



THE NEED FOR DIRECT OBLIGATIONS FOR BUSINESSES ON THE INTERNATIONAL TREATY ON BUSINESS AND HUMAN RIGHTS: AN ANALYSIS OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS CASE LAW

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ABSTRACT

This article is part of the discussion of human rights and business from the perspective of the accountability of companies, especially transnational corporations, within the framework of the debates on binding standards in international law. In the last eight years, the United Nations Human Rights Council (UNHRC) has discussed the construction of a legally binding instrument on transnational corporations and human rights, within the Open-ended Intergovernmental Group for the construction of the instrument created by Resolution 26/9. The negotiations have been marked by an intense dispute over the normative content. One of them is the possibility or not of implementing the direct obligation for companies. Simultaneously, the Inter-American System of Human Rights issued a report on the Inter-American Standards on Business and Human Rights. Seeking to contribute to the discussions taking place at the UNHRC, this paper presents empirical research that aims to answer the following question: are there any standards in international human rights law, especially in the Inter-American System of Human Rights, that provide a substrate for the provision of direct obligations for businesses in the legally binding instrument? The methodology for constructing the article follows the inductive approach, and uses literature review and documentary analysis. The results show that it is not only possible but also extremely necessary for the effectiveness of the international instrument to insert direct obligations for transnational corporations in the document.

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A NECESSIDADE DE OBRIGAÇÕES DIRETAS PARA AS EMPRESAS SOBRE O TRATADO INTERNACIONAL SOBRE EMPRESAS E DIREITOS HUMANOS: UMA ANÁLISE DA JURISPRUDÊNCIA DO SISTEMA INTERAMERICANO DE DIREITOS HUMANOS

RESUMO

O presente artigo se insere no campo de discussão dos direitos humanos e empresas, na perspectiva da responsabilização das empresas, especialmente transnacionais, no âmbito dos debates de normas vinculantes no direito internacional. Nos últimos 8 anos, no Conselho de Direitos Humanos das Nações Unidas (UNHRC), tem se discutido sobre a construção de um instrumento juridicamente vinculante sobre empresas transnacionais e direitos humanos, dentro do Grupo Intergovernamental de Composição Aberta para construção do instrumento criado pelo Resolução n.º.26/9. As negociações tem sido marcadas por uma intensa disputa sobre o conteúdo normativo. Uma delas é a possibilidade ou não de implementar a obrigação direta para as empresas. Simultaneamente, o Sistema Interamericano de Direitos Humanos emitiu um relatório sobre as Normas Interamericanas sobre negócios e direitos humanos. Procurando contribuir para as discussões que ocorrem no UNHRC, este documento apresenta uma pesquisa empírica que pretende responder à seguinte pergunta: existe alguma norma no Direito Internacional dos Direitos Humanos, especialmente no Sistema Interamericano de Direitos Humanos, que fornece um substrato para a provisão de obrigações diretas para as empresas no instrumento legalmente vinculante? A metodologia para construção do artigo segue a abordagem indutiva, e utiliza revisão bibliográfica e análises documentais. Os resultados mostram que não só é possível como extremamente necessário para a eficácia do instrumento internacional a inserção de obrigações diretas para as empresas transnacionais no documento.

Palavras-chave: Sistema Interamericano de Direitos Humanos. Trata Internacional sobre empresas transnacionais. REDESCA. Opinião Consultiva.

INTRODUCTION

The relationship between business and human rights has been one of the contemporary challenges. The political, economic and cultural power that these companies have accumulated, and their organization in global value chains, are obstacles to their accountability that have not yet been overcome by international law. Since the 1970s, in the United Nations Organization (UNO), there have been initiatives that debate the issue. The advance of neoliberal policies and the implementation of a logic of consensus in multilateral organizations have led to the protagonism of a voluntary and self-monitoring paradigm for the private sector.

Thus, voluntary guidelines such as the ILO Declaration, OECD, and the Global Compact have prevailed. Especially the Guiding Principles on Business and Human Rights of 2011, known as the Ruggie Framework. This, although widely endorsed by states and considered a milestone of the agenda, consists of a series of recommendations to states on the agenda, defining duties of respect for human rights. Thus, it did not fill the gaps in corporate accountability. For example, one can mention the lack of extraterritorial mechanisms, the voluntary nature of its provisions, and thus the lack of endorsement and the failure to break with the establishment.

In contrast, from 2012, during the mobilization of the People's Summit, civil society built a political action to demand accountability from companies, especially

transnational corporations, denouncing the permanence of a corporate impunity with the validity of voluntary frameworks. The mobilizations met with the wave of progressive governments in the Global South, which took up a critical state agenda on the actions of corporations.

