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Reparação de vítimas à luz de um tratado sobre empresas e direitos humanos

Reparation of victims in light of a treaty on business and human rights

Ana Cláudia Ruy Cardia

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Reparação de vítimas à luz de um tratado sobre empresas e direitos humanos

Reparation of victims in light of a treaty on business and human rights

Ana Cláudia Ruy Cardia*

Resumo

Este estudo tem como objetivo analisar as tentativas em nível internacional de implementar regras capazes de garantir a responsabilização das corporações transnacionais por violações de direitos humanos. Ele verifica, entre os avanços e retrocessos das últimas décadas, a edição dos Planos Nacionais de Ação pelos Estados desde 2011 e as principais questões consideradas por um grupo intergovernamental discutindo a elaboração de um tratado sobre o tema em relação à indenização às vítimas. Será avaliado que, embora haja alguma informação sobre a compensação de vítimas nos Planos de Ação Nacionais já existentes, é necessário um maior desenvolvimento neste campo, especialmente no tratado que está sendo discutido. Essa essência também está em consonância com os Objetivos de Desenvolvimento Sustentável, que constitui a Agenda 2030 da ONU. O método é focado em (i) fontes primárias e (ii) fontes secundárias. O método de interpretação resulta principalmente de fontes secundárias que abordam (i) uma leitura crítica do Direito Internacional Contemporâneo, e (ii) a relação entre Direito Internacional, Direitos Humanos e Política Internacional. Seu valor surge da perspectiva sobre a compensação das vítimas - o reconhecimento de seu sofrimento - e a necessidade de uma norma vinculante que possa responsabilizar os Estados e as corporações pelas violações dos direitos humanos.

Palavras-chave: Direitos Humanos e Empresas. Direito Internacional. Princípios Ruggie. Planos Nacionais de Ação. Tratado sobre Empresas e Direitos Humanos. Objetivos do Desenvolvimento Sustentável.

Abstract

This study aims to analyze the attempts at an international level to implement rules capable of ensuring accountability of transnational corporations for human rights violations. It verifies, amongst the advances and setbacks of recent decades, the edition of National Action Plans by states since 2011, and the main issues considered by an intergovernmental group discussing the drafting of a treaty on the issue with regard to the victim compensation. It will be assessed that, although there is some information on the compensation of victims in the already existing National Action Plans, more development in this field is necessary, especially in the treaty that is being discussed. This essence is also in consonance with the Sustainable Develo-

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pment Goals, that constitutes UN 2030 Agenda. The method is focused on (i) primary sources and (ii) secondary sources. The method of interpretation results mainly from secondary sources that address (i) a critical reading of Contemporary International Law, and (ii) the relationship between International Law, Human Rights and International Policy. Its value arises from the perspective on the compensation of victims – the recognition of their suffer - and the necessity of a binding norm that can make States and corporations accountable for human rights violations.

Keywords: Human Rights and Business. International Law. Ruggie Principles. National Action Plans. Treaty on Business and Human Rights. Sustainable Development Objectives.

1. Introduction

The evolution of international society over the last fifty years has brought as a consequence, in addition to the emergence of new issues and actors responsible for control of the socio-economic and political dynamics of States, a myriad of new forms of human rights violations.

Despite the increase in the number of treaties intended to protect the rights of individuals globally, new entities subject to international law and actors have remained unnoticed in this new social setting in relation to their characterization as holders of obligations. Accordingly, it was found that in parallel to their establishment in the performance of transnational activities, serious human rights violations were committed by them.

The role of transnational corporations is particularly prominent in this new configuration. With an economic power greater than a large number of States their influence and lobbies are capable of modifying legislation or even initiating processes in the Executive and Judicial plans of States. Such interference in internal processes is also detrimental to the interests of individuals who are the main victims of the negative impacts of activities performed by those actors. Situations that place them in conditions analogous to slavery, the international trafficking of people, loss of livelihood and other forms of physical, moral and psychological degradation become commonplace in the absence of an imposing ruling capable of ending the culture of impunity and establishing a true human rights protection culture to counter the development of business activity.

It is this spirit that has guided the international community since the 1970s establishing a discussion on the creation of international standards that regulate the activities of transnational corporations. 2011 saw the issue of the much-celebrated UN Guiding Principles on Business and Human Rights on a global level, a rule that would establish, among other equally important issues, a requirement that the States implement National Action Plans for proper protection of human rights by companies. Accordingly, the obligation to establish the basis of a much-needed protective culture was transferred to a state plan.

However, an evaluation of the entities subject to international law and actors in the international community, especially civil society, revealed that this responsibility, given the events that marked the course of last decades, would not be developed without a binding instrument capable of effectively ensuring that the States are responsible if they remained inactive in the implementation of this ideal. Guided by this spirit, in 2014, a group of States adopted resolution A/HRC/26/L.22/Rev.1 in the Human Rights Council (HRC) of the United Nations (UN), which laid the foundation for the elaboration of a treaty on human rights and business.

At present, therefore, the international community is making advances in those thematic discussions, and this is where the problem of this work arises: what are the obstacles to the full compensation of victims discussed in intergovernmental meetings for the elaboration of a binding instrument for States and companies on the theme of human rights violations committed by corporations? Accordingly, would it be possible to achieve compensation for all violations committed by companies? Would these principles be in line with the UN 2030 Agenda?

This paper intends to answer these questions by historical and critical analysis on development of the issue and results of qualitative research based on documentary analysis of primary and secondary sources. It will be assessed that, although there is some information on the compensation of victims in the already existing National Action Plans, more development in this field is necessary, especially in the treaty that is being discussed. This essence is also in consonance with the Sustainable Development Goals, that constitutes UN 2030 Agenda.

The method is focused on (i) primary sources (documents and UN reports and resolutions of the HRC/UN, National Plans on Human Rights and Business, and reports of the Intergovernmental Group for the preparation of a treaty on business and human rights) and (ii) secondary sources (national and international legal literature). The method of interpretation results mainly from secondary sources that address (i) a critical reading of Contemporary International Law, and (ii) the relationship between International Law, Human Rights and International Policy.

2. Companies and human rights in the UN plan: the triad "protect, respect and remedy" and the compensation component of National Action Plans

Concern for the protection of human rights arising from business activity at the UN plan dates back to the 1970s. Since then, a series of measures intended to regulate participation of those actors before the international community which, until then, was so only regulated by States themselves and relied on the participation of other entities subject to international law hitherto recently recognized in the framework of International Law, namely International Organizations.

That was one of the reasons up to the early twenty-first century little had been done in relation to the establishment of binding rules for companies with regard to accountability for the performance of activities detrimental to human rights. The difficulty in recognizing them as being subject to International Law, in addition to the economic power that is the hallmark of their activity in the world, prevented that the originally proposed initiatives would result in effective rules and policies.

In 2005, the UN Secretary-General appointed John Ruggie to conduct research on the normative possibilities on the issue of business and human rights. As a result of this work, in 2011 the Human Rights Council approved Resolution A/HRC/RES/17/4, which established Guiding Principles on Business and Human Rights, also called the "Ruggie Principles". In general terms, the rule is based on the triad of "Protect", "Respect" and "Remedy". The States have a duty to protect human rights, actively intervening in violations made by third parties. Companies, in turn, would have a duty to respect those rules, i.e. to refrain from performing acts contrary to human rights. Finally, both entities should ensure judicial or extrajudicial compensation to those who suffer such abuses.

As regards soft law, the Ruggie Principles are characterized as a potential initiative to stimulate the regulation of human rights violations by corporations, to the extent that States and companies begin to endorse its content and put its precepts into operation. That Resolution also determined that the States that adhere to such a standard should implement National Action Plans seeking to put the recommendations made by that instrument into practice.

Accordingly, to date the following States have enacted National Action Plans in line with the UN Guiding Principles on Business and Human Rights: UK, Netherlands, Italy, Denmark, Finland, Lithuania, Sweden, Norway, Colombia, Switzerland, the USA, Germany, France, Poland, Spain, Belgium, Chile, the Czech Republic and Ireland.

For the purposes of this study, only items of National Action Plans concerning remedy mechanisms for compensation of victims of human rights violations by corporations under the third axis of the Ruggie Principles shall be considered.

The United Kingdom was the first State to launch its National Plan in September 2013 and conducted a review of its basis in a paper published in 2016. The British plan considered the possibility of compensation to victims in a judicial and extrajudicial framework. A highlight of the measures implemented by the United Kingdom to compensate victims was the entry into force of the Modern Slavery Act in 2015. However, in 2017, the Joint Committee on Human Rights published a report criticizing the United Kingdom in relation to its National Action Plan and the practice of protection for human rights victims committed by corporations, particularly in terms of access to justice and the bureaucratic procedure for formalization of accusations against companies and the possibility of presenting proof of alleged violations.

The Netherlands launched its National Action Plan in December 2013. The final draft of the document mentions that there was no consensus among interested parties on judicial liability of Dutch companies within or outside Dutch territory or on reparations to victims. As regards the latter issue it is known that the Dutch

National Action Plan suffered criticism from civil society of that State, particularly for not envisioning protection of human rights from the perspective of the victims.

Denmark launched its official document in April 2014, and Finland in October of that year. Neither example contained express considerations on the forms of reparation for victims.

Lithuania, Sweden, Norway and Colombia launched their plans in 2015. The Lithuanian National Action Plan brought procedural measures to promote access to justice. However, it is important to emphasize that these measures do not necessarily ensure compliance by companies for any convictions in cases of human rights violations. The Swedish National Action Plan describes the internal rules intended for reparation of victims in cases of violations of their rights. However, said National Action Plan has been subject to criticism[1] as it does little to consider their voices in the final draft presented to society. The Norwegian National Action Plan also offered little detail on the issue.

In the Colombian plan, the first to be developed by a Latin American country[2], despite an intervention request from the Working Group on UN Business and Human Rights to carry out analysis of existing remedies and an indication of more effective mechanisms in the reparation and protection of victims of grievous, business activities, nothing has been implemented so far in that regard.

In 2016, Switzerland, Italy, the United States and Germany launched their plans, increasing the number of States that have joined this initiative. None of them, however, established robust accountability on companies for human rights violations or compensation measures for victims.

The other National Action Plans, launched in 2017 and 2018[3], in turn, did not present any advance in developing innovative forms of reparation for victims of violations of human rights committed by companies.

From analysis of the National Action Plans established so far it can be concluded that in their less formal aspects, the initiatives resemble the recommendations set out in the Ruggie Principles. Highlights are those that during their drafting and review process included participation from entities subject to international law and actors belonging to the States, albeit in an imperfect manner. However, despite the fact that such provisions may describe improvements in the plan for protection and promotion of human rights plan for companies, advances with respect to establishing binding rules relating to compensation for victims of human rights violations committed by companies are also required.

So as not to dismiss the efforts by the States that have adopted National Action Plans it is also imperative to constantly monitor compliance with their provisions to ensure that such initiatives do not become merely a mechanism for those States to strengthen their protectionist rhetoric before the international community and continue drawing out negotiations on the treaty or hide under a cloak of impunity.

In this regard, the International Corporate Accountability Roundtable statement is valid, in that a binding instrument could potentially eliminate the lack of complaint mechanisms at an international level or even support the implementation of internal accountability mechanisms for corporations for human rights violations[4].

Finally, although the aforementioned States have implemented National Action Plans, cases of human rights violations committed by companies based in their respective territories are still reported, which is why one can argue for the need to establish a treaty on the subject, which will be seen below.

1 EUROPEAN COALITION FOR CORPORATE JUSTICE. *Sweden*: more action required for business and human rights. Available at: <http://corporatejustice.org/news/169-sweden-more-action-required-for-business-and-human-rights>.Accessed: May 28, 2018.

2 On the proactivity of European States in developing National Action Plans on business and human rights, possibly attempting to justify the lack of necessity in establishing a treaty on the same matter, see CANTÚ RIVERA, Humberto. Planes de acción nacional sobre empresas y derechos humanos: sobre la instrumentalización del derecho internacional en el ámbito interno. *Anuario Mexicano de Derecho Internacional*, v. 7, p. 113-144, 2017.

3 Between 2017 and 2018 National Action Plans were published for Spain, France, Poland, Belgium, Chile, Ireland, the Czech Republic and Georgia. In this regard, see NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS. *Countries*. Available at: <https://globalnaps.org/country/>. Accessed: 29 May 2018.

4 INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE. *Key recommendations*: Pillar III. Available at: <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5865e19ebe6594411018015a/1483071903727/Pillar-3-Recommendations-FINAL.pdf>.Accessed: 28 may 2018.

3. Discussions on the preparation of a treaty on Business and Human Rights and the need for effective remedies

The Ruggie Principles, established in 2011, made provisions in the UN system for corporate accountability of human rights violations, despite the non-binding nature of its provisions.

Due to the dissatisfaction of states and civil society organizations regarding the legal hierarchy of the Ruggie Principles and the urgent need for effective association with, and accountability of, non-state actors for human rights violations given the continued occurrence of human rights violations by companies, Resolution A/HRC/26/L.22/Rev.1 was adopted by a majority vote at the 26th Session of UN Human Rights Council in 2014. It provided for discussions under sessions of an Intergovernmental Working Group for the drafting of a treaty on the issue.

