual obligation.<sup>24</sup> Following the reasoning of the Court of Justice of the EU, it has to be assessed whether there exists (or should exist) such a norm conferring legal protection to victims of the activity of certified companies to establish the liability of the certifier for its negligent conduct. Indeed, two options may be at stake. First, the possibility to consider certifiers' liability as a mere contractual one under domestic law. The audits are usually carried out by the certifier on the basis of a certification contract (a service contract) in force between the two companies. Those whose rights may be adversely affected by the activity of the certified company are usually not parties to the contract and therefore cannot raise a contractual liability claim towards the parties to the contract. However, they may be considered as third-party beneficiaries of the certification contract, as a necessary consequence of the human rights content of the certificate itself. This reading is even supported by some private certification standards. To take the example of the SA8000 certification provided by RINA Services S.p.A. to Ali Enterprises before the collapse of the building, the standards drafted by Social Accountability International states that the intent is to provide standards "*to empower and protect all personnel within an organisation's control and influence who provide products or services for that organisation, including personnel employed by the organisation itself and by its suppliers, sub-contractors, sub-suppliers and home workers. It is intended that an organisation shall comply with this Standard through an appropriate and effective Management System*".<sup>25</sup> The empowerment and protection of personnel within the organization seem to refer to third parties who may benefit from the social auditing and, consequently, it may be used as a basis for claiming the auditor's contractual responsibility in

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<sup>23</sup> DE BRUYNE, *A Conceptual and Comparative Analysis of the Obligations of third-party Certifiers*, 2018, Ohio Northern University Law Review, p. 208.

<sup>24</sup> CJEU, Judgement, 16 February 2017, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, par. 36

<sup>25</sup> SA8000 (2014) I.1.

case of poor auditing quality. Therefore, although the primary duty to make sure that basic human rights and labor rights are respected lies on the certified company, taking on such a contractual duty on behalf of the certifier would create the obligation upon the latter to execute the service contract in accordance with a minimum standard of due diligence. The culpable failure to fulfil appropriate audits before issuing the certificate as per the service contract concluded with the requesting company may therefore be raised by those third-party beneficiaries of the human rights object of the audits.

However, the most viable way to hold certifiers accountable may be found in tort liability, establishing that the certifier indeed owes a duty of care towards victims of business accidents or human rights violations. Here, recent evolutions in business and human rights litigation have taken place, ending up with the admission of a group of Zambian villagers as claimants before UK Courts in the *Vedanta* case.<sup>26</sup> The claimants held that the subsidiary, running copper mining operations in Zambia, caused a water pollution severely impacting their livelihoods. Although related to the establishment of the duty of care of the parent company in relation to the activity of its subsidiaries abroad, several passages of the judgment can open the door to the recognition of a duty of care of third-party auditors.

Indeed, in the judgement, the UK court recalled a relevant passage of another case, namely *AAA v Unilever*, stating that the relevant legal principles to be applied to the duty of care of the parent company towards third parties harmed by the subsidiary should be the same as those to be applied by a consultant giving advice to the company.<sup>27</sup> The relationship between the certifier and the company requesting the certification can indeed be considered as such: it is not by chance that most of the procedures applicable by the certifiers provide for the issuing of action plans and remedial plans in case shortcomings are detected during the auditing process. Most importantly, a crucial passage of the *Vedanta* case states that “[e]ven where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, [...] the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such

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<sup>26</sup> All such cases can be relevant to assess and apply tort theories to hold third-party certifiers liable since, notwithstanding the widespread character of the phenomenon, few cases were brought up to now before domestic courts to claim the liability of third-party certifiers in the field of social auditing. For the purpose of the present work, such landmark cases in tort law that led to the latest *Vedanta* case will not be recalled, but they are efficiently summarized in *Vedanta* case and in e.g. Court of Appeal for Ontario, *Das v. George Weston Limited*, 2018 ONCA 1053, 20 December 2018.

<sup>27</sup> *Vedanta case*, par. 50, citing *AAA v Unilever plc* par 36.

*circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken*".<sup>28</sup> In other words, it appears that the sole fact that a company voluntarily undertakes the task to control the respect of some standards by another entity and makes it public is sufficient to give rise to the duty of care. Applying this test to social auditing companies could lead to the same results of creating a duty of care upon the certifiers towards third parties in case of low standards of audits resulting in human rights abuses by the certified company. For if the parent company assumes the duty to care towards third parties harmed by the subsidiary by solely advertising to do so through public statements, *a fortiori* such a duty exists for those entities whose very core business is to verify and certify, after appropriate auditing activity, that a company meets some social and human rights standards. Certification bodies such as RINA Services S.p.A. or Bureau Veritas include the contribution to the compliance of their clients in their company's mission, as it is advertised in their websites. If this is the case, it necessarily follows that negligent auditing – i.e. below the due diligence standards, to be evaluated on case-by-case basis – should allow the victims of the harmful activity of the certified company to claim for the liability of the certifier.

The solution proposed in the *Vedanta* case seems to anticipate what international law hard instruments will ask States to implement in domestic law to hold corporations liable, in line with the content of international soft law instruments such as the OECD Guidelines for MNEs. The 'public international law' oriented reading of the due diligence obligations of certifiers when human rights are at stake is indeed what already emerges from such instruments, as we will see in the following paragraph.

##### 5. ... and their consistency with international law

Third-party certifiers must be intended as companies whose activity can have an adverse impact on human rights of those employed and generally harmed by audited companies. The commitment required to companies by international instruments, such as the UN Guiding Principles (the "UNGPs"), the OECD Guidelines on Multinational Enterprises (the "Guidelines") and the most recent Zero Draft Treaty,<sup>29</sup> provides the necessary framework to identify the standard of conduct of social auditors and, consequently, the basis to find their liability for poor auditing standards towards victims of human rights abuses by audited companies. In particular, both the UNGPs and the Guidelines introduce two specific tests which may be relevant to inform the due diligence

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<sup>28</sup> *Vedanta case*, par. 53.

<sup>29</sup> The latest version of the draft *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* was released on 16 July 2019, available on [www.ohchr.org](http://www.ohchr.org) (last access on 19 August 2019).

standard and the related responsibility to be raised against third-party certifiers, namely, the tests of “contribution” and “leverage”, which are also recalled in the latest version of the Zero Draft Treaty.

Although not binding upon States nor directly on companies, the UNGPs are still one of the most important instruments enucleating the relevant principles related to companies’ responsibility to protect human rights. In the commentary to Principle no. 19, the UNGPs provide that “[w]here a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm”.

The OECD Guidelines for Multinational Enterprises provide for detailed recommendations for responsible business conduct, based on core human rights international covenants. The Guidelines may be considered as a hybrid instrument, as they are formally a soft law instrument towards companies, while providing for hard law provisions towards member States, who are requested to set up a State-based non-judicial mechanism (through the institution of National Contact Points) as a platform for negotiation or conciliation in case a specific instance is brought against a company for non-compliance with the Guidelines. As the UNGPs, the OECD Guidelines provide that enterprises are required to undertake human rights due diligence to detect potential risks of adverse impacts on human rights that they may create with their business activity or they may contribute to. When a risk of contributing to adverse impacts is detected, the enterprise should take all necessary steps to cease or prevent the contribution, also by using its leverage to mitigate such impacts, when it has the possibility to effect changes in the wrongful practice of the enterprise that cause harm.<sup>30</sup>

Two concrete cases brought before National Contact Points can serve as examples on how the concepts of contribution and leverage of the UNGPs and the OECD Guidelines can be used as a basis for holding social auditors accountable.

The cases were brought before the German and the Italian NCPs asking for the assessment of non-compliance with the Guidelines of the activity of two auditing companies, namely TÜV Rheinland<sup>31</sup> and RINA.<sup>32</sup> In both cases, the complainants alleged that the auditing company did

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<sup>30</sup> §19 of the Commentary on General Policy (Chapter II); similarly when the company detect a potential human rights adverse impact, even if the enterprise did not contribute to it, the enterprise is required to use its leverage to influence the entity causing the adverse impact to prevent or mitigate it (§43 Commentary, Chapter IV).

<sup>31</sup> German National Contact Point, complaint by *ECCHR and others v. TÜV Rheiland AG*, Final Statement of 26 June 2018.