The result was the establishment of a series of critiques in the Human Rights Council on the actions of corporations and the limits of the Ruggie Framework. Thus, in 2014, Resolution No. 26/9 was passed, creating the mandate for the establishment of an open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises in relation to Human Rights (OEIGWG). Since 2015, the group has been meeting to construct a binding instrument.

This treaty represents a great step towards mitigating the corporate impunity, nonetheless, the drafts of the document have been considered a disappointment by civil society and other entities and also states, especially regarding the lack of concrete provisions as extraterritorial mechanisms and obligations expressly directed for the corporations. Without these, the treaty loses its capacity of changing the scenario recognized as the architecture of impunity, in which transnational corporations are not held accountable for their violations of individuals' and communities' human rights.

In parallel, the Inter-American Commission of Human Rights released, in January 2020, the report called "Business and Human Rights: Inter-American Standards", which reunites the main standards of the system and elaborated recommendations to States and companies about prevention and remediation of violations. This movement shows the theme is latent in the system, and the contributions of the IASHR may be very important to add arguments to the discussion in order to pursue the most effective treaty possible.

The main purpose of this paper is to present a discussion on one of the absences in the treaty's drafts, about the possibility of attributing direct obligations for business in this legally binding instrument on transnational corporations and other business regarding human rights (LBI) and what are the IASHR's standards that aggregate to confirm or deny this possibility.

Thus, the work aims at answering the question "Is there any standard in International Human Rights Law, especially in the Inter-American System of Human Rights, that provides a substrate for the provision of direct obligations for businesses in the legally binding instrument?".

The hypothesis is that not only is plainly possible to extract these standards from the IASHR case law but is also imperative that TNC's have direct obligations established in the document in order to guarantee its maximum efficacy. The research qualifies as empirical, and the methodology used is of inductive nature, as the main techniques are bibliographic review and documental analysis.

The article presents, first, a brief analysis on corporate impunity and a small summary of the negotiation process of the LBI. Next, the paper presents a topic defining the civil society demand for direct obligations and the analyses of the attribution of obligations for companies in other instruments of international law. The following

topic provides the results of the research, the analysis of the IASHR case law, and its possible inputs to the discussion. Lastly, it establishes the conclusion.

1. CORPORATE IMPUNITY SCENARIO

Beginning in the 1970s, denunciations of human rights violations by transnational corporations have proliferated on the international scene, both by civil society organizations and states. Despite some critical efforts, there were no advances in the regulation of the human rights and business agenda. In the 1980s, we observed a significant advance in the promotion of the deregulation of rights in the Global South, and the proliferation of Trade and Investment Agreements. In this period, several initiatives for voluntary codes of conduct by companies are propagated. This scenario makes up what is known as *lex mercatoria*⁴, which requires a series of supranational norms for trade protection, and on the other hand, human rights are relegated to a debate of corporate voluntariness.

Over the decades, some elements, arising from the developmentalist ideology and neoliberal economy, have permeated business performance, generating what we can diagnose as widespread impunity. Impunity, as established by the CETIM⁵ based on the concept of the United Nations itself, could be understood such as escape from liability and criminal, civil or administrative conviction, and consequently to the lack of fixing a penalty aiming at the reparation of those affected.

Returning to the elements that facilitated the establishment of this panorama, one of the most relevant is the emergence of the concept of Corporate Social Responsibility (CSR), which beginnings were in the 1950s⁶, but it was mainly consolidated after the expansion of neoliberalism as an economic ideal. CSR emerged as a way of varnishing the image of large corporations to deal with the increasing inequality and concentration of income generated by their constant growth⁷, instead of the promised development.

For example, the idea of multi-stakeholders as everybody is interested in the success of the companies justifies a “caution” in imposing strong regulations on the activities of transnationals, because, after all, without them, economic growth would not be viable⁸.

In the 1990s, with the full implementation of the neoliberal model in the Global South, with the strong presence of privatizations, and the increase in the power of large global chains, there is a large number of violations and a lot of tension with civil society movements⁹. Complaints begin to reveal cases of modern slavery, trafficking dumping

⁴ ZUBIZARRETA, Juan H; RAMIRO, Pedro. *Against the ‘Lex Mercatoria’: proposals and alternatives for controlling transnational corporations*. Madrid: OMAL, 2016.