Accordingly, in July 2015 the First Session of the Intergovernmental Working Group to discuss the basis of that document was convened. At that first meeting the establishment of effective remedies for victims of human rights violations by transnational companies were discussed, among other issues, as well as other equally important points such as the possibility of extra-territorial application of the treaty, necessary dialogue with other international organizations dealing with the protection of human rights and similar initiatives (ILO, OECD, etc.) in the event of violations of human rights by companies. This also included contributions on the establishment of judicial and extrajudicial mechanisms to compensate damages caused to individuals stemming from activities conducted by transnational corporations and possibly accepted by States. There was also the existence of positions contrary to the immediate adoption of a treaty given the short timeframe between the issue of Ruggie Principles and their effective implementation by States. There was also disagreement between European Union representatives on the expansion of the scope of this standard to companies of any nature, and not only transnational corporations. Finally, among the Member States of the United Nations participating in the discussions a number of countries that today headquarter a large number of transnational companies, particularly involved in paradigmatic cases of human rights violations, were absent.

The second session, held in October 2016, also saw participation from States, as well as civil society organizations and other interested parties in the construction of the main basis of the international treaty. It is important to highlight a paradigm shift in the discussions: when before this focused on the creation of a binding instrument solely for transnational companies, it was decided at the second session to expand the scope of the standard to all corporate entities. The extension of the scope of the treaty, as seen, was the result of pressure from the European Union made in the previous year and that, in some way, became a condition for its participation in that forum. Moreover, there was intense lobbying by non-governmental organizations on the need to strengthen guarantees for access to justice for victims of human rights violations by companies in the internal plan but left the establishment of a special international tribunal for this purpose pending. Similarly, no agreement was reached on the expansion of the jurisdiction of existing international tribunals to hold companies accountable for human rights violations. Among the proposals, the most important were discussions on the inclusion of specific clauses on the protection of human rights in bilateral and multilateral investment agreements involving companies, which would take place in parallel with the treaty under discussion; questioning the sovereignty of States in the event of the use of extraterritoriality for holding companies accountable; cooperation between States in cases of violations committed in countries where companies have subsidiaries; strengthening the remedies provided for in the Ruggie Principles in parallel with greater assurance for access to justice for vulnerable groups affected by business activity. These also included the establishment of an actual dialogue between states, businesses, civil society and the potential and actual victims of the activities carried out by companies.

The third session, dated October 2017, was significant for the progress in discussions on access to justice for protection of victims of human rights violations by companies, as well as prospects for international legal cooperation and discussions on the extraterritorial aspect of the jurisdiction rules. In relation to compensation of victims, there was controversy about the possibilities of redress in civil and criminal spheres, especially as the latter is not accepted in a number of States in cases involving corporate entities. However, these points are still the subject of much controversy

among the interested parties so it is currently expected that there will be new sessions to continue the discussions presented herein.

It is clear, therefore, that the focus of discussions at the moment lies on the need to establish mechanisms to ensure effective redress for victims of violations committed by corporations. Therefore, and in view of the discussions on the establishment of the means of full compensation, the following item shall consider aspects of international law doctrine of human rights issues, particularly in relation to international procurement agencies (Regional courts and DH) to provide suggestions on possible forms of reparation to be included in the text of the new treaty.

In addition, observance of internationally assumed standards regarding protection of human rights confirms the importance of a focused analysis on the actual demands of the victims, so that a well-oriented institution with similar mechanisms would be in accordance with the objectives of Sustainable Development, part of the UN 2030 agenda, in particular Objective 16, to promote peaceful and inclusive societies with sustainable rights, with progress on access to justice for all and building effective, accountable and inclusive institutions at all levels, particularly item 16. 3 and 16.6.

4. Conclusion

Recent discussions on the drafting of a treaty binding States and companies to the necessary protection of human rights are the result of intense international negotiations dating back to the 1970s under the United Nations. Since then, the need to establish a culture of protection of human rights arising from business activity has been recognized by the post-modern international society. However, despite the intense international dialogue, it was only in 2011 that a resolution establishing a mechanism to serve the interests of individuals and non-state actors responsible for compliance with this standard was approved at the UN.

There was no great delay to begin discussions on the need for a treaty on the issue, especially if we consider the concern that the National Action Plans failed to establish effective arrangements for the accountability of States or companies for violations of human rights, which became manifest in the years following the publication of Ruggie Principles.

Thus, the issue of a UN Human Rights Council resolution that demands the creation of a binding instrument was celebrated by States and civil society organizations, but the outcome of the dialogue of the first three sessions of the Intergovernmental Working Group focused on the development of the standard on the issue is, as we have seen, far from a consensus, particularly with regard to the establishment of compensation for victims in case of violations committed by corporations.

Accordingly, the present study sought to analyze the main points discussed in the first three intergovernmental sessions to establish a treaty on human rights and business, focusing on reparation rules for victims for acts that violate human rights. It was therefore possible to verify the evolution of the basis of the discussion on that the issue, which has gained greater visibility in the last two years.

However, regarding compensation to victims for human rights violations by companies, it is clear that often such measures are virtually impossible, particularly when there are situations where business activity is responsible for devastating entire areas where certain communities once thrived. In this sense, the total redemption of the identity of the individuals affected by the negative impacts of corporate activity becomes difficult.

It is certain that the treaty would bring elements of existing international law and those expressed in other treaties for the protection of human rights. In the case of reparations little has been debated, particularly because of the will of each state to develop its internal remedies. The question, however, is still controversial with States, since there are jurisdictions that manifest interpretation contrary to the establishment of criminal law for corporations, for example.

The treaty, therefore, would be a tool to reinforce the commitment of States to protect human rights in the context of business activities, since its provisions would inevitably have to combine with other treaties already established in specific areas such as the protection of women, children, indigenous peoples, the prohibition of discrimination of race, corrupt practices, among others. Accordingly, the treaty under discussion would be aligned with the most current discussions related to the protection of human rights at the international level

as well as the UN 2030 Agenda.

Regarding the application of the treaty provisions by States, it is certain that the wording must be used sparingly so as not to detract from the main purpose of that international standard. Regarding the states which accede to the treaty, it is certain that its provisions would eventually have to be changed in order to comply with international guidelines regarding corporate accountability procedures for violations of human rights and fair compensation to victims, an issue already widely used and recognized under international law.

Moreover, the provisions of the treaty must be expressed and arranged in relation to full compensation of victims, in order to clarify to the States and companies the possible penalties and their contexts.

Accordingly, despite the many controversies that surround the drafting of a treaty intended to protect human rights by companies, it is certain that training will be important not only in reinforcing the commitment of States and those entities in relation to the protection of victims, but also to strengthen the historical ideal of assistance for human rights that has been widely debated in the global system of human rights protection.

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Consumer Social Responsibility as a Requirement for Corporate Social Responsibility

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Consumer Social Responsibility as a Requirement for Corporate Social Responsibility

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At a conference on Corporate Social Responsibility in which I recently participated in Brazil, one of the sessions focused on the conundrum of Mining, Business and Human Rights — a topical issue in Latin America. The drastic impacts of mining activities on Human Rights are known and well documented in the literature and there is serious ongoing research on the subject in the legal scholarship[1]. The speakers were technically flawless, they were competent jurists, their intentions were the best and their realistic approach and proposals were highly appreciated. They discussed how legal tools could be construed to enforce Human Rights norms in the mining sector. Although convinced by their technical contributions, I could not help staring puzzlingly at the ornaments they lavishly sported. Some of the speakers were indeed betrayed by a whole set of shining gems and jewels which decorated their fingers and/or necks and/or ears: my lay eyes could recognise gold, emerald, diamond, maybe lapis lazuli. From the very technical problems characterizing mining and corporate social responsibility, another problematic — of a more existential nature — drew its contours in the already cynical background. And I thought: is it possible to be wholly and permanently coherent while advocating for corporate social responsibility and human rights in Business?

1. Is there an ethical consumer?

Joel Bakan ended his enlightening masterpiece *The Corporation. The Pathological Pursuit of Profit and Power* with an optimistic tone by inferring that, to some extent, how corporations behave is "really all about us"[2]. It is, indeed.

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1 See for instance: Mihaela Ailincai, Sabine Lavorel (org.), *Exploitation des ressources naturelles et protection des droits de l'Homme*, Paris, Pédone, 2013, 252p.; Delphine Couveinhes-Matsumoto, *Les droits des peoples autochtones et l'exploitation des ressources naturelles en Amérique latine*, Paris, L'Harmattan, 2016, 618 p.; Patrice Christmann, Dominique Guyonnet, "Les minerais et métaux : au hazard de la rareté », *in*, Philippe Chalmin, *Des ressources et des hommes. Matières premières : 1986-2016, trois décennies de mondialisation et au-delà*, Paris, François Bourin, 2016, pp.271-292 ; Directorate-General of the External Policies of the European Union, "Indigenous Peoples, Extractive Industries and Human Rights", Documento Expo/B/droi/2013/23, September 2014, 35p; Sarah L. Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights", *Canadian Yearbook of International Law*, vol.51, 2011, pp.59-116; David Bilchitz, "Introduction: Putting Flesh on the Bone. What Should a Business and Human Rights Treaty look like?", *in,* Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights. Context and Contours*, Cambridge, Cambridge University Press, 2017, p.1 *et seq*.
Human Rights Watch has also dedicated specific studies to the matter and these are available at: https://www.hrw.org/topic/business/oil-mining-and-natural-resources
See also, the organized book entitled: *Industries minières. Extraire à tout prix*. Points de vue du sud, Paris, Syllepse, 2013, 212 p.

2 Joel Bakan, The Corporation. The Pathological Pursuit of Profit and Power, New York, Free Press, 2004, p.167.

But in the interplay between corporations and "us" — that is "us" as potential consumers — "we" are way too easily and too often condoned and excused. Corporate social responsibility, business and Human Rights theories and policies are justly but tremendously oriented by the forces of the supply side. They focus on corporate behaviour. There is, nonetheless, a complacency when it comes to the demand side or to the buyers' side, that is, regarding consumers' patterns of social behaviour. Studies do show that, when surveyed, consumers are prone to accept and to change to an ethical consumerism with regards to products whose manufacturing process does not minimally abide to the best practices of corporate social responsibility[3]. Sometimes, boycotting programs are resultantly planned[4]. Still, very little evidence exists to follow up the practical implementation of such intentions[5]. Some authors accordingly coined "the myth of the ethical consumer"[6].

There is an utter lack of coherence in the discourse and in the behaviour of those citizens who are, on one hand critical of corporations and their selfish behaviour, actions and decisions when, on the other hand, they act, at their own level as impulsive, self-centred consumers whose rationale finds secure abode in their immediate material interests. Conspicuously, the aim is not to excuse corporations or to minimise their doings. But this question of social responsibility must be discussed at all levels of the playing field. And for the issue of corporate social responsibility to be approached with maximum efficiency, in search of concrete results, consumers' social responsibility cannot be neglected.

2. Are consumers the mirrors of corporations?

Consumer social responsibility is the reforming mirror of corporate social responsibility. It can be defined as the level of intrinsic diligence consumers have regarding the origins and the overall production process of their purchases[7]. Corporations are expected to muster a maximum effort to exercise due stewardship of the environment, of human and workers' rights or to adopt ethical standards — of not indulging in acts of corruption for example — while doing business. Consumers are often concerned about the harmful and damaging consequences a given product might have on their own health and well-being. However, they are not always diligent when it comes to knowing and understanding how, where and under which circumstances the good was manufactured, that is, how and if their purchases have affected others[8].

Corporations are selfish entities; they lure for profits which are their main and sometimes their ultimate goal[9]. They may act as cold monsters, putting social and human aspects of their business in a pragmatic cost--benefit accounting plan and strategy whereby moral concerns become irrelevant. Maximizing profits while minimizing costs is basically a common business mantra. And imposing duties or responsibilities upon corporations is a potential cost. For this reason, corporations with enough bargaining power sometimes lobby congress persons to block projects aiming at regulating their activities[10]. Asking for corporate social behaviour is, to some extent, an oxymoron, it is preposterous within the codes of the business world unless this demand originates from the very market. Diluting corporation social practices in business practice is tantamount to an incompatible transplantation. Of course, this does

3 David Vogel, *The Market for Virtue. The Potentials and Limits of Corporate Social Responsibility*, Washington, Brookings Institution Press, 2005, p.48.

4 See for example, the campaign against McDonalds organized by McSpotlight and available at: http://www.mcspotlight.org/index.shtml. The *Ethical Consumer* has an A to Z list of further boycotting campaigns, available at: http://www.ethicalconsumer.org/boycotts/boycottslist.aspx. See also: Marylyn Carrigan, Ahmad Attalla, "The Myth of the Ethical Consumer — Do Ethics Matter in Purchase Behaviour?", *Journal of Consumer Marketing*, vol.18, no.7, 2001, p.565.

5 David Vogel, *The Market for Virtue. The Potentials and Limits of Corporate Social Responsibility*, Washington, Brookings Institution Press, 2005, p.48; Marylyn Carrigan, Ahmad Attalla, "The Myth of the Ethical Consumer — Do Ethics Matter in Purchase Behaviour?", *Journal of Consumer Marketing*, vol.18, no.7, 2001, pp. 561-563.

6 Marylyn Carrigan, Ahmad Attalla, "The Myth of the Ethical Consumer — Do Ethics Matter in Purchase Behaviour?", *Journal of Consumer Marketing*, vol.18, no.7, 2001, pp.560-577.

7 James A. Roberts, "Profiling Levels of Socially Responsible Consumer Behaviour: A Cluster Analytic Approach and Its Implications of Marketing", *The Journal of Marketing Theory and Practice*, vol.3, no.4, 1995, p.98.

8 Edward Morrison, Larry Bridwell, "Consumer Social Responsibility – The True Corporate Social Responsibility", Pace University (article available at: Consumer Social Responsibility – The True Corporate Social Responsibility).