<sup>32</sup> Italian National Contact Point, complaint by *AEFFAA and others v. RINA Services S.p.A.*.

not comply with the Guidelines since the poor quality of auditing standard did not match the due diligence required in auditing activity, as they did not investigate appropriately the potential human rights abuses and safety shortcomings of the audited companies. In the claimants' view, acting with due diligence would have led the auditing companies to foresee and point out to the audited companies the shortcomings in human rights and safety standards of their activity and possibly prevent them from carrying out the business activity in dangerous situation. In the German case, the complaint was partially admitted for further examination, accepting that the issue raised potential non-compliance with the Guidelines for their possible contribution to the maintenance of child labor, forced labor or discrimination situations, lack of freedom of assembly and generally poor due diligence standard related to the auditors' activity. Similarly, in the case before the Italian National Contact Point, the claimants made the point that the activity of the auditing company may contribute to the human rights impact of the audited company, since it may influence the conduct of the latter by providing remedial action plans. Consequently, the audited company would be in the position to use its leverage to mitigate potentially adverse impacts.

The claims proposed before the National Contact Points may be read as a positive contribution to the discussion. Indeed, such claims were based on the idea that auditing companies potentially contribute to adverse impacts on human rights by not using the appropriate leverage to stop abuses perpetrated by audited companies, as a precondition to issue the certificate requested by the latter. The concepts of contribution and leverage impose upon companies, including third-party certifiers, a standard of conduct that directly stems from international soft law instruments and may encourage domestic legislators and courts to be open to similar interpretations of liability theories.

Furthermore, the Zero Draft Treaty may concur in establishing a liability norm applicable to third-party auditors, by committing ratifying States to adopt a higher standard of liability in domestic law. The relevant rule can be found in Article 6.6 of the Zero Draft Treaty providing that business entities should be held liable for *“failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities”*. The wording immediately recalls the well-known *due diligence standard* elaborated in public international law, according to which State liability for human rights violations perpetrated by private entities (towards which therefore States is not a direct actor but a ‘mere’ third-party controller) may amount to omissive responsibility of the State where the latter’s authorities *“knew*

*or ought to have known*” that there was a concrete risk of violation of human rights and did not “*take all the necessary steps*” to avoid the harm, meaning doing everything that can be done with the *best effort* of the controlling entity.<sup>33</sup>

These would therefore be the conditions to be satisfied to claim the responsibility for negligence of the certifier. The first condition requires the entity to have a contractual relationship with the company that causes the harm. The condition is easily satisfied for the certifier usually undersigns a certification contract or an auditing contract (i.e. a service contract) with the requesting entity. As for the second condition, namely the sufficient control or supervision of the activity, some problems may arise. Indeed, there is no doubt that the auditing entity, considering the very nature of the task it committed to undertake, has a certain degree of awareness over the activity of the entity that requests the certification, since it is in charge of verifying the procedures of the company itself, but it may be argued that no control exists. In this sense, however, the liability required by the Zero Draft treaty should be read in the light of other concepts provided in the abovementioned business and human rights instruments, namely *the contribution* and *the leverage*. Indeed, as stated in the introduction, certifiers not only have (or should have) the power to issue remedial action plans when they acknowledge shortcomings in social and human rights compliance of the requesting entity, but also they can exercise influence over the company requesting the certification by not issuing the certification or issuing the certification provided that the audited company remedies to the detected shortcomings. Indeed, at least when they act as gatekeepers (whether formally or informally), certifiers can prevent human rights abuses of the requesting entity by refusing to issue the certification. In other words, “*by being able to withhold the necessary cooperation or consent, they can prevent misconduct by the certified entity*”.<sup>34</sup>

In any event, controlling or supervising the entity causing harm seems to be an alternative to another condition which is necessarily satisfied by the position of the auditing company, namely the fact that it may foresee or should have foreseen the potential human rights adverse impact of the company with whom it has the contractual relationship. In this sense, when a company commissions external audits it does so precisely to be certified on the compliance with certain standards (social or whatsoever) and, conversely, to gain advice in potential improvements and remedies to non-compliance. The very content of the contractual relationship, therefore, may be used to put the auditing company in the position to foresee – as a contractual task – the potential adverse impacts of the audited business activity. The enter into force of the Zero Draft Treaty, in

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<sup>33</sup> On due diligence in international law see generally KULESZA, *Due diligence in international law*, 2016, Leiden.

<sup>34</sup> COFFEE, *Gatekeepers: the role of the professions in corporate governance*, 2006, cit. in DE BRUYNE, *A Conceptual and Comparative Analysis of the Obligations of third-party Certifiers*, Ohio Northern University Law Review, 2018, p. 204.



its current version, would therefore imply the necessity for States to foresee the liability of certifiers under this norm.