⁵ CENTRO EUROPA-TERCER MUNDO (CETIM), *La Impunidad de Las Empresas Transnacionales*. Ginebra: Cetim, 2016, p. 4

⁶ SOUTH CENTER. *Designing an international binding instrumento on business and human rights*. Ginebra: 2020, p. 7.

⁷ *Idem*, p.8.

⁸ GLECKMAN, Harris. *Multistakeholder Governance and Democracy: a global challenge*. New York: Routledge, 2018, p.357.

⁹ SOUTH CENTER. *Designing an international binding instrumento on business and human rights*. Ginebra: 2020, p. 7.

of toxic waste, exposure of communities to chemicals, and persecution of human rights defenders¹⁰.

Another element that also expands from the last decades of the 20th century is the logic of attracting foreign investments, in the wake of globalization. Most transnational companies have their headquarters domiciled in developed countries, and many developing states seek to attract foreign investment. The economic dependence of countries in the Global South, and the adoption of conservative development models, leads these countries to participate in the "race to the bottom", choosing to lower their human rights standards and offer tax exemptions to reduce the costs of the economic activities of these companies. This process occurs through the signing of bilateral investment and trade agreements, which often do not favor the development of national industry, and also in the promotion of structural reforms such as labor, social security, and environmental protection legislation.

The constitution of *lex mercatoria*, the presence of arbitration tribunals in free trade and investment agreements, has constituted an obstacle to access to justice for populations who are victims of violations of their rights by transnational companies. Added to this, the complex organizational structure in global value chains, which include subsidiaries and a huge supply chain, and the investment or free trade treaties impede progress.

We must remember that these companies have a gross domestic product greater than that of many states, concentrating political, economic, and cultural power never before seen. The configuration of such power with the subordination of developing countries imposes unequal conditions for the enforcement of human rights. The complexity of human rights violations that involve this power dispute can only be answered if they are thought of on a global scale.

Thus, International Human Rights Law stands out as a fruitful field for analyzing the contours of these new demands for rights. This requires a rethinking of the classical definitions of the field, so that the primacy of human rights and their *erga omnes* character can be put into effect, in order to place transnational corporations in the role of perpetrators of human rights violations and, therefore, responsible for their conduct.

2. LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

The creation of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (OEIGWG) in relation to human rights, led by Ecuador and established in Resolution 26/9 in 2014, marked the beginning of a new moment of debate, on the international stage, on the regulation of corporate power.

Since 2015, the Working Group has held annual sessions at the headquarters of the UN Human Rights Council in Geneva to exercise its mandate and build the legally binding instrument. To date, eight sessions have been held, chaired by Ecuador, which

¹⁰ *Idem*, *Ibidem*

was elected Chair of the Working Group, with the group's work still not expected to be completed.

The first session took place between July 6 and 10, 2015, and the discussions were organized into eight roundtables, each with a different theme that would help establish the initial principles and elements of the instrument. The eight roundtables dealt with issues such as the principles of the binding instrument, its scope, the human rights that should be provided for, the obligation of states to ensure respect for human rights, including the aspect of extraterritoriality, the legal responsibility of companies, and the establishment of national and international jurisdictional mechanisms.¹¹ Some gaps in the Guiding Principles were explained by delegations that mentioned the need to provide maximum human rights protection, redress mechanisms and also some complementary instrument that would improve the enforcement of protection in the domestic sphere.¹²

In the third session, which took place from October 23 to 27, 2017, the first concrete product of the negotiation process, the document “Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights” was presented, which brought in its content the issues discussed in the first two sessions such as the principle of the primacy of human rights and the possibility of an international court to hold TNCs accountable, and marked the beginning of the most substantial discussions of the instrument's text.¹³

At the end of the discussions on the Elements, in addition to scheduling a fourth session for the following year, States and other interested parties were invited to make comments and observations on the elements of the project so that the first version of the LBI could be introduced. In July 2018, Draft Zero was launched.

Draft Zero was considered a disappointment by a large part of the academic community and organized civil society that accompanied the discussion process. Despite the barriers that were already faced, there was hope for success, once the draft was consummated and launched.¹⁴

But the text presented, in general, appeared very vague, broad, without clear predictions, and far below what was expected, even below what was already established in the Elements.¹⁵ This was interpreted as a real blow to the treaty and there was a lot of uncertainty regarding the session that would take place from 15 to 18 October 2018. At this point, the government of Ecuador was already beginning to show weaknesses in the conduct of the process negotiations.

¹¹ HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with regard to human rights with a mandate to draft an international legally binding instrument* (A/HRC/31/50). Geneva: OHCR, 2015.