9 Milton Friedman, *Capitalism and Freedom*, Chicago, University Press of Chicago, 1962, p.112.

10 Lee Drutman, "How Corporate Lobbyists Conquered American Democracy", The Atlantic (20 April 2015) [available at: https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/]

not mean that such measures are never successful. Regulations on corporate social behaviour have been implemented — at least in terms of norm adoption — both at the national and at the international level. For example, on the 27 March 2017, France enacted a Statute (2017-399) on the "devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre" (duty of care for the parent and ordering companies)[11]. Still in France, a new bill — entitled *Plan d'action pour la croissance et la transformation des entreprises* (Action plan for growth and for the transformation of companies) is currently under discussion; one of its aims is to adjust the very definition of 'companies', thereby giving it a social function. If enacted, the bill will impose an environmental and social stewardship to private companies. Their mission would extend beyond the interests of their shareholders. Some of the recent international investment agreements — like those proposed and signed by Brazil — contain specific provisions on corporate social responsibility[12]. On similar grounds, a binding treaty on Business and Human Rights is currently being discussed within the ambit of the United Nations Human Rights Council[13]. Their effective enforcement is, obviously, another debate.

The behavioural pattern — in terms of social negligence —, which characterizes the corporate world and for which companies are often criticized correspondingly reflects in the consumers' world. Morals and ethics tend to be revised to minimum or to ground zero when it comes to satisfying self-interests. Companies like Nike, Shell, Chevron, Wal-Mart, Monsanto[14], Coca-Cola, Dell, Samsung, Syngenta, Nestlé, Apple[15] and many others have been reminded on some of their malpractices[16]. Such information is not locked in a safe. It has been widely published in and circulated by the media (passive transparency); moreover, nowadays, consumers do have the means to minimally check the corporate behavioural history and the practices of those companies from which they buy or whose services they consume (active transparency). Still, these companies remain dominant players and their profits are sky high. Their corporate malpractice, their dramatic and sometimes irreversible impacts on the environment or on the social and human rights fields have not run them out of business. In other words, they are still supported by the consumers' infrastructure: corporate misbehaviour does not necessarily plummet consumers' will to consume. Companies may have an easy hand on negative externalities when it comes to maximizing profits. And consumers often do the same when their immediate material well-being is at stake[17].

Consumers can be as rational, pragmatic and cold as the companies from which they purchase: externalities can be easily bypassed, ignored, minimized to satisfy a self-interest. A *homo oeconomicus* rationale! This is not a pathology. It is — or has become — normality. Consumers might indeed act as vehemently and suspiciously as companies if ever asked to apply high standards of consumer social responsibility. When left to depend on conscience, morals or ethics, then due diligence is reduced to the strict minimum. It is always more comfortable to single out the other accusingly; changing one's own comfort, one's own habits is more demanding.

3. Uncritical consumerism in a fatigued society

But this is what is expected to happen in a fatigued or burnout society[18]. The philosopher Byung-Chul Han masterly explains this social tiredness in his book, Burnout Society[19]. The author therein describes an automation of social life, namely in the occidental world. He explains how an excess of work and a lack of idleness

11 The Statute is available at: https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte

12 These agreements are available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu

13 Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Draft Resolution A/ HRC/26/L.22/Rev.1 [25/06/2014].

14 Monsanto recently merged with Bayer.

15 David Barboza, "Workers sickened at Apple Supplier in China", The New York Times (22 February 2011) [available at: https://www.nytimes.com/2011/02/23/technology/23apple.html].

16 Eric David, Gabrielle Lefèvre, *Juger les multinationals. Droits humanis bafoués, ressources naturelles pillées, imputé organisée*, Bruxelles, Mardaga, 2015, 185p ; William Bourdon, *Face aux crimes du marché*, Paris, La Découverte, 2010, 333p.

17 James A. Roberts, "Profiling Levels of Socially Responsible Consumer Behaviour: A Cluster Analytic Approach and Its Implications of Marketing", *The Journal of Marketing Theory and Practice*, vol.3, no.4, 1995, p.97.

18 Byung-Chul Han, *Sociedade do Cansaço*, Petrópolis, Editor Vozes, 2015, 128p.

19 Byung-Chul Han, *Sociedade do Cansaço*, Petrópolis, Editor Vozes, 2015, 128p.

— a lack of *otium* as Nietzsche would put it[20] —, has reduced the human being to the state of an *animal laborans* (a working animal)[21]. Bertrand Russell also critically discussed this question in one of his works[22]. In this mechanized world and life, little or no time is dedicated to *thinking* or to *questioning* as an activity. It therefore becomes easy to let oneself go with the flow, a flow of mimicry whereby everyone consequently becomes the other because there is no intrinsic will. Questioning, thinking, doubting, choosing… all surrender to tiredness. And such tiredness casts an irradiating light upon various components of society. Tastes, for example, tend to become uniform and unquestioned, and are often dictated by the market. This context subsequently becomes a fertile womb for uncritical consumerism by fatigued consumers. We do live at a market place and are easily drawn to be(come) passive market players and to blindly obey the market's law. Surrendering is the easiest and most complacent option for many. Adopting immediate attitudes to change one's consuming behaviour demands a full stock of good will and critical distance. In turn, transforming such good will into positive actions rests upon a necessary vitality which is lacking in our tired societies. In this book "*Soumission*"[23], the French author Michel Houellebecq sardonically describes how a lack of vitality in a given society facilitates the *submission* to a new religion, because, all in all, according to a cost-benefit setting, submitting or surrendering oneself (cost) leads to more personal advantages, privileges and power (benefit). Here, the analogy holds because the consumers' reality — between options and choices, between costs and personal benefits — is not very different. Many things can be sacrificed, bypassed, overlooked or excused to uphold a personal gain. The consumer calculation is also a cold one whereby regrets and remorse easily become *liquid*[24]. A bad, discomposing conscience and shamefacedness are often not strong enough to change consumers' habits: knowing that child labor, forced or exploited labor was used in a given manufacturing process, that security norms were not adopted do not necessarily deter the will to purchase. Many products — sometimes superfluous ones — define our standard of living and questioning their use implies revisiting such living standard. It is a cultural trap organized by a market trap.

If corporate social responsibility, effective Business and Human Rights practices require a corporate cultural change, the latter depends, to some extent, on a cultural change in our consumption habits.

20 Friedrich Nietzsche, *Human, All Too Human: a Book for Free Spirits*, Cambridge, Cambridge University Press, 1996. p. 132.

21 Byung-Chul Han, *Sociedade do Cansaço*, Petrópolis, Editor Vozes, 2015, pp.41-50.

22 Bertrand Russell, *A conquista da felicidade*, Rio de Janeiro, Nova Fronteira, 2017, pp.45-53.

23 Michel Houellebecq, *Soumission*, Paris, Flammarion, 2015, 315p.

24 Zygmunt Bauman, *La cultura en el mundo de la modernidad liquida*, Mexico City, FCE, 2013, 101p; Zygmunt Bauman, *La vie liquid*, Paris, Fayard, 2013, 252p.

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Crisis in Venezuela: The Brazilian response to the massive flow of Venezuelans in Roraima

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Crisis in Venezuela: The Brazilian response to the massive flow of Venezuelans in Roraima

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On a daily basis, thousands of Venezuelans are forced to leave their country as a result of the political and economic crisis. The lack of basic supplies, such as medicine and food, the lack of freedom, due to an authoritarian government, and the soaring crime rates led to a massive movement toward neighboring countries, like Brazil and Colombia.

The inflation rate[1] of 13,860%, in April of 2018, can easily demonstrate the unprecedented economic crisis of Venezuela. In 2017, while the monthly minimum wage was approximately 200,000 Bolivares, the estimative of the price of basic groceries was around 1,000,000 Bolivares[2]. Hence, it became impossible for most people to provide for themselves and their families.

Besides, the International Community demonstrates continuous concerns regarding the local respect for human rights. In May 2018, the United Nations High Commission for Human Rights considered that there was no political or social condition to carry on the elections in Venezuela. Thus, the United Nations refused to send an international observer to the elections.

Due to the lack of political, social and economic condition, there is a massive flow of Venezuelans in the State of Roraima due to the shared border with Brazil. Forced by the circumstances, leaving their country seems to be a matter of survival. Although Brazil has a positive open door policy, the issues faced by Venezuelans put it in check.

In May of 2018, I visited Boa Vista in order to interview Venezuelan refugees, local people, Government authorities and representatives of international organizations. The results of my research are reported in this chronicle as an attempt to share the Brazilian response to the massive flow of Venezuelans there.

1. The increasing refugee status requests from Venezuelans in Roraima

Considering the situation, expressive amounts of Venezuelans seek the refugee status in other countries. According to the 1951 Convention, a refugee is a person who was forced to move to another country due to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In addition, persecution could also be other human rights violations related to the mentioned reasons[3].

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1 INTERNATIONAL MONETARY FUND. **Inflation rate, average consumer prices.** Available at < http://www.imf.org/external/datamapper/PCPIPCH@WEO/WEOWORLD/VEN >. Accessed on 21 June 2018.

2 CENDAS-FVM, Sary Levy, professor at the Central University of Venezuela. Bolivares is the current Venezuelan currency.

3 UNITED NATIONS REFUGEE AGENCY: **Handbook on Procedures and Crite-**

In Brazil, the requests for refugee status from Venezuelans have significantly raised. In 2010, there were only four requests. However, the number has increased and, in 2017, almost 18,000 Venezuelans applied for refugee status, which represented more than half of all the requests in the last year. Most of them were made in Boa Vista[4].

As Roraima and Venezuela share a common border, the latter is being crossed by a massive flow of Venezuelans. The Brazilian Federal Police estimates that there are currently almost 50,000 Venezuelans in Roraima[5]. In the last five months, the daily average entrance[6] was around 416 there. Nevertheless, not all of them applied for the refugee status.

According to a mapping carried out, from May 28 until June 9 of 2018, by the municipal government of Roraima, there are currently 25,000 Venezuelans living in Boa Vista[7]. The of entries on the Brazilian soil from January to May of 2018 was 55% higher than in whole past year, which demonstrates a constant increase[8].

In order to understand the impact, it is necessary to mention the main features of the State of Roraima. In spite of a territory, which extends up to 224,300 km², there are only 15 cities in the whole State. The total population is approximately of 522,636 people[9] and most of them, around 332,020, live in Boa Vista[10]. For such reason, 25,000 new people in the city is a significant quantity and the consequences are easily noted.

2. The difficulties faced by Venezuelans in Boa Vista

The economy of Roraima is unable to generate as many jobs as necessary to employ all the Venezuelans arriving daily. Through the whole city of Boa Vista, it is possible to see men in the traffic lights holding signs to show that they are looking for a job. Meanwhile, Venezuelan mothers and their children are begging all over the city.

Even though many of them have higher education degrees, the circumstances led some to accept jobs they would never think of. It is not uncommon to know that Venezuelans accept job positions paid illegally less than a minimum wage. Such situation creates even more hostility towards some Brazilians, who feel that foreigners are *stealing* their jobs.

In fact, there is a limited amount of job vacancies and an increasing number of people arriving daily looking for jobs in order to rebuild their lives. Unfortunately, this reality creates an unprecedented inexpensive workforce in Roraima and leaves room for different sorts of exploitation.

There is a neighborhood in Boa Vista where Venezuelan women work as prostitutes. Due to the value usually charged, the neighborhood is known as "ochentas" (eighty in Spanish). Besides, cases of slave-like work conditions are also a reality in Roraima, especially in the rural area. For such reason, Federal Government and the Labor Public Attorney´s Office have discussed measures to prevent the recruiting of Venezuelans in order to submit them to labor analogous to slavery[11].

Thus, the positive open door refugee policy of Brazil collides with the daily difficulties faced by Venezuelans in their new country. Notwithstanding the well-known Brazilian hospitality, the cases of xenophobia in Boa Vista has brought some nuance to this cultural

ria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Available at < http://www.unhcr.org/4d93528a9.pdf >. Accessed on 20 June 2018.

4 MINISTÉRIO DA JUSTIÇA: **Refúgio em números – 3º edição**. Available at: <http://www.justica.gov.br/news/de-10-1-mil-refugiados-apenas-5-1-mil-continuam-no-brasil/refugio-em-numeros_1104.pdf/view>. Accessed on 20 May 2018.

5 CASA CIVIL: **Polícia Federal – Migração em Roraima** – 9 de maio de 2018. Available at < http://www.casacivil.gov.br/operacao-acolhida/documentos/policia-federal-migracao-em-roraima-9-de-maio-de-2018/view>. Accessed on 20 June 2018.

6 PREFEITURA BOA VISTA: **Prefeita apresenta resultado do mapeamento de venezuelanos que vivem em Boa Vista**. Available at: < https://www.boavista.rr.gov.br/noticias/2018/06/prefeita-apresenta-resultado-do-mapeamento-de-venezuelanos-que-vivem-em-boa-vista>. Accessed on 20 June 2018.

7 The mapping did not differentiate migrant and refugee.

8 PREFEITURA BOA VISTA: **Prefeita apresenta resultado do mapeamento de venezuelanos que vivem em Boa Vista.** Available at: < https://www.boavista.rr.gov.br/noticias/2018/06/prefeita-apresenta-resultado-do-mapeamento-de-venezuelanos-que-vivem-em-boa-vista>. Accessed on 20 June 2018.

9 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. Available at: < https://cidades.ibge.gov.br/brasil/rr/panorama>. Accessed on 20 June 2018.

10 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. Available at: <https://cidades.ibge.gov.br/brasil/rr/boa-vista/panorama>. Accessed on 20 June 2018.