By applying such liability test to the case of certifiers, the question remains what it should mean for certifying companies to take all the necessary steps to avoid the violation. Some soft law instruments can, again, provide suitable guidance. The activity of external auditors can be considered as outsourcing to third-party independent inspectors the human rights impact assessment that the company is required to carry out. The due diligence required to the certifying body in carrying out the auditing activity cannot but be equated to the level of due diligence required to the specific audited company. Within the OECD, both the Due Diligence Guidance and sector guidances (such as on agricultural, garment and footwear etc.) were adopted to guide companies to identify and address the main risks of adverse impact of their activity. In this sense, by carrying out an auditing activity on the business of third parties, the certifiers should use from time to time the relevant due diligence standards required to the audited company, taking into account specific sector and geographical risks. Going back to the recent examples provided by NCPs specific instances, it seems reasonable to ask the third-party certifier to follow the garment and footwear sector OECD guidelines when auditing a textile business. In this sense, the best option would be to regulate in positive law the activity of the certifying body as it already happens in some more controlled sectors.<sup>35</sup> Missing such an instrument or in taking inspiration for future legislative developments, the guidance drafted in the OECD context may be a useful tool for domestic courts to evaluate the quality of the auditing activity carried out by social auditors and assess whether or not they reach the level of due diligence required to meet the “best effort” under international human rights law.

In the light of the above, the liability of social auditing companies may be assessed by referring to the standards set by international human rights law, as endorsed by recent domestic case-law, and interpreted in accordance with soft law instruments.

## **6. Conclusions**

Exposing third-party certifiers to liability for human rights abuses and accidents occurred in the context of certified businesses is not only just and necessary but also required by business and human rights instruments. At a closer look, the proposed reading of the latest version of the Zero Draft Treaty, recognizing a possible norm to be applied to certifiers’ liability for poor auditing

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<sup>35</sup> See the example of financial auditors examined by VAN HO, TERWINDT, *Assessing the Duty of Care for Social Auditors*, *European Review of Private Law*, 2019.

standards, seem to be endorsed by the recent domestic case-law recalled above and OECD complaints before State-based non-judicial instances, such as the NCPs.

Recent case-law related to tort liability showed that it is possible to hold accountable those who – even voluntarily – assumed and exposed to the public their commitment to care about human rights. Although elaborated in the context of parent-subsidiary relationship, this paper proposes that this level of responsibility should be implicitly assumed by those who make their core business out of the control of the respect by others of such human rights, i.e. by enterprises acting as third-party certifiers. This application of liability in domestic law is furthermore coherent with the requirements of business and human rights international instruments, whether soft or hard law. Both the UNGPs, the OECD Guidelines for Multinational Enterprises and the recent Zero Draft Treaty provides for a due diligence standard requiring the company to avoid contribution to human rights harm – even if not directly caused by their business activity – and to use any leverage to prevent such harm by third parties and business partners. In the context of social auditors, the possibility to avoid and prevent to the greatest extent possible human rights violations caused by the audited entity is inherent to the activity of the auditors, that undertakes the task to evaluate the company compliance with certain standards. The possible contribution of the auditing company to the compliance of the audited company with human rights standard is all the more clear when they are called to issue certificates attesting the compliance with social accountability standards. The relevance that such certifications acquired in the global market may indeed be considered as a crucial element to exercise the necessary leverage to avoid human rights adverse impact perpetrated by the certified entity.

Of course, even drawing from the due diligence standard in international law, the obligations of the auditing company cannot but be an *obligations of means*, laying on the requesting entity the final duty to remedy possible indications of non-compliance by the auditors. The latter however have due diligence obligations on their own, to act in their best effort to avoid human rights violations, following the standards of human rights due diligence required by the specific sector or geographical area in which they operate. In this sense, unless the audited company culpably hides circumstances to the auditors, the latter may be responsible under civil liability theories – as they need to be understood in the light of international BHR instruments.

Whereas the European Court of Justice left to States the possibility to hold certifiers accountable, such a possibility has not become a reality until now, except for some possibility to read into the lines of recent domestic case-law new solutions to certifiers' liability. In this framework, the turning point may be reached by looking at international law: the OECD Guidelines already set the possibility to put certifiers before their responsibility and the Zero Draft Treaty would impose

this as a hard obligation to ratifying States, that (hopefully) will be followed by precise and coherent duties of third-party auditing companies.