¹² *Idem*, *Ibidem*

¹³ HUMAN RIGHTS COUNCIL. *Report On The Third Session Of The Open-Ended Intergovernmental Working Group On Transnational Corporations And Other Business Enterprises With Respect To Human Rights*, (A/HRC/37/67). Geneva: OHCR, 2017

¹⁴ SOARES, Andressa C.; ROLAND, Manoela C. *A essencialidade do instituto da jurisdição extraterritorial no tratado internacional sobre direitos humanos e empresas*. In: Pedro G Andrade (eds.), *Direitos humanos e empresas: responsabilidade e jurisdição*. Belo Horizonte/ São Paulo: D'Plácido, 2020, p. 29-60.

¹⁵ GUAMAN, Adoración. *El Draft 0 del BindingTreaty: análisis crítico del contenido del texto y su adecuación con el objetivo de la Resolución 26/9*. In: Homa, *Cadernos de Pesquisa* (2018) 1:6

In the fourth session, many delegations defended the draft text and approved the fact that only direct obligations and responsibilities were foreseen by the states themselves. However, other delegations and several NGOs questioned whether there would be real effectiveness when there is no express liability provision for companies, arguing the absence of an impediment to companies being directly accountable at the international level.¹⁶

This possibility had been strongly justified by Surya Deva, in his participation as an expert in the second negotiation session and corroborated by Olivier de Schutter. In the third session, when he mentions that, despite the existence of the term "primary responsibility" of the State with respect to human rights in the document of the Elements, this could not give rise to a justification for not providing for the allocation of direct responsibilities to companies.¹⁷

But even so, with all the accumulation of discussions from previous sessions, the same delegations had to question again this point, among others, such as the lack of provision for extraterritorial jurisdiction, an alleged unnecessary duplication of provisions of the Guiding Principles, and the lack of prediction of the primacy of the human rights instruments over trade and investment agreements. The justification is that this would mean the superiority of one branch of international law over the other, although this primacy is established in International Human Rights Law, and in European and Inter-American regional systems.¹⁸

In the end, the draft did not seem to please either party, nor civil society, which expected a stronger text, nor the states that have always opposed the treaty. Despite the frustration, civil society was not discouraged and remained mobilized, as it already knew that there would be countless challenges along the way.¹⁹

On July 17, 2019, the Revised Draft or Draft One was published by the presidency of the OEIGWG and, despite having corrected certain well-criticized points of the previous one, mainly regarding the formal structure, the text did not focus on the systemic regulatory gaps transnational companies, remained vague and without appearing to present any possibility of being enforced.²⁰ Again, it was below what was foreseen in the Elements document and the demands of affected individuals and movements.

The fifth negotiation session, which took place between October 14 and 18, 2019, made it clear how the process was going through a difficult time. There was a political shift in the spectrum of international relations, the USA left the Human Rights Council permanently and neoliberal governments were consolidating again in Latin America.

¹⁶ HUMAN RIGHTS COUNCIL. *Report On The Fourth Session Of The Open-Ended Intergovernmental Working Group On Transnational Corporations And Other Business Enterprises With Respect To Human Rights* (A/HRC/40/48). Geneva: OHRC, 2018.

¹⁷ SCHUTTER, Olivier de. 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', BHR Symposium, 10 septembre 2020.

¹⁸ HUMAN RIGHTS COUNCIL. *Report On The Fourth Session Of The Open-Ended Intergovernmental Working Group On Transnational Corporations And Other Business Enterprises With Respect To Human Rights* (A/HRC/40/48). Geneva: OHRC, 2018.

¹⁹ HOMA. *Cadernos de Pesquisa -HOMA*. Juiz de Fora: Homa, 2018.

²⁰ HOMA. 'Análise do Draft One: avanço ou retrocesso?' - *Cadernos de Pesquisa Homa*. Vol.2. Juiz de Fora: Homa, 2019.

The profound changes in Ecuador's international relations affected the conduct of the negotiation work.