11 MINISTÉRIO PÚBLICO DO TRABALHO. Available at < http://portal.mpt.mp.br/wps/portal/portal_mpt/mpt/sala-imprensa/mpt-noticias/6c5a7442-ccb8-4f12-a161-9947a27b7535>. Accessed on 4 September 2018.

feature. In February of 2018, a man threw an incendiary device at a building occupied by Venezuelans. In the same month, an intentional fire in a house inhabited by more than 10 Venezuelans injured a family, including a four- year- old child.

Furthermore, the gaps between Brazilians and Venezuelans are deepened by their lack of integration in the domestic society. Most Venezuelans live in refugee shelters and, consequently, do not often interact with Brazilians. Even though Spanish and Portuguese may be similar, the learning process is not effortless and is even more difficult due to the lack of interaction between the two peoples

Resultantly, the unemployment issue emerges again. Without speaking Portuguese, the possibility to be hired remains even remoter. Without a job position, it is even more complicated to leave the refugee shelters and provide for themselves and their families.

In this regard, another difficulty arises due to the family separation. Frequently, the plan is for one or a few family members to cross the border first and, after having settled, to bring the others who remained in Venezuela. For this reason, it is appealing for some to remain in Roraima, instead of moving to other states in Brazil.

Moreover, another problem faced is the lack of documents. As previously mentioned, the majority of people seeking refuge are Venezuelans and this situation usually compels them to leave their country without enough time to prepare. A life in a new country without the necessary documents is unconceivable.

Despite all the difficulties, the situation is not hopeless or unchangeable, considering the efforts made by the Government, organizations of the civil society, and International Organizations in order to resettle Venezuelans in Brazil. Surely, there are uncountable challenges, especially because this is an unprecedented situation. However, there are prepared and willing people to offer help and, consequently, hope for the ones who most need it.

3. The positive actions toward Venezuelans in Roraima

In view of the challenges faced by Venezuelans and by the State of Roraima, in 2018, the Federal Government stepped in to offer support. One relevant measure was the implementation of the control of the entry and exit at border crossing points, with the assistance offered by refugee shelters placed on the border, organized by the military and with the aid of the United Nations High Commissioner for Refugees (UNHCR).

Therefore, in order to substantiate such actions, the most important legal measures toward Venezuelans were (i) the Decree No. 9285/2018, which recognizes vulnerability of migrants fleeing the humanitarian crisis in Venezuela[12]; (ii) Decree No. 9286/2018, which defines the composition, competencies and operating rules of the Federal Committee of Emergency Assistance for the reception of vulnerable migrants[13]; and (iii) the Provisional Measure No. 820/2018, converted into the Statute no. 13,684/2018, which provides for emergency assistance measures for the reception of people in a vulnerable situation deriving from the migratory flow caused by the Venezuelan crisis[14].

Since the recognition of the vulnerability of the Venezuelans by the Decree No. 9285/2018, the Statute No 13,684/2018 designed actions that are more specific in order to implement social protection. According to this law, the definition of social protection regards "structured public policies to prevent and remediate situations of social vulnerability and personal risk that imply in the violation of human rights". The Government - at the federal, district and municipal levels – should carry on the public policies with organizations of civil society as well.

In fact, Government, organizations of civil society and International Organizations are already working together. In the refugee shelters, the military have been working with the UNHCR in the organization of such places. The support given by the military has improved the logistic of supplies and the health care. For instance, in Boa Vista, in April of 2018, the military sanitized a

12 CÂMARA DOS DEPUTADOS. Available at <http://www2.camara.leg.br/legin/fed/decret/2018/decreto-9285-15-fevereiro-2018-786170-publicacaooriginal-154864-pe.html>. Accessed on 30 June 2018.

13 CÂMARA DOS DEPUTADOS. Available at <http://www2.camara.leg.br/legin/fed/decret/2018/decreto-9286-15-fevereiro-2018-786171-norma-pe.html>. Accessed on 30 June 2018.

14 PRESIDÊNCIA DA REPÚBLICA. Available at < http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/Lei/L13684.htm>. Accessed on 30 June 2018.

gymnasium in order to revert the hazardous conditions found there due to the overcrowding of Venezuelans.

Nevertheless, the Public Prosecutor´s Office has inspected the conditions of the shelters in order to verify the respect of human rights. In May of 2018, a report regarding the shelters was drafted and recommendations were made to improve the situation of the Venezuelans. In such occasion, the Public Prosecutor´s Office observed that the shelters with indigenous Venezuelan population, in Pacaraima, had the worst condition. This shelter is especially challenging due to the quantity of Venezuelans arriving daily.

The Venezuelan indigenous population is the most vulnerable and demands especial care. The act of feeding, for instance, has its own particularities. They are used to prepare their own food, which can be an issue in a shelter with hundreds of people. In addition, they have food restrictions that may seem unusual to non-indigenous people.

Furthermore, the Public Defender´s Office offers legal assistance to the ones – Brazilians or foreigners - who are not able to afford legal services. Thus, in 2017, the Public Defender´s Office and the Public Prosecutor´s Office filed a Public Civil Action before the Federal Court in order to request the waiver of the payment of the fees charged for granting temporary residence for needy Venezuelan immigrants in Brazil.

Despite these measures, the civil society and other organizations have played in important role. A Catholic Church in Boa Vista, the Consolata, has opened its doors to Venezuelans to live there. With the support of UNHCR and the military, a shelter was settled in the backyard and families were welcomed and accommodated. They are able to use the structure of the Church and the members also support them with donations.

In a similar vein, there are non-governmental organizations (NGOs) that develop aid actions in the assistance of Venezuelans. The NGO "Los Hermanos", created by two friends, a lawyer and a doctor, helps Venezuelans in Boa Vista with donations and food twice or three times a week. They have a team of volunteers and work in the integration of the Venezuelans in the new city. In addition, the NGO has been working in the creation of a new shelter, supported by UNHCR and another International Organization, the International Humanitarian Federation, with a project to improve the installations of the building.

In view of the actions, the articulation of public policies by the Government with other organizations may be an adequate way to approach the situation. As the numbers show, the flow of Venezuelans is still increasing in the State of Roraima. For this reason, the participation of different sectors of society is essential to provide the best possible outcome.

4. Final considerations

All the positive actions listed are samples of the current initiatives in Roraima. It is clear that each one has its own importance. As the challenges are countless, the support of different entities provides actions backed by solid knowledge in their respective fields. Thus, the articulated polices among different entities seem to be the most successful resource for Roraima and Venezuelans as well.

Nevertheless, the broad terms used in the legislation regarding Venezuelans created an unclear scenario that could interfere in the proper articulation of public policies. The terms used to describe the migratory flow are vague, as they do not distinguish between refugee seekers and migrants. Legally speaking, both concepts are completely different.

In the first case, refugee seekers do not voluntarily move to another country, but they are forced to run from the well-founded fear of being persecuted for reasons for race, religion, nationality, membership of a particular social group or political opinion, or by other related human rights violation. Meanwhile, migrants voluntarily move, usually to other countries, for any particular reason. For instance, the motivation could be a better life abroad or to join family members.

In the case of Venezuelans, crossing borders to Brazil usually is a matter of survival, not a voluntary decision. Life in their country turned out to be impossible due to the continuous human rights violations. The Statute No. 13,684/2018 recognizes such facts by the definition given to "humanitarian crisis", which is described as a situation of, among other possibilities, "widespread violation of human rights or international humanitarian law that causes a disorderly migratory flow toward the region of the national territory". However, there is no specific term regarding refugee seekers.

Finally, the distinguishing terms would be useful for Venezuelans and for Brazil as well. The responsibility of a country is different regarding, on one hand, migrants and refugee seekers, on the other hand: the rights of refugee seekers are broader than the rights of migrants. Even though the inaccuracy of the terms could be intentional, a clear position would be an important step in the defense of human rights, as it would allow a better planning of public policies to efficiently approach the situation.

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Some remarks on the third sessions of the Business and Human Rights Treaty Process and the 'Zero Draft'*

Algunas observaciones sobre el tercer período de sesiones del proceso del Tratado de Negocios y Derechos Humanos y el 'Zero Draft'

Humberto Cantú Rivera

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Some remarks on the third sessions of the Business and Human Rights Treaty Process and the 'Zero Draft'*

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Abstract

The process of creating an international legally binding instrument to regulate, under international law, the activities of transnational corporations and other business enterprises with respect to human rights, is slowly moving forward. Important and complex issues were addressed during the third session of the Intergovernmental Working Group, which was once more a forum of ideological and political confrontation. Nevertheless, the contours of a potential treaty are starting to become clearer, as a relative consensus on the measures that the instrument should include starts to crystallize. Substantial and procedural elements addressed during the third session have provided a large basis for discussion and analysis, while political and legal considerations are starting to appear more intensely as the process approaches the negotiation stage. In that regard, the 'zero draft' of the binding instrument provides States and other stakeholders with a starting point to negotiate one of the potential developments in the business and human rights field.

Key words: business and human rights; treaty process; Intergovernmental Working Group; transnational corporations; UNGPs.

Resumen

El proceso de crear un instrumento internacional jurídicamente vinculante para regular, bajo el derecho internacional, las actividades de las empresas transnacionales y otras empresas con respecto a los derechos humanos, comienza a avanzar lentamente. Diversas cuestiones, tanto importantes como complejas, fueron abordadas durante la tercera sesión del Grupo de Trabajo intergubernamental, que se convirtió nuevamente en un foro de confrontación ideológica y política. Sin embargo, los contornos de un eventual tratado empiezan a aclararse, conforme comienza a cristalizarse un consenso relativo respecto a las medidas que tal instrumento debería incluir. Los elementos sustantivos y procesales que fueron tratados durante la tercera sesión aportan una base amplia para la discusión y el análisis, mientras que distintas consideraciones políticas y jurídicas aparecen con mayor intensidad conforme

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la fase de negociación del proceso se aproxima. De tal forma, el 'borrador' del instrumento vinculante presenta a los Estados y otros actores interesados un punto de partida para negociar uno de los potenciales desarrollos del campo de las empresas y los derechos humanos.

Palabras clave: empresas y derechos humanos; tratado vinculante; Grupo de Trabajo intergubernamental; empresas transnacionales; Principios Rectores sobre las empresas y los derechos humanos.

1. Introduction

The third session of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (hereinafter 'IGWG') took place between 23 and 27 October 2017, after two previous sessions where the potential scope and content of a business and human rights treaty were discussed. The third session,[1] as it will be explored in this article, had as its main objective to begin discussions on a draft instrument on business and human rights, on the basis of a document prepared by the Chairperson-Rapporteur of the Intergovernmental Working Group. While the aforementioned document was not the draft text of the instrument, it did provide a wide and interesting basis for States and other stakeholders to discuss, for a week, the potential options available that could be included in the text for negotiation. However, as this article will briefly discuss, many of the options presented in the document could be controversial aspects of a potential legally binding instrument, a situation that could lead to reticence or even open rejection from many States, taking into consideration the contentious nature of the IGWG during its initial sessions. In addition, considering that the future instrument would be a part of general international law, it is important to situate it within the current practice of States –and in any case, to aim for elements that can evolve with their general acceptance–, in order to achieve a resulting document that presents feasible traits for the development of international (human rights) law.

In addition, the recent publication of the draft instrument for negotiation calls for a short analysis on some of its most important provisions –the *core*, so to speak, of the draft instrument–, in order to analyze the initial choices made by the Chairperson-Rapporteur for the beginning of negotiations, which shall take place in October 2018. As it can be observed from this short introduction, the aim of this article is not to provide a scientific or theoretical analysis; rather, its humble intention is to provide some comments on the different aspects included in the document for the third session, to take a quick glance at the actual negotiations that took place during that session, and to take a first look at the draft instrument, in an effort to compare these instruments to the current status of several of its elements under international law. In this regard, a first section will address the 'Elements' document prepared for the third session; a second section will reflect on some of the reactions and contributions of States during the session vis-à-vis some of the controversial or central aspects included in the Elements document; and finally, a last section will briefly address some of the aspects contained in the draft instrument released by the Chairperson-Rapporteur in mid-July 2018, prior to the fourth session of the Open-Ended Intergovernmental Working Group.

2. The basis for the third session: the 'Elements' document

Resolution 26/9 of the Human Rights Council mandated the Chairperson-Rapporteur of the IGWG to develop a document containing "elements for the draft legally binding instrument for substantive negotiations… taking into consideration the discussions held at its first two sessions".[2] Both sessions addressed numerous issues,[3] ranging from jurisdiction and State responsibility, to potential civil, criminal and administrative liability regimes in relation to corporate conduct. In addition, other important questions were also covered, such as the horizontal and vertical scope of the potential instrument (adressing which rights should be covered by

1 For a short recapitulation of some aspects of the session, see Cassel, Doug, "The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty", *Business and Human Rights Journal*, Vol. 3:2, 2018.

2 Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9 (26 June 2014), par. 3.

3 Cantú Rivera, Humberto, "Negotiating a Business and Human Rights Treaty: The Early Stages", *UNSW Law Journal*, Vol. 41(3), 2017.

the treaty in the first case, and which companies within a corporate group should be responsible for human rights violations committed within global supply chains, in the second case). In that sense, the 'Elements paper'[4] that was presented by the Chairperson-Rapporteur –barely a month in advance of the session, a situation that impacted on the possibility for delegations to adequately prepare for the session– with the intention of commencing negotiations included numerous substantive aspects (A), on the one part, as well as procedural possibilities (B), on the other part, with the aim of encouraging dialogue to bridge the important gap that so far has been the 'trademark' of the business and human rights treaty process. Nevertheless, one of the key aspects of the Elements paper was the fact that it included a large number of possibilities without any specific orientation, in an effort to favor dialogue among States and other stakeholders.