In general, the dispute remained between countries that considered the provisions of the new Draft still too vague and insufficient to guarantee the effectiveness of the instrument, including Cuba, Azerbaijan, Egypt, South Africa and Palestine, which are accompanied by civil society, against those who insisted on a more targeted approach to States and that the document should present nothing more than standardization of the Guiding Principles.²¹

It is worth mentioning the participation of Brazil, which, on the last day of discussions on the draft text, wanted to present an amendment to the final report so that the following year, 2020, civil society could not have access to some parts of the discussions between States, that is, that some of them occurred behind closed doors and with no chance of manifestation of the movements. This proposal was formulated by Brazil and China, and was vehemently rejected by several other nations, including the European Union. Finally, an observation was added that the negotiation is guided by States, but that in the sixth negotiation session, civil society and different stakeholders would continue to participate actively in the process.²²

In the year 2020, in the midst of a worldwide pandemic of COVID-19, much speculation about the format of the session and the progress of the agenda hung around until the publication of the new, revised version of the document in August. During the session in October, despite guaranteed virtual, and limited in-person participation, the negotiations were not fruitful. Many countries were immersed in domestic agendas turbulent by the pandemic.

At the 7th session in 2021, the negotiations were given a new lease of life by the article-by-article debate methodology. The first articles received greater attention from the states, and involved interesting proposals to expand the protective frameworks, but the issue of direct obligations for transnational companies, the transnational character, and the provision of mechanisms, have not yet reached a conclusion, with different proposals from the states. At the end of the session, the Presidency proposed as a methodology the creation of a group of Friends of the Presidency that would work during the period between sessions to seek consensus and the consolidation of the text.

Despite the proposal, Ecuador did not invite any states to form the group, and existing dialogue circles were maintained. The lack of progress on the methodology was reflected in the presentation of a surprise proposal at the 8th session. The Chair, instead of consolidating the text under negotiation, presented, less than a month before the session, the proposal of a new text called "Chair's proposal". The initiative was reflected in complete disorganization throughout the first two days of the meeting. States were critical of the lack of transparency and commitment in the negotiation of the existing text, some such as South Africa and Palestine proposing that the "Chair's proposals" should be defended by the Ecuadorian delegation, and submitted to the text already being negotiated.

²¹ HUMAN RIGHTS COUNCIL. *Report On The Fifth Session Of The Open-Ended Intergovernmental Working Group On Transnational Corporations And Other Business Enterprises With Respect To Human Rights* (A/HRC/43/55). Geneva: OHRC, 2019.

²² *Idem*.

After the methodology imbroglio, the session continued with the existence of two texts under debate. Only the USA and Mexico made contributions to the "chair's proposals", and Mexico also made proposals to the other documents. The diplomatic weariness of the situation led to a long meeting to draft the final report of the session, held behind closed doors. Finally, the "chair's proposal" was incorporated into the text under negotiation, and it was designated that informal consultations would be held to continue the negotiations.

Negotiating the instrument has not been easy. The issue is sensitive for many economic sectors and their victims. The power mechanisms of the relations between the North and the global South have always been evident in the context of the States. Among the various controversial points raised by the different sectors, the establishment of direct obligations is certainly a key point. Therefore, we intend to contribute to this reflection below.

3. THE DEMAND FOR DIRECT OBLIGATIONS

Among the debates on direct obligations, we highlight civil society's demand for them, especially the contributions of the Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and End Impunity (Global Campaign)²³. In 2014, the Global Campaign released the document International Peoples' Treaty for the Control of Transnational Corporations. It is a compilation of ideas and proposals gathered through consultations with various civil society movements, traditional peoples, trade unionists, activists, affected communities and legal experts.

The objective was to elaborate a document outside the logic of Classic International Law, starting from the struggles and experiences of the peoples, as a way to democratize the debate that then emerged and not let the process of building the binding instrument be dominated by academic experts and law firms. advocacy. In addition, the Campaign annually publishes a position on the draft launched by OEIGWG and suggests new texts for articles and amendments. These documents are sent to the secretariat of the working group.

In 2017, the Global Campaign constructed its own Treaty proposal that establishes a section for specific obligations for transnational corporations, based on the duty already recognized in international human rights law to respect rights, albeit horizontally²⁴. In the Treaty discussion, however, this is a very controversial position. It is a fact that occurs because, based on a classic view of the International Law, it is claimed that obligations should be directed to States, which are primarily responsible for the protection of human rights. It is also argued that a forecast of obligations for companies would promote them to full subjects of DIP, which would guarantee them a problematic position.

²³ The global campaign was created in 2012, during the Rio +20 People's Summit, and is a network that brings together more than 250 social movements, civil society organizations, and research groups from around the world. Available in: <https://www.stopcorporateimpunity.org/#>. Access 19.03.2023

²⁴ Available in: https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf. Access 19.03.2023

However, none of these arguments' rests on more careful analysis. First, corporate obligations would be differentiated from state obligations, of course. The provision of direct obligations could include the following duties: not to violate human rights; prevent violations through Human Rights Due Diligence (as a result of an obligation); transparency and concession of information, automatic responsibility for the acts of subsidiaries and affiliates²⁵; and not to demand states when they, for example, have threatened their function to respect, protect and guarantee human rights.

The idea of the State as the main human rights violator is no longer satisfactory in the current scenario and there is enough international jurisprudence to recognize violations by non-state actors, in a horizontal way. Providing direct obligations for companies, which has already been done in other international treaties that will be mentioned below, would not elevate them as a full subject of international law, since the individual, for instance, has obligations and duties, for example, in the Rome Statute. Even when able to be criminally prosecuted by an international court, individuals are not considered a full subject, as they do not celebrate treaties.

The need for direct obligations for transnational companies expressly provided for in the text is hereby defended. Without this provision, the duty of companies to respect human rights remains as general as in the Guiding Principles, and at the mercy of establishing domestic guidelines and obligations, which, as previously reported, are not sufficient.

The provision of direct obligations for private entities does not mean assigning the same obligations that States have, nor does it mean raising them to the condition of a full subject of International Law, as professors Olivier DeSchutter and Robert McCorquada have already highlighted in the negotiation sessions of the LBI.

The United Nations Convention Against Corruption (UNCAC), ratified so far by 187 nations, has as its main goal to prevent and punish corruption practices worldwide. In order to do so, since corruption is a phenomenon that includes public and private sectors, this treaty provides some obligations which businesses should follow.

Specially in its article 12, but in other points of the text, it deals with measures that States must provide so private sector can be regulated regarding corruption. Although the language is directed to States, which are the parties of the agreement, and therefore, receive the obligations, there are provisions on how companies and the private sector in general must behave. As it is possible to assess in article 12.3:

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention: (a) The establishment of off-the-books accounts; (b) The making of off-the-books or inadequately identified transactions; (c) The recording of non-existent expenditure; (d) The entry of liabilities with incorrect identification of their objects; (e) The use of false

²⁵ AMNESTY INTERNACIONAL (ed.). *Creating a paradigm shift: legal solutions to improve access to remedy for corporate human rights abuse*. Londres: Amnesty International And Business And Human Rights Resource Centre, 2017, p. 60.

documents; and (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law²⁶

This said, it is mainly possible to affirm that the treaty on business and human rights could have a section dedicated to define how companies should be regulated, which are their obligations regarding human rights, and how States must act in order to build internal frameworks to prevent and hold transnational businesses accountable.

4. THE COMPANIES' OBLIGATIONS IN THE INTERAMERICAN SYSTEM

At the regional level, it is also interesting to analyse the advances in the positioning of the Inter-American Commission on Human Rights on the subject. On November 1, 2019, the IACHR approved the report prepared by its Special Rapporteur for Economic, Social, Cultural, and Environmental Rights (REDESCA), with financial support from the Spanish Fund for the OAS /AECID. The document was published on January 27, 2020.

The main objective of the report is to establish the content of the obligations of States in the scope of Business and Human Rights and the effects that such obligations may have on businesses, based on the main Inter-American instruments, namely, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man and the case law of the IASHR. The international obligations of States regarding human rights are also considered in cases where business actors are involved in realizing or affecting these rights.²⁷

To this end, the document carries out a systematic analysis of the pronouncements of the Inter-American System, seeking to organize contributions to the topic. The analysis is conducted according to the centrality of the evolutionary interpretation of human rights instruments.²⁸ This consists of a fundamental principle of international human rights law and is applied systematically by international supervisory bodies, as well as consolidated in the jurisprudence of the Inter-American Court, which believes that treaties should be interpreted as living texts adapted to the context of current life and the evolution of the times, in order to always guarantee the maximum protection of human rights.

This understanding is in line with the provisions of the Vienna Conventions on the Law of Treaties and American Human Rights.²⁹ The rapporteur also points out that, due to the huge number of legal challenges that the theme presents, the document does not aim to exhaust them all or focus on specific obstacles and factual reports.

²⁶ OEIGWG, *Second Revised Draft Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* Available in: <https://daccess-ods.un.org/tmp/4957747.45941162.html> . Access in 19.03.2023

²⁷ REDESCA (org.). *Empresas y Derechos Humanos: Estándares Interamericanos*. Washington: CIDH/OEA, 2019, p. 24.