2.1. Substantive elements: rights and obligations for States and businesses

The Elements paper addressed an important number of substantive aspects, among them issues such as the scope of application (specifically which rights, acts and actors would be covered by it); general obligations for States, business enterprises and even international organizations; preventive measures that could be adopted in order to prevent human rights violations linked to business enterprises; and finally, aspects revolving around the issue of legal liability, focusing both on international responsibility and domestic liability for the different actors involved. While addressing each one of them in detail is beyond the scope of this article, some comments will be shared in relation to the potential options being presented to States by the Elements paper.

First of all, in relation to the scope of application, the Chairperson-Rapporteur divided it in two different aspects: an objective scope focusing on all human rights violations or abuses resulting from corporate activities that have a transnational character; and a subjective scope, where it is specifically mentioned that it "does not require a legal definition of TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character."[5]

In relation to the objective scope, the Elements paper tries to ensure that all human rights violations are covered, which should be the main purpose of this instrument, considering the explicit recognition made in the UNGPs –and its acceptance by Member States of the Human Rights Council– that business enterprises have the capacity to impact on all human rights. The suggestion included in this section also addresses other important issues, such as labor rights, environment, or corruption. This broad approach is especially adequate, since many corporate-related human rights abuses –which regularly take place in developing countries– normally start as a result of violations to economic, social, and cultural rights, including the right to a healthy environment or to labor standards, which then, due to the interrelated and interdependent character of human rights, can also impact on other civil and political rights.

But an important aspect to ponder in this area is the way in which this potential treaty would operate, if such an option was followed: since the treaty currently being discussed is being considered so far as a stand-alone treaty –and an instrument that does not create by itself new human rights–, it would potentially rely on the human rights obligations that States have so far committed to uphold, which could then lead to a rather inequitable outcome in terms of State obligations vis-à-vis the different internationally-recognized human rights. As it is widely known, different human rights treaties have varying degrees of ratification;[6] thus, a stand-alone treaty simply making reference to other human rights (and in this case, not even to other international instruments *per se*) could then allow States to pick and choose –to some extent, at least– the rights that could be applicable under this new conventional regime, or would depend on their ratification of other international and regional instruments.[7] Of course, this is not the only possible

4 *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights.*

5 *Ibid.*, p. 4.

6 For example, both of the Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights) have a large amount of ratifications, as does the Convention on the Rights of the Child. But that is not the case for other treaties, such as the Migrant Workers Convention, or even of several protocols to the core human rights treaties.

7 *Cf.* Forteau, Mathias, "Les renvois inter-conventionnels", *Annuaire français de droit international*, Vol. 49, 2003, pp. 100-101, 104, where Professor Forteau explains that while the voluntary approach

scenario, since several human rights are considered to be of a customary nature,[8] and as such do not require explicit conventional commitments from States; however, this is not the case for the wide majority of human rights, many of which are only considered by States as binding as a result of an explicit conventional commitment –namely those of an economic or social nature, and even some civil or political rights. In a sense, this could create an asymmetrical horizon for the application of new conventional obligations deriving from a business and human rights treaty.

In terms of the subjective scope, on the other hand, the Elements paper tries to move beyond the constant *impasse* that the definition of 'transnational corporations' has represented in past efforts at the UN. As such, it states that the aim of the instrument is to encompass "violations or abuses of human rights resulting from any business *activity that has a transnational character*…" (emphasis added). There is an important virtue in this approach, for as it has been explained previously,[9] from a legal point of view, transnational corporations do not exist.[10] They are an economic fiction that do not fit within current legal reality –or *realities*, taking into consideration both domestic and the international legal systems. In addition, it is not the transnational or domestic character of the perpetrator itself that should be the focus of this effort, but rather the human rights violation that is committed, regardless of the 'transnational' or 'domestic' character of the company –and it may be added, its public, private or joint character. Therefore, focusing a new instrument on *business activities of a transnational nature* could potentially contribute to establish clearer boundaries, and to move from a subjective scope to a 'conduct-based approach', in a similar vein to those treaties that prohibit certain egregious conducts, where the specific identity of the perpetrator is not necessarily defined. In this regard, the focus on business activities will need some delimitation, to ensure that all situations where business operations, activities or commercial relationships generate negative impacts on human rights are adequately covered, and to ensure that the specific aspects of transnationality that limit the capacity of domestic jurisdictions to pursue or hold businesses accountable are adequately taken into account.

The discussion on the subjective scope of the instrument is not confined to this particular aspect: the Elements document suggests that States, business enterprises, organizations of regional economic integration and even natural persons could be subject to the scope of the treaty. There are several important aspects to take into consideration regarding this suggestion: first of all, public international law continues to recognize full international legal personality exclusively to States;[11] all other actors of international relations may at best have limited legal personality –either *functional*, as in the case of international organizations, or relative (or limited) legal personality, as in the case of business enterprises. Secondly, considering it is States who are negotiating this international instrument, and taking into consideration that many of them have expressed explicit opposition to granting full international legal personality to business enterprises, it would probably be wise to recognize that the potential for the (indirect) evolution of international legal personality may not be the most desirable option to pursue through the development of a business and human rights treaty –especially if widespread ratification and acceptance by States is desired or expected.

While some authors have suggested that international law already applies directly to business enterprises or that there is a need to ensure that it addresses them directly,[12] it is unclear what benefits –beyond pure

remains a fundamental parameter of international law, the *renvoi* between different conventions seeks to ensure a solidary and unified application of different treaty regimes. Thus, he suggests that if a State accepts the norm that generates the *renvoi*, it implicitly agrees to the application of the second instrument (in this case, the human rights stipulated in the Elements document, which would then cover an important number of conventions and treaties on the subject).

8 Decaux, Emmanuel, "Le projet de l'ONU sur la responsabilité des entreprises transnationales" in Daugareilh, Isabelle (dir.), *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, Brussels, Bruylant, 2010, p. 473.

9 Cantú Rivera, Humberto, "¿Hacia un tratado internacional sobre la responsabilidad de las empresas en el ámbito de los derechos humanos? Reflexiones sobre la primera sesión del grupo de trabajo intergubernamental de composición abierta", *Anuario Mexicano de Derecho Internacional*, 2016, pp. 442-443.

10 See Kessedjian, Catherine, *Droit du commerce international*, Paris, PUF, 2013, p. 117; Menjucq, Michel, *Droit international et européen des sociétés*, 3e ed., Paris, Montchrestien, 2011, p. 401, on the characteristics of so-called 'transnational corporations', where he describes the phenomenon as one that is guided by the principles of unity of action, strategy or finance. See also Muchlinski, Peter T., *Multinational Enterprises and the Law*, 2nd ed., New York, Oxford University Press, 2007, p. 7.

11 Crawford, James, "Chance, Order, Change: The Course of International Law", *Recueil des cours*, Vol. 365, 2013, p. 159; Pellet, Alain, *Le droit international entre souveraineté et communauté*, Paris, Pedone, 2014, pp. 63-66.

12 Carrillo Santarelli, Nicolas, *Direct International Human Rights*

symbolism– this approach would bring: at the end of the day, creating international legal obligations directly applicable to business enterprises –which is, of course, not *legally* impossible– would be confronted to the need to ensure monitoring or oversight of some kind; that monitoring would need to be performed by the State, which then begs the question of the need to move beyond a State-centric approach, or to make an attempt to a sort of 'refoundation' of international law. Instead, a different route may be followed: as Vincent Chétail explains, primary rules of international law establish the expected or prohibited conduct that is to be observed both by States and non-State actors[13] (which would then support the argument of the direct application of international law to business enterprises), but the secondary rules have only developed to allow the attribution of State responsibility. In that regard, the State obligation to transpose the rules established in international instruments to their domestic order in order to ensure that business enterprises adopt preventive measures –and are subject to civil, criminal or administrative liability in case of their contribution to human rights violations– could probably contribute to avoid a diplomatic *impasse* in the first place, as well as to ensure a relatively uniform evolution of attribution regimes relating to corporate accountability for human rights violations under domestic law. This approach, while apparently conservative –or at least less revolutionary than the idea of direct international human rights obligations for businesses–, could probably receive enough support from States to become an international norm, a *sine qua non* condition to ensure the evolution of international business and human rights standards, and avoid a political *impasse* that could delay unnecessarily or even derail the process.

The options set forth in the Elements document suggested a wide range of measures that States could adopt to advance the internationalization of the business and human rights regime. They went from direct international human rights obligations for corporations –which curiously reflected many of the aspects outlined by the second pillar of the UNGPs, including compliance mechanisms to ensure adequate human rights due diligence–, to more general State obligations under international human rights law. However, an important aspect that was also included in the text of the Elements was the need for States to adopt preventive measures in their domestic legislation to require corporate human rights due diligence, on the one hand, as well as a set of other procedural requirements under international human rights law, such as adequate consultation processes with potentially affected stakeholders, on the other hand. As it can be observed, the Chairperson-Rapporteur presented the participating States to the IGWG with one potentially unfeasible option –in terms of the legal acceptance by States–, as well as with a viable option that had just recently been adopted by France, through its *loi de devoir de vigilance*.[14] This could be an acceptable option for States, one that would clearly impose upon them an obligation to regulate the extra-territorial activities of business enterprises domiciled within their domestic jurisdiction, a scenario that could probably create a level-playing field, and one which reflects what may potentially become a general legal requirement in numerous States even before a new treaty regime on business and human rights comes to light.

A final important point that was presented in the Elements document with respect to substantive aspects was the issue of legal liability, which is presented as a State obligation to adopt measures in the civil, criminal and administrative fields to ensure the legal liability of business enterprises involved with human rights violations, in addition to the potential international responsibility of the State for actions, omissions or complicity

Obligations of Non-State Actors: A Legal and Ethical Necessity, Oisterwijk, Wolf Legal Publishers, 2017; Francioni, Francesco, "Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations" in Benedek, Wolfgang, De Feyter, Koen and Marrella, Fabrizio (eds.), *Economic Globalisation and Human Rights*, Cambridge, Cambridge University Press, 2007, pp. 254-260.

13 See algo Chétail, Vincent, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Alland, Denis et al. (eds.), *Unité et diversité du droit international:* écrits *en l'honneur du professeur Pierre-Marie Dupuy*, Leiden, Brill, 2014, p. 127: "As soon as there is state responsibility in accordance with the notion of due diligence, one may assume that the violation in question has been –or at least will be– committed by private actors which are thus the holder of the relevant international obligation. Otherwise no breach can be attributed to them and there is no ground for justifying the duty of the state to act in due diligence to prevent, investigate or redress violations. In other words, as violations are not directly imputable to the state itself, private actor must be considered the direct bearer of the violated rule."

14 On this legal development, see Cossart, Sandra, Chaplier, Jérôme and Beau de Lomenie, Tiphaine, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", *Business and Human Rights Journal*, Vol. 2(2), 2017; several other States, including Switzerland and Germany, have been working in the development of similar laws to require corporate human rights due diligence throughout global supply chains.

with corporate activities that have a negative effect on human rights.[15] Beyond establishing a general legal liability provision similar to that present in the ILC draft articles on crimes against humanity,[16] this particular section of the Elements document sets forth several measures with respect to criminal liability of business enterprises, particularly in relation to actions that may constitute international crimes. For example, it highlights the importance of ensuring the potential criminal liability of "transnational corporations" and other business enterprises in their domestic legislation as a result of its violation or abuse or that of applicable international human rights instruments, as well as for any attempt to engage in such conduct, complicity or participation in the commission of such violations. This provision, which clearly departs from international positive law, would however find support in several domestic legal systems around the world that do provide for the criminal liability of business enterprises, an aspect that has recently been in OHCHR's agenda.[17] While a general idea, it states the importance of ensuring repression of any corporate engagement with gross human rights violations, as it has been repeatedly argued before federal US courts in Alien Tort Statute cases,[18] as well as in other jurisdictions.[19]

A second aspect that is explored to a certain extent is that of civil liability, where the Elements document sets forth that States shall adopt measures to ensure the civil liability of business enterprises for abuses throughout its activities, as well as for its planning, preparation, direction of or benefit from human rights abuses. This aspect is especially relevant for victims, due to the important focus on redress and reparation of damages. Nevertheless, it is important to highlight the inherent difficulties that have appeared in the different domestic legal systems dealing with civil lawsuits for business-related human rights violations, notably the United States, the United Kingdom, France or the Netherlands, and especially the fact that while the political branches of some of these governments seem to embrace the ideal of potential corporate civil liability for involvement in human rights abuses (as is the case of France, for example), the judiciaries in these countries have been hesitant –and in some cases even reluctant– to grant any type of reparation to victims of business-related human rights abuses, therefore creating an important gap between political choices, on the one hand, and judicial practice, on the other. Finally, administrative sanctions are suggested as a way to complete the domestic legal framework of States, in a manner that seems to suggest the importance of responsible business conduct to ensure continued access to public procurement and commercial contracts with States. This provision would reflect some of the aspects that are present in the UNGPs, where States are invited to fully use their domestic legal powers to incite appropriate corporate behavior with respect to human rights.

As it can be observed, the substantive aspects of the Elements document had the main objective of starting to delineate the potential options that States could choose to adopt in the framework of a business and human rights treaty. In that regard, due consideration should be given not just to the legislative and poltical practices and preferences of States, but also to the judicial experiences that have taken place in numerous cases across different jurisdictions. While the topics of general obligations and preventive measures will more than likely be within the general purview of political branches, the issue of legal liability needs to be addressed with an appropriate dose of judicial realism, in order to ensure that the suggestions made in the near future vis-à-vis this topic can be plausible and in accordance with the legal principles of States, in order to avoid a chasm between law and practice.

15 How this provision may interact with the Draft Articles on State Responsibility for Internationally Wrongful Acts, or how much influence it may have upon it, is a relevant question that is relatively unclear at the time of discussion of the Elements paper.

16 International Law Commission, *Crimes against humanity. Addendum: Text of draft article 5, paragraph 7, provisionally adopted by the Drafting Committee on 7 July 2016*, A/CN.4/L.873/Add.1 (8 July 2016).

17 On this aspect, see the reports produced by OHCHR for its Access to Remedy Project: Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights*, A/HRC/32/19 (10 May 2016); Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*, A/HRC/32/19/Add.1 (12 May 2016).

18 See generally Koebele, Michael, *Corporate Responsibility under the Alien Tort Statute*, Leiden, Martinus Nijhoff, 2009; Muir Watt, Horatia, "L'*Alien Tort Statute* devant la Cour Suprême des Etats-Unis", *Revue critique de droit international privé*, 2013.

19 The notable case of France in the Lafarge case is an example, where the company has been indicted for charges of financing a terrorist organization (the Islamic State), engaged in potential crimes against humanity. The case is still pending at the time of writing.

2.2. Procedural elements: access to justice, effective remedy and jurisdiction

Beyond the substantive aspects considered in the previous subsection, several other "procedural" questions (which at the same time also address substantive rights) were introduced in the Elements paper presented by the Chairperson-Rapporteur, most notably the issues of access to justice, effective remedy and the (controversial) question of jurisdiction. The first two of them are particularly interrelated, given the eminently procedural nature of access to justice and the substantive aspects that conform the right to an effective remedy;[20] both are complemented by the dual nature (public and private) of jurisdiction.

In relation to the questions of access to justice and effective remedy, the Elements paper suggested several interesting elements. One of them is the focus on vulnerable groups, stating that their particular characteristics should be taken into account when adopting measures to guarantee access to justice and to an effective remedy. Several other points are made in relation to due process guarantees that have long been reclaimed in cases brought by individuals or groups against transnationally-operating business enterprises, such as equality of arms, reversal of the burden of proof, public interest litigation or the right to a fair trial with an impartial judge. The suggestions included in this regard also go as far as to include the principle of discovery, which nevertheless is unnatural to civil law systems, where such procedural tools are not necessarily available for contending parties. An important question to consider in relation to this is the nature of human rights litigation, where the victim usually has an extended legal protection as a result of its legal fight against the State, a legally and politically superior entity; but in cases of business-related abuses, where two relatively equal parties –in terms of both being non-State actors– are in dispute, such considerations need to be pondered cautiously,[21] in order not to affect the principe of equality, on the one hand, and to avoid frivolous claims –which unfortunately do happen–, on the other hand. Of course, such scenarios may be clearer where there are widespread negative effects on the livelihood, health or environment surrounding a person or group; but this won't necessarily be the case with all kinds of human rights violations. In any case, it is important to ensure that an effective access to justice that adequately protects the right to due process and reinforces the possibility of access to remedy for victims is available at the domestic level, in order to ensure that no human rights abuse goes unpunished.

In relation to the right to an effective remedy, the Elements paper proceeds in a relatively different direction. To begin with, it suggests that remedies should exist in cases where "a TNC or OBE is acting under their instructions, direction or control; or when a TNC or OBE is empowered to exercise elements of governmental authority and has acted in such capacity while committing the violation or abuse of human rights."[22] In this specific scenario, it is particularly important to take into consideration the position adopted by the International Law Commission on the Draft Articles on Responsibility of States for Internationally Wrongful Acts,[23] whereby article 5 clearly refers to "parastatal" entities exercising public functions or services, that is, elements of governmental authority,[24] which may include private corporations in certain circumstances. Article 8 of the Draft Articles also makes reference to the possibility of involvement of private business enterprises in internationally wrongful acts, especially if they act on the instructions of, or under the direction or control of the State in exercising a specific conduct.[25] As it can be observed, both are replicated in the text of the Elements paper. However, the question left unresolved in this specific case is who will bear responsibilty for the breach of an international obligation, and more impor-

20 See generally Shelton, Dinah, *Remedies in International Human Rights Law*, 3rd ed., Oxford, Oxford University Press, 2015.

21 Rodley, Sir Nigel, "Engagement des États parties" in Decaux, Emmanuel (dir.), *Le Pacte international relatif aux droits civils et politiques*, Paris, Economica, 2010, p. 122, cautioning against unnecessarily expanding the human rights field into the private sphere.

22 *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, p. 9.

23 General Assembly, *Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83 (12 December 2001).

24 General Assembly, *Report of the International Law Commission on the work of its fifty-third session (23 April-1June and 2 July-10 August 2001)*, A/56/10 (2001), p. 43, par. 2: "The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of governmental authority concerned." See also Crawford, James, *State Responsibility: The General Part*, Cambridge, Cambridge University Press, 2013, pp. 126-132, 141-147.

25 Crawford, James, *State Responsibility: The General Part*, Cambridge, Cambridge University Press, 2013, pp. 161-165.

tantly, who will have the obligation to repair. The ILC Articles point to the responsibility *of the State* for the breach of an international obligation, which as a consequence entails its own obligation to provide reparation to the injured or aggrieved party. However, it is unclear what the specific intent of invoking the Articles on State Responsibility is beyond providing a legally sound basis, given that as it has been argued generally throughout the sessions of the Intergovernmental Working Group, the apparent objective of the project is that businesses will bear responsibility (including the obligation to repair damages) for their participation or involvement in human rights abuses, not States themselves. In the way that it is phrased, that aspect on the obligation to provide victims with an effective remedy gets somewhat lost within the lines making reference to the Articles on State Responsibility, and especially in relation to its articles 5 and 8.

Beyond this specific aspect, the position on remedies follows to a certain extent the choices made in the UN Guiding Principles, therefore recognizing the possibility of coexistence between judicial and non-judicial mechanisms, provided that the latter does not supersede the former. This, of course, is a positive step that serves to highlight the specific nature of the business and human rights dilemma, in which a non-State actor is subjected to historically State-centred legal standards, including those on the obligation to repair the damage as a result of a breach of international law; yet, the novelty is the openness to consider the possibility of non-judicial mechanisms, which have not been expressly taken into account in other international human rights treaties. To that regard, the Elements paper makes a nod to the van Boven and Bassiouni Principles on reparation[26] –as well as to the ILC Articles–, stating that measures should be taken to ensure that an integral reparation is considered and applied where possible. Thus, this should entail measures of restitution, compensation, rehabilitation, satisfaction and non-recurrence, in order to allow *restitutio in integrum* to the largest extent possible.

In addition to access to justice and the right to remedy, one of the most important and complex procedural aspects addressed by the Elements paper is that of jurisdiction. The suggestions included in this section must be confronted to the expansion of judicial practice across national jurisdictions around the world in business and human rights cases. To begin with, the first point made in the Elements paper in relation to jurisdiction is that States parties "shall adopt legislative and other adequate measures to facilitate that their judiciaries are allowed to consider claims concerning human rights violations or abuses alleged to have been committed by TNCs and OBEs throughout their activities…" A second point refers to allowing judiciaries to consider claims of abuses committed "under their jurisdiction or concerning victims within their jurisdiction", while a third one expands this notion to include "violations or abuses committed by TNCs and OBEs and their subsidiaries throughout the supply chain domiciled outside their jurisdiction." As it can be observed, the three proposals put forward by the Chairperson-Rapporteur make reference to adjudicative jurisdiction,[27] in which a court in one State may consider situations that took place in a different State –thus, beyond its own jurisdiction.

The first and third suggestions make implicit reference to situations potentially taking place beyond the territory of the State ("throughout their activities" and "throughout the supply chain domiciled outside their jurisdiction"), situations in which, under public international law, there must exist either a connection between a person, property or situation and the State assuming jurisdiction (territory, nationality, passive personality, effects doctrine or otherwise);[28] or, on the other hand, when there are not sufficient links with one State, but a denial of justice is plausible, a third, unrelated State may assume jurisdiction to avoid such a scenario.[29] In relation to the first point, a classic situation of extra-territorial jurisdiction, recent domestic case law from different jurisdictions has been relatively divided, as it

26 General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147 (16 December 2005).

27 General Assembly, *Report of the International Law Commission on the work of its fifty-eight session (1 May-9 June and 3 July-11 August 2006)*, A/61/10 (2006), Annex E, par. 5: "Adjudicative jurisdiction refers to the authority of a State to determine the rights of parties under its law in a particular case." See also Ryngaert, Cedric, *Jurisdiction in International Law*, 2nd ed., Oxford, Oxford University Press, 2015, pp. 9-10.

28 General Assembly, *Report of the International Law Commission on the work of its fifty-eight session (1 May-9 June and 3 July-11 August 2006)*, A/61/10 (2006), Annex E, pars. 10-15.

29 Bucher, Andreas, "La compétence universelle civile", *Recueil des cours*, Vol. 372, 2014, p. 103; Ryngaert, Cedric, *op. cit.*, pp. 135-142. This point will not be discussed in detail in this article.

has been shown in *Kiobel*[30] or *Daimler*[31] before the United States Supreme Court; the same position has been taken by at least the Versailles Court of Appeals in the *Jerusalem Tramway* case.[32] In all of them, the existing link between a foreign parent corporation, the facts and the corresponding jurisdiction were considered to be insufficient to be able to adjudicate the case. But other cases have relied in different rationales for allowing the domestic court of one country to assume jurisdiction over situations taking place elsewhere. For example, in *Akpan*,[33] the Dutch Code of Civil Procedure allowed its courts to exercise jurisdiction where there was a link to situations taking place in a different country, although applying the substantive rules of the foreign jurisdiction (in that particular case, Nigeria) and taking into consideration an existing duty of care from parent companies vis-à-vis its foreign subsidiaries. In *Vedanta*,[34] the London Court of Appeals allowed a tort claim to move forward as a result of the still-developing doctrine of the parent company's duty of care in relation to foreign subsidiaries, allowing Zambian villagers to file a claim against the parent company for its lack of due diligence vis-à-vis its foreign subsidiary and themselves. Finally, in *Al-Shimari*,[35] United States federal courts are considering a case of torture and other grave violations of international human rights law committed by a military contractor –a private military and security company– that took place in Iraq, where they have recently found that immunity does not apply vis-à-vis such violations, and that there is a clear and substantial link between the forum, the facts and the parties to allow the exercise of extraterritorial adjudicative jurisdiction. While a general, unified trend does not so far exist, comparative judicial practice in the exercise of extraterritorial adjudicative jurisdiction may perhaps show that two interesting points are becoming more relevant for the assertion of extraterritorial jurisdiction: on the one hand, the exercise of a duty of care (or lack of) by a parent company vis-à-vis its foreign subsidiaries (as it has been pointed out in the UNGPs through the figure of human rights due diligence); and on the second hand, the consideration of a sufficient degree of influence between a parent company and its foreign subsidiaries, in addition to a sufficient nexus between the adjudicating forum and the case –the famous "touch and concern" test put forward in *Kiobel*.

The other important point that is presented in the Elements paper relates to claims concerning violations or abuses commited under the State's jurisdiction or concerning victims within their jurisdiction. At first sight, this proposal appears to refer exclusively to jurisdiction over domestic cases, which would in theory be outside of the scope sought in resolution 26/9; at the end of the day, States are supposed to be able to effectively control corporate behaviour that is purely domestic in nature –or at least that is the assumption made in the resolution creating the Intergovernmental Working Group. However, a second look sheds light on the possibility of transboundary harm that may have a detrimental effect to persons within that State's jurisdiction, thus also hinting at extraterritorial jurisdiction based on several of the principles of jurisdiction as detailed by the ILC Secretariat (with perhaps the sole exception of the nationality principle). Both types of proposals attempt thus to cover the domestic and extraterritorial exercise of jurisdiction, and focus on the adoption of legislative measures that allow judiciaries to consider such claims. Nevertheless, given the wide discretion awarded to States to apply international obligations within their domestic sphere (which of course includes respect to their legal principles and traditions), and the possibility that a large number of States already include such legal standards within their own civil procedure codes[36] –which appears to be the focus of this section, rather than criminal jurisdiction–, it is necessary that going forward a much clearer delimitation of the exercise of extraterritorial jurisdiction is developed,

30 *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 133 S. Ct. 1659 (2013).

31 *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

32 *Association France-Palestine Solidarité et al c. Société Alstom Transport SA et al*, nº 11/05331, Cour d'appel de Versailles (2013).

33 *Friday Alfred Akpan et al c. Royal Dutch Shell PLC et al*, Nº C/09/337050/HA ZA 09-1580, District Court of The Hague (2013).

34 *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

35 *Suhail Najim Abdullaj Al Shimari et al. v. Caci Premier Tech., Inc.*, No. 1:08-cv-827 (LMB/JFA), District Court for the Eastern District of Virginia.

36 At the end of the day, the assertion of jurisdiction for civil (tort) law cases will not only depend upon jurisdiction under public international law, but on the exercise of jurisdiction in accordance with domestic conflict of law (private international law) rules. See also Ryngaert, Cedric, *op. cit.*, p. 19: "Unlike public international rules, which merely require a *strong* nexus of the regulating State with a situation, conflict of laws rules are ordinarily geared to identifying the State with the *strongest* nexus to the situation… traditional rules of public international law, which allow several States to exercise their jurisdiction over one and the same situation, will cast aside only the most outrageous assertions."

one that takes into account the indirect rationales that appear in judgments in business and human rights cases across different jurisdictions.