²⁸ *Idem, ibidem*

²⁹ *Idem, p. 25*

It urges to stress that the Inter-American Human Rights System is only competent to establish obligations for States. Therefore, it is natural that the document is primarily addressed to them. This does not mean, however, that REDESCA is necessarily recognizing that States must appear as principal parties to the treaty and that companies cannot be assigned direct obligations. Some analyses of the report carried out tried to defend this argument, which cannot be inferred by a limitation of the organism's competence.

Returning to the report, after the first chapter that presents the background and methodology, Chapter II reports a series of criteria that will be applied across the document as essential elements for any approach. Then, Chapter III presents the state's human rights and business obligations. Next, chapters IV and V address the extraterritorial obligations of States and the legal effects that state obligations have on companies, respectively. These two chapters call special attention, as they deal with two more deficient points in the presented drafts of the LBI and will be the central part of the analysis in the present work.

There are still 4 other chapters in the document, which determine areas of special attention for the IACHR and REDESCA (chapter VI), the impact of violations on vulnerable groups (VII), and bring together good initiatives as a positive reference. The last chapter, IX, makes recommendations to guide state efforts on the continent.

In chapter VI, specifically, the report presents legal effects of the obligations of States that can be linked to companies. There is a recognition that, in order to fully protect human rights, it is not possible to ignore the threats or violations that business activities impose on the exercise of these rights.³⁰

As a normative basis, in addition to Articles 41.a of the ACHR and 106 of the OAS Charter, the document mentions the interpretation of Article 30 of the Universal Declaration of Human Rights (UDHR) in order to justify that, in international human rights law, despite the understanding that the primary obligation belongs to States, it is widely accepted that respect for human rights is the norm applicable to all, regardless of the existence of domestic laws that regulate it.³¹ Furthermore, inter-American jurisprudence has already recognized that the duty to respect and guarantee human rights also has an effect on inter-individual relations.³²

Likewise, it is argued that the evolution of this branch demonstrates that non-state actors may have obligations in relation to human rights, as is already the case in customary rules, *jus cogens*, and international treaties such as the Convention on the Rights of Persons with Disabilities. So does the normative framework within the UN on Torture and other cruel, inhuman, and degrading treatment (which even mentions private agents as capable of violating human rights).³³

The Rapporteurship (2019, p. 94) recognizes that despite the fact that the bodies of the IASHR do not have the competence to configure responsibility in relation to non-state actors in general, this does not mean that they do not affect human rights.

³⁰ *Idem*, p. 93

³¹ *Idem*, p. 94

³² *Idem*, p. 95

³³ *Idem*, p. 94

Likewise, the absence of international mechanisms that require companies to comply with HD does not mean that they are exempt from obligations.

Then, some possible duties of companies are presented, arising from the responsibility of respecting human rights, namely: to prevent them from provoking their violations and contributing to their occurrence; exercise due diligence in their own activities within both home and extraterritorial circumscriptions, in the activities of subsidiaries, in the economic groups they belong to and in the value or supply chains; render accounts and assume consequences in criminal, civil and administrative spheres.³⁴

It is important to consider the report that voluntary rules are not enough and that there is a deficit in rules of international law that makes it possible to assign direct obligations to companies.³⁵ As already mentioned, the IASHR does not have the competence to do so but recognizes the possibility that this can be done in other spaces and documents. It should be noted that civil society defends that such obligations are linked to the international treaty, with no factual or legal impediment to such an attribution.

This doctrine is reinforced by the Advisory Opinion n. 18/03, which decided about the rights of undocumented migrant workers. When interpreting the principle of equality and non-discrimination, the Court affirms that it has a “fundamental character” for the protection of all human rights, both in international and domestic law. Therefore, the obligation of States to eliminate regulations that have discriminatory provisions in their regulations is completely peaceful, as well as to combat discrimination in a generalized way, regardless of domestic provisions in that sense. After all, this group of obligations belongs to the international *jus cogens*.³⁶

In this part, it is also reinforced that the obligation to respect and guarantee the exercise of human rights is enforceable *erga omnes*, which, in addition to binding all States, have effects on third parties, including individuals.³⁷

In recognizing that migrant workers are at a disadvantage compared to other workers, the Court considers that States and individuals are not obliged to offer work to a migrant, but that, from the moment they do, there are demands for respect and guarantee human labour rights that have different scope and effects. As the decision points out, labour relations are present in both the public and private spheres. It should be added that, in a private labour relationship, there is an obligation to respect rights between non-state people, whether individuals or legal entities.³⁸

According to the court, (2003, p.126), the legal doctrine of *Drittwirkung*, which develops the idea that fundamental rights must be respected by public authorities and also in horizontal relations between private agents, had been adopted in the jurisprudence since the first cases.