As a starting point, the Elements paper presented by the Chairperson-Rapporteur of the Open-Ended Intergovernmental Working Group includes a broad amount of potential measures in relation to several topics, in order to allow States to discuss and consider the several existing possibilities, under international (human rights) law, to move forward in relation to the negotiation and adoption of a convention on human rights and transnational corporations and other business enterprises. Whether the political will to address such a complex issue in a treaty exists is yet to be seen; however, the third session –as it will be briefly summarized in the following section– clearly showed the inherent difficulty to advance the current *status quo* under international law.

3. Law and politics in the third session of IGWG

The third session of the Open-Ended Intergovernmental Working Group on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights took place between 23 and 27 October 2017 in the Palais des Nations, in Geneva. While a full account of the session can be found in the official report presented by the Chairperson-Rapporteur to the Human Rights Council,[37] the following paragraphs will concentrate on some of the aspects and issues that were especially relevant for setting the tone of the IGWG in its third meeting. In particular, three aspects will be briefly addressed: the issue of 'primacy' of human rights over investment and trade interests and instruments; the question of the subjective scope of the treaty; and finally, the different types of obligations that the Elements paper presented. Of course, these comments will be paired with a personal appreciation of the reaction of States, which might be an indicator of the type of proposals they may be more inclined to accept or endorse as the fourth session looms closer, and which may provide room for convergence over an eventual conventional instrument on business and human rights.

One of the key issues that have been discussed in the past few years has been the suggestion that human rights should take precedence before trade or investment interests. An argument that has been advanced to support this position is that trade and investment are at the service of human beings, and that they are instruments to pursue human development and rights, not an end in themselves. As a moral or philosophical discussion, this can clearly be considered a valid and sound argument: the economy, as well as the State, are instruments to ensure the protection and well-being of the population. However, when taken to the plane of international law, to a landscape where only a few select norms –*jus cogens*– have a superior normative value than the rest[38] –and where all other norms largely depend on the voluntarist approach of international law–, this idea becomes, at least from a legal standpoint, less definitive and perhaps even fragile.[39] One of the initial controversies that arose during the third session was precisely the issue of 'primacy', as a result of a specific aspect in the proposed principles and objectives of the Elements paper that highlighted the need to recognize "the primacy of human rights obligations over trade and investment agreements." Civil society, academia and even some States have, to some extent, pushed precisely for that explicit recognition to be made in a future binding instrument;[40] however, some of the main questions to ponder in this regard are whether a general recognition of such a 'hierarchy' of norms is necessary; to what extent it can actually produce the desired results –notably a systemic or harmonic interpretation of the body of rules of public international law–; and finally, how it would operate in practice.

First, the question of a general recognition of a hierarchy within norms of public international law faces an important dilemma: how can a "primacy" rule in a busi-

37 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 (24 January 2018). Another short note on the third session can be found in Cassel, Doug, *op. cit.*

38 Pellet, Alain, "Notes sur la 'fragmentation' du droit international: droit des investissements internationaux et droits de l'homme" in Alland, Denis et al. (eds.), *Unité et diversité du droit international: Écrits en l'honeur du Professeur Pierre-Marie Dupuy*, Leiden, Martinus Nijhoff, 2014, p. 780.

39 For a balanced analysis of the issue of primacy, see De Schutter, Olivier, *International Human Rights Law*, 2nd ed., Cambridge, Cambridge University Press, 2014, pp. 71-111.

40 *Cf.* Shelton, Dinah, "Normative Hierarchy in International Law", *American Journal of International Law*, Vol. 100, 2006, p. 294: "The asserted primacy of all human rights law has not been reflected in state practice."

ness and human rights treaty generate effects beyond its State Parties? A quick survey of the positions expressed by States during the third session of IGWG reflects that there is no clear consensus on this issue –with several States expressing hesitation or reticence to the idea of establishing a hierarchy of norms–, and while some arguments were made that the IGWG could contribute to the codification of the primacy of international human rights law over other areas of international law, it appears to be that there is not sufficient State practice to support that assertion. Otherwise, how would numerous countries be involved in investor-State dispute settlement, if they had already asserted in their bilateral investment treaties that human rights obligations prevail over obligations towards investors? In any case, this specific point demonstrates that State practice over the years has at least implicitly recognized the equal value of international norms (or at least between investment and human rights treaties), not a hierarchy among them, and thus, it may be an issue subject to progressive development –including through the development of *ex ante* obligations for States before the conclusion of new investment or trade agreements[41]–, but not to codification at this point. In addition, it is not necessarily an issue of generating an abstract rule of primacy, but to ensure that whenever a "normative interaction"[42] takes place, all aspects of public international law that may be relevant to the conflict of norms are adequately taken into account.[43]

A plausible option –although one that may perhaps be limited to Latin American countries– would be the possibility of considering the primacy of human rights over investment and trade regimes as a general principle of law, taking into consideration that most constitutions of Latin American States consider human rights to be of supraconstitucional or constitutional value, and thus to have a higher "hierarchy" than investment or trade agreements within the domestic order. However, this would not necessarily offer a solution to the question of primacy –at least under international law–, particularly considering that investment tribunals will most likely not take into consideration domestic norms as part of the legal basis of a dispute, and that the issue at hand is not one of the interpretation of international norms at the domestic level, but rather of a conflict of norms within the international sphere.

A second interesting point that came forward during the third session was the subjective scope of the instrument. While some arguments have already been expressed *supra*, there was an important level of disagreement among delegations, experts and NGOs as to who should be subject to the binding instrument: should it be exclusively transnational corporations? Or transnational corporations and all other business enterprises, as suggested by the European Union and affirmed by several developing countries, as well as by some NGOs and even some experts? Or, as posited above, should the focus be *conduct-based*, instead of subject-based? An important recognition of the "transnational mirage"[44] was pushed forward by Olivier De Schutter in his written remarks in response to the Elements paper, where he explained that

> "from the legal point of view, the distiction between transnational corporations and other business enterprises does not pass scrutiny: TNCs are simple networks of distinct companies (each of which is domiciled in a national jurisdiction) more or less tightly connected to one another by investment or contractual links, and that follow a global strategy under a more or less integrated leadership structure. Thus, the scope of the future [Treaty on Business and Human Rights] is rightly more based on the transnational nature of the activity than on the nature of the corporation itself: in other terms, it is to the extent that the corporation develops its economic activities across different national jurisdictions… that the future TBHR shall be of relevance to those activities."[45]

Nevertheless, the ideological focus on transnational corporations, and the verbal lack of recognition –at least during the third session– by some States that all business enterprises, regardless of their specific characteristics, can have a direct or indirect negative impact on human rights,[46] is at least concerning, particularly taking

41 Simma, Bruno, "Foreign Investment Arbitration: A Place for Human Rights?", *International & Comparative Law Quarterly*, Vol. 60(3), 2011, pp. 594-596.

42 Pellet, Alain, "Préface" in Burgorgue-Larsen, Laurence et al (dirs.), *Les interactions normatives: droit de l'Union européenne et droit international*, Paris, Pedone, 2012.

43 Pellet, Alain, "Notes sur la 'fragmentation' du droit international…, *op. cit.*, pp. 769-770.

44 This point was first suggested in Cantú Rivera, Humberto, "¿Hacia un tratado internacional…, *op. cit.*

45 De Schutter, Olivier, *The "Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respecto to human rights": A Comment*, 23 October 2017, par. 19.

46 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 (24 January 2018), par. 60.

into consideration that several of those States also support a focus that could yield, in practical terms, little to no results at all. A certain reminiscence of the North--South clash that impregnated the UN Code of Conduct era appears to be taking place in the IGWG process, one which does not necessarily take into account the current global reality where numerous transnational business operations have their origin in developing countries, and where a practical approach is needed if any expectations of developing an international set of norms to regulate corporate conduct vis-à-vis human rights are to become a reality.[47]

A final relevant point that resulted from the third session relates to the types of obligations presented by the Elements paper. As it has also been mentioned before, the two main models presented by the Chairperson-Rapporteur are direct international obligations for corporations, and indirect obligations for corporations via the State. States participating in the third session did not have homogeneous approaches to this question: whereas the European Union, Brazil, Singapore and several others openly questioned the feasibility and convenience of imposing direct international obligations on corporations, some others, such as South Africa, insisted on the necessity to ensure that the treaty addresses them directly. On the other hand, in relation to indirect obligations through the lens of preventive measures –and notably of the establishment or 'hardening' of corporate human rights due diligence through national legislation–, a larger consensus seemed to appear: both developed and developing countries participating in the session, such as Mexico, Brazil, France, South Africa and the European Union, underscored the importance of adopting national legislation requiring corporations to undertake human rights due diligence throughout their activities and operations, in order to identify, prevent, mitigate or redress human rights abuses caused by them or with which they are involved. This is a significant statement with a profound echo, a development that has been led by the French law on *devoir de vigilance*, and that could be an applicable model that could potentially create an international legal standard of prevention –very similar to the prevention principle in international environmental law–, which is, at the end of the day, one of the main needs in business and human rights cases. In that regard, this aspect seems to be one of the most promising avenues that have resulted so far from the negotiations of the business and human rights treaty, but also one that needs to be paired with appropriate domestic mechanisms for implementation, the main Achilles' heel of international human rights law.

Beyond these considerations, the "temperature" of Room XX in the Palais des Nations during the third session was at least as confrontational as that of the first session. While the European Union and its member States attended the session and participated actively during the different panels held during the week –although mostly to raise doubts or ask questions about the objectives or proposals put forward in the Elements paper–, a particular tension was felt between them and the Chairmanship of the Intergovernmental Working Group, the Permanent Representative of Ecuador. This is not only reflected in the report of the third session, but also appeared in an informal meeting taking place before the final formal session on Friday 27 October 2017, which had as its main objective to consult with States and other stakeholders on the route to be followed after the third session, considering that the resolution mandating the creation of the IGWG only made reference to three sessions, but not beyond that. This meeting marked the first appearance of the United States delegation in the treaty process, claiming that the mandate of the Intergovernmental Working Group would expire after the third session, as per the terms of resolution 26/9. An important exchange took place among several delegations, with many of them expressing full support to the continuation of the IGWG, and some others suggesting that despite their relative support to the process, the Human Rights Council should provide a roadmap on the way to follow, which is the Council's practice (as it can be observed in the IGWG on private military and security companies).[48] As the uncertainty and tensions grew, the Office of the High Commissioner for Human Rights clarified the issue, stating that the duration of the Working Group is determined by the original mandate, which clearly states that the goal is the development of a legally binding instrument. This episode, however, transferred into the final meeting of the Intergovern-

47 Sauvant, Karl P., "The Negotiations of the United Nations Code of Conduct on Transnational Corporations", *The Journal of World Investment & Trade*, Vol. 16, 2015, p. 74.

48 Human Rights Council, *Renewal of the mandate of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies*, A/HRC/RES/28/7 (26 March 2015), par. 1.

mental Working Group, which was once more marked by the animosity between the representatives of the European Union and Ecuador.

One of the main characteristics of the third session was the lack on in-depth participation of many delegations, as a result of the limited time between the release of the Elements paper and the start of the session. Nevertheless, it is clear that beyond the issue of preventive measures, much remains to be done in terms of consensus-building in relation to most of the other aspects being addressed in the business and human rights context, especially if the adoption of a treaty on this subject matter is expected to happen sometime soon. Complex questions such as jurisdiction, legal liability, international cooperation, as well as the scope of application of the instrument, need to be seriously considered and debated by all parties and stakeholders, in order to create a new legal regime that effectively addresses the imbalances of power among States, business enterprises, and the population in general, as well as the governance gaps[49] that allow businesses to escape accountability whenever they are directly or indirectly involved in human rights abuses.

4. Final thoughts: preliminary considerations of the zero draft of the legally binding instrument

While making detailed comments on the first draft of the legally binding instrument is not the objective of this article, its recent publication calls for a brief reflection on some of the choices made by the Chairmanship of the Intergovernmental Working Group. To begin with, the "zero draft" is divided in three broad sections, the first one focusing on the preliminary parts of the text, the second one on the substantive and procedural issues, and the third one on the potential follow-up mechanisms and the general provisions in relation to a conventional instrument. At a first glance, the text reflects important choices made on several aspects where consensus was more largely present during the first three sessions.

As it can be observed in the statement of purpose in article 2, there are three main goals that are envisaged for a future instrument: the design of new rules of international (human rights) law; the reinforcement of domestic provisions, namely in terms of legal procedures and prevention; and finally, the enhancement of international cooperation to limit impunity in business-related human rights cases. This is a positive sign, since the second goal is one of the areas where more consensus appeared to exist during the third session of the IGWG, especially in relation to preventive measures. But beyond that point, several other aspects are included in the substantive section of the draft instrument. In relation to the scope, especially compared to the Elements paper, the draft instrument points out that the instrument "shall apply to human rights violations in the context of any business activities of a transnational character." As it can be observed, a preference for the conduct-based approach was the choice made by the Government of Ecuador, in a pragmatic effort to focus on the actual actions (or omissions) that may result in negative impacts on human rights. This decision is relevant, since it allows the government to bypass the controversial issue of defining what a "transnational corporation" is –a decision further reflected in draft article 9.5–, although more refinement will be required in the definition of what a business activity of a transnational character actually means, particularly in terms of causation or involvement.