This idea is consolidated in paragraph 146:

³⁴ *Idem*, p. 101

³⁵ *Idem*, p. 100

³⁶ Interamerican Court Of Human Rights (org). *Advisory Opinion 18/2003*. San Jose: CORTEIDH/OEA. p. 113-117

³⁷ *Idem* p.119

³⁸ *Idem* p.126

"146. In this way, the obligation to respect and guarantee human rights, which normally has its effects on relationships between States and individuals subject to their jurisdiction, also projects their effects on inter-individual relationships. As far as the present Consultative Opinion is concerned, the necessary human rights obligations in relation to private relationships are specified in the framework of the private employment relationship, in which the employer must respect the human rights of his workers." (CORTE IDH, 2003, p.128) (own translation)

Repeated in many decisions analysed, another quite important and solid understanding is the recognition of the existence of the obligation to respect not only civil and political rights among individuals in the private sphere but also the Economic, Social, Cultural, and Environmental rights, as in the case of labour rights.

This is the first relevant contribution of the case law of the IASHR, since, if there were obligations in relation to human rights opposed to individuals, the reason for not providing for them in an international instrument would cease.

However, the decision goes even further by recognizing the factual capacity of companies to violate human rights. In paragraph 148 (CORTE IDH, 2003, p. 128), the Court states that the State must not allow its private employers to violate human rights. This point is extremely important since the argument for not establishing direct obligations for companies under the international treaty is often related to the discourse that companies do not violate human rights, but only abuse or impact in the course of their activities, a situation in which the obligation should be of the States. Having recognized the ability of third parties to violate rights, it is clear that this argument has no basis in the IASHR.

As already established in this text, state and private obligations have different scope and nature, but this does not mean that there is an impediment for companies to also have obligations established directly.

Thus, the advisory opinion makes clear, stating:

"151. In employment relationships, employers must protect and respect the rights of workers, and these relationships develop in the public and private sectors of societies. The obligation to respect the human rights of migrant workers has a direct effect on any type of employment relationship, both when the State is the employer and when it is a third party, and it is a physical or legal person "³⁹

Still, in the decision, there is the determination that, due to the existence of many domestic and international norms related to the protection of human rights, especially labour, and that there is not always a harmony between these laws and their application, one must apply always the most favourable norm for the worker, be it internal or international.⁴⁰

³⁹ *Idem* p.129. Translation done by the author

⁴⁰ *Idem* p.130

The *pro persona* principle of international human rights law supports the application of more favourable legislation, which should be provided for by the treaty, especially with regard to the application of extraterritorial jurisdiction.

The analysis of this decision concludes, then, with the detection of three important contributions to sustain the demands of civil society in relation to the LBI: the factual capacity for violation of human rights by private actors, the obligation existing in the international *jus cogens* respect for human rights by individuals in their interrelations and the precedent for applying legislation more favourable to the victim of a violation.

CONCLUSION

Throughout the article, a historical account of the negotiations of the binding international instrument on transnational corporations and human rights was constructed, in which one can see that from the very first sections the debate on the possibility of holding corporations directly accountable for human rights violations has been ongoing. It also highlighted the political and legal obstacles, notably the economic interests of parent countries and corporations, the submission of recipient countries, and the acclaim of the Guiding Principles as the main obstacles to the adoption of a paradigm shift in International Human Rights Law.

In the light of civil society's proposals, the way was found to define the obligations rightfully incumbent upon companies without hurting state sovereignty and the consequent weakening of states, through the recognition of the concrete reality of what already occurs in the scope of the Arbitration Chambers of Agreements.

Furthermore, from the report and the decision of the Inter-American System of Human Rights analyzed empirically, but also from the precedent of other treaties mentioned in the text, that establishing direct obligations for companies in the legally binding instrument on business and human rights is clearly legally possible. It is therefore up to the American countries that are signatories to the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man to recognize these precedents from the System's jurisprudence and uphold them in the treaty negotiation.

However, many countries in the continent have different statements when it comes to the UN negotiations. But this position has political and economic reasons, which disguise themselves as legal issues. The negotiation of a treaty is undoubtedly a political space, but it is really important to analyze the so-called legal arguments to provide civil society with the weapons to deal with them.

Finally, it can be concluded that direct obligations for transnational corporations are not only possible, but necessary to ensure the maximum effectiveness of the treaty, since non-specific obligations to corporations may delay the liability process, depending on national frameworks and procedures for victims to access justice. The adoption of this institute is an important step to mitigate corporate impunity and improve redress.

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