A second point raised within the scope of the instrument is the already mentioned *renvoi*: as it currently stands, article 3.2 mentions that the instrument "shall cover all international human rights and those rights recognized under domestic law." This aspect will probably raise some concerns among delegations, particularly taking into consideration the uneven level of ratification of the different international human rights instruments; for example, what happens to those States that recognize in their domestic laws rights that have not yet crystallized under international law? Or, on the other hand, what about those States that have not ratified some of the basic human rights treaties? How will this provision affect their position vis-à-vis those other treaty regimes? These questions will need to be addressed, perhaps through an exception stating that the *renvoi* will only operate in relation to those rights that have already been recognized by the State (although this will unfortunately limit the objective scope of the future instrument, in a similar way as reservations could potentially do as well).

In terms of jurisdiction, the draft instrument curren-

49 See generally Simons, Penelope and Macklin, Audrey, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, London, Routledge, 2014.

tly proposes that the *forum loci delictii* or the *forum societatis* criteria should be applicable, therefore allowing a dual jurisdiction whereby both the host State or the home State may be suitable forums to bring claims against corporations for their involvement or participation in human rights abuses. This is a pertinent decision, given that it may create a subsidiary jurisdiction in the home State, which may be accessible either after the exhaustion of remedies in the host State, or as a result of the legal or practical impossibility of the host State to provide adequate remedies to the victims. This could serve a double purpose: incentivize capacity-building in developing countries (which at the end of the day, should be a goal in itself within this negotiation), and secondly, to ensure that victims will have an available forum to bring their claims should the original forum not be adequate or available. Yet, an important issue may arise in relation to article 5.2, where the draft instrument tries to define where a legal person is "at home". While the first two options point to the statutory seat or the central administration of a legal person (which would be in line with Brussels I bis regulation) as the places where it would be at home, the third and fourth points are potentially less convincing, given that they relate to the place where a company may have a "substantial business interest" or a "subsidiary, agency, instrumentality, branch, representative office or the like". The main problem with this provision is that at least in *Kiobel* and *Daimler*, the United States Supreme Court recognized that the most adequate fora to bring such claims against foreign corporations would be where they are at home –and that, it was concluded, certainly is not the case for a representation office (as in *Kiobel*) or where a company may have "substantial" business interests (as in *Daimler*). Thus, a different formulation will probably need to be determined in order for this provision to be in line with current practice under international and European law.

In addition to the issue of jurisdiction, article 9 addresses the issue of prevention, which is a step forward in 'hardening' the corporate human rights due diligence requirement established under the UN Guiding Principles on Business and Human Rights. Through this provision –where the different steps of human rights due diligence are spelled out in detail, and complemented with some other requirements that have consolidated under domestic or regional law, such as non-financial reporting requirements, or the use of leverage in supply chains and contractual relations–, the Chairmanship of the IGWG takes a step forward in highlighting the need for a debate on the domestic law mreasures that need to be adopted, in order for States and businesses to comply with Pillars 1 and 2 of the UNGPs. Considering the measures already in place in France, as well as in other countries in relation to non-financial reporting, this provision may cause States to act at the domestic level to consider these elements as necessary reforms in their legislation, which could thus contribute to raise the profile of this provision as one of the central additions that could be made by the draft instrument.

A potentially contentious article of the draft instrument will be article 10 on legal liability. While its inclusion in the Elements paper was welcomed, the idea of providing specific instructions to States on how and what steps will need to be taken may prove counterproductive, particularly considering the opposition manifested by some States during the third session vis-à-vis their own legal traditions and principles. Particularly on the issue of criminal liability –where the text provides that "State Parties *shall provide measures under domestic law to establish criminal liability* for all persons with business activities of a transnational character…" (emphasis added)–, the current wording may not necessarily attract much support, especially from States that do not yet foresee corporate criminal liability in their criminal codes.[50] Another aspect that is particularly peculiar is the appearance of the concept of universal jurisdiction "over human rights violations that amount to crimes" under draft article 10.11, an aspect that is not present in relation to civil liability. This is a curious choice, given that potentially most cases involving human rights abuses by business will not necessarily qualify as a crime, but most –if not all– of them will require at least some form of reparation as a result of direct or indirect damages to victims, a situation that would call for the development of a transnational civil liability regime.

Finally, another interesting point that is raised in article 13 (titled "Consistency with International Law") is the issue of trade and investment agreements. Contrary to the abstract "primacy" idea that was present in the Elements paper, the draft instrument presents two provisions on that question: first, it states that future trade

50 Nevertheless, draft article 10.12 foresees that in the event that the legal system of a State does not foresee corporate criminal liability, other dissuasive non-criminal sanctions –including administrative sanctions– may be applicable.

and investment agreements shall not contain provisions that conflict with the implementation of the draft instrument; second, it mentions that "all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under the Convention…" As it can be observed, the first suggestion could be more easily fulfilled, given that this treaty could impose a future obligation upon State parties to ensure that they insert clauses in trade and investment agreements preventing the well-known consequence of "regulatory chill". However, the second provision, requiring a certain type of interpretation for existing agreements, appears to be more problematic to put into practice, especially if those agreements are not in the process of being renegotiated. In essence, the problem is not only the restriction on their abilities to respect and ensure existing international human rights obligations; rather, it is actually the interpretation made by arbitral tribunals of the behavior adopted by States which would be contrary to bilateral investment treaties or trade agreements, an aspect that should be addressed in order for those tribunals to take into account other rules of public international law. However, as already discussed, it remains unclear how this treaty could generate effects over other legal instruments from a different area of international law.

As it can be observed from these brief reflections, the current process of drafting a business and human rights treaty is starting to crystallize, and with it, numerous possibilities and difficulties will become more and more apparent. In that sense, it will be especially important to take into consideration that international human rights law –as mentioned by Alain Pellet– is a part of general international law, and as such, it should take into account the different options –and perhaps solutions?– that this area of law offers.[51] As Dan Sarooshi mentioned in his course at The Hague Academy of International Law (in what may be a potentially appropriate metaphor), making tea involves a slow process where different elements have to coincide under the right conditions, but eventually there is a moment when the time –and tea, of course!– is right. This begs the question if, like tea, this is the right time to consolidate norms of international law on a complex subject matter such as business and human rights, and whether all the different elements are in place to move forward in such a quest.

51 Pellet, Alain, ""Droits-de-l'hommisme" et droit international", *Droits fondamentaux*, N°1, 2001, p. 168.

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The United Nations guiding principles on business and human rights, the State Duty to protect human rights and the State-business nexus

Os princípios orientadores das Nações Unidas sobre empresas e direitos humanos, o dever do Estado de proteger os direitos humanos e o nexo empresarial do Estado

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The United Nations guiding principles on business and human rights, the State Duty to protect human rights and the State-business nexus*

Os princípios orientadores das Nações Unidas sobre empresas e direitos humanos, o dever do Estado de proteger os direitos humanos e o nexo empresarial do Estado

Mihaela Maria Barnes **

Abstract

Despite the fact that the United Nations Guiding Principles on Business and Human Rights (UNGPs) have specific provisions that are applicable to States to ensure that businesses that are owned or controlled by the State, or that enter into transactions with the State, respect human rights; most scholarship, so far, seems to have focused mainly on the corporate responsibilities of privately owned entities to respect human rights. This article seeks to rectify this apparent gap in scholarship by providing an introduction to what the UNGPs refer to in Principles 4, 5 and 6 as 'the State-business nexus.' In this context, this article is composed of five sections and proceeds in the following manner. The first section introduces the coverage of the State-business nexus in the UNGPs. The second section seeks to determine who are the actors to whom the provisions of UNGPs 4, 5 and 6 may be applicable. The third section analyses in detail on Principles 4, 5 and 6 and shows how the UNGPs focus on this issue from three different perspectives. The fourth section examines the content of the State duty to protect human rights in the context of the State-business nexus, while the fifth section concludes.

Keywords: Human Rights. UNGPs. State-Business Nexus.

Abstract

Apesar do fato que os Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos (UNGPs) terem disposições específicas que são aplicáveis aos Estados para garantir que as empresas que são de propriedade ou controladas pelo Estado, ou que realizam transações com o Estado, respeitem os direitos humanos; a maioria dos estudos, até agora, parecem ter se concentrado principalmente nas responsabilidades corporativas das entidades privadas para respeitar os direitos humanos. O artigo procura corrigir essa aparente lacuna fornecendo uma introdução ao que os UNGPs referem nos Princípios 4, 5 e 6 como 'o nexo Estado-empresa'. Nesse contexto, esse artigo é composto de cinco seções e prossegue da seguinte

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maneira. A primeira seção introduz a cobertura do nexo Estado-empresa nos UNGPs. A segunda seção procura determinar quem são os atores para os quais as provisões dos PNGs 4, 5 e 6 podem ser aplicáveis. A terceira seção analisa em detalhes os Princípios 4, 5 e 6 e mostra como os UNGPs enfocam essa questão de três perspectivas diferentes. A quarta seção examina o conteúdo do dever do Estado de proteger os direitos humanos no contexto do nexo Estado-empresa, enquanto a quinta seção conclui.

Palavras-chave: Direitos humanos. UNGPs. Nexo Estado-Empresa

1. Introduction

1. Since their endorsement in 2011 by the United Nations Human Rights Council,[1] the United Nations Guiding Principles on Business and Human Rights (UNGPs)[2] have become the global standard concerning the protection and respect of human rights in the context of business activities, applicable to both States and corporations. [3] Developed under the auspices of the United Nations (UN), by Professor John Ruggie – then Special Representative of the Secretary-General Kofi Annan on the issue of human rights and transnational corporations – the UNGPs have been generally well received by States, businesses, civil society[4] as well as in academia,[5] despite some criticism concerning their voluntary nature and certain other design weaknesses.[6] Given that the journey, which ultimately led to the endorsement of the UNGPs by the Human Rights Council, had been for a long time, characterised by confrontation and failures,[7] as witnessed for instance by the lack of success of the Draft UN Code of Conduct on Transnational Corporations[8] and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises,[9] Professor Ruggie's achievement is by all means remarkable.

2. While the development of ideologies that aimed to make business act in a responsible manner can be traced all the way back to the abolitionist movement of the Atlantic slave trade, which was later followed by attempts to develop international labour law and by the criminal prosecution of German industrialists that supported the Nazis during WWII,[10] it was the UNGPs that not only finally managed to achieve a global consensus[11] on this issue, but ultimately also reopened a more balanced dialogue seeking to bridge the often diverging interests of States, businesses and civil society.[12] Consequently, while the UNGPs do not create any new legal obligations as such, for either States or for corporations,[13] they are nevertheless a key 'soft law' ins-

1 UNITED NATIONS. Human Rights Council. *Resolution 17/4 human rights and transnational corporations and other business enterprises,* 2011. (A/HRC/RES/17/4)

2 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2011. (A/HRC/17/31)

3 UNITED NATIONS. *The corporate responsibility to respect human rights:* an interpretative guide. 2002. (HR/PUB/12/02). p. 1.

4 BUHMANN, Karin. Navigating from "train wreck" to being "welcomed": negotiation strategies and argumentative patterns in the development of the UN framework. In. DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business:* beyond the corporate responsibility to respect. Cambridge: Cambridge University Press, 2013.

5 BERNAZ, Nadia. *Business and human rights:* history, law and policy: bridging the accountability gap. Londres: Routlege, 2017. p. 195.

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7 BERNAZ, Nádia. *Business and human rights:* history, law and policy: bridging the accountability gap. Londres: Routlege, 2017. p. 163-176; ZERK, Jennifer A. *Multinationals and corporate social responsibility:* limitations and opportunities in international law. First paperback edition. Cambridge: Cambridge University Press, 2011. p. 244-266.

8 UNITED NATIONS. *Draft UN code of conduct on transnational corporations*. [1983 Version]. Available at: <investmentpolicyhub.unctad.org/Download/TreatyFile/2891>.; SAUVANT, Karl P. The negotiations of the united nations code of conduct on transnational corporations: experience and lessons learned. *The Journal of World Investment and Trade,* v. 16, p. 11-87, 2015. p. 11.

9 UNIVERSITY OF MINNESOTA. Human Rights Library. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights:* E/CN.4/Sub.2/2003/12/Rev.2. 2003.

10 BERNAZ, Nádia. *Business and human rights:* history, law and policy: bridging the accountability gap. Londres: Routlege, 2017. p. 17–79.

11 DEVA, Surya. *Treating human rights lightly:* a critique of the consensus rhetoric and the language employed by the guiding principles: human rights obligations of business: beyond the corporate responsibility to respect. Cambridge: Cambridge University Press, 2013. This book chapter adopts a critical perspective on the widely accepted 'consensus rhetoric' that is believed to underpin the UNGPs.

12 DEVA, Surya. *Treating human rights lightly:* a critique of the consensus rhetoric and the language employed by the guiding principles: human rights obligations of business: beyond the corporate responsibility to respect. Cambridge: Cambridge University Press, 2013. (n. 6). p. 105.

13 SHAW, Malcolm N. *International law.* 7. ed. Cambridge: Cambridge Univ Press, 2014. p. 182-183. (n. 6) ('These Principles Conse

trument, which is likely to influence in a positive way[14] the conduct of both States and businesses, as far the integration of human rights considerations within the ambit their economic activities is concerned. For example, the UNGPs have prompted the update of other soft law instruments such as the OECD Guidelines for Multinational Enterprises[15] and the ILO Tripartite Declaration concerning Multinational Enterprises,[16] which have both integrated the UNGPs in their texts. The basic architecture of the UNGPs is composed of three Pillars and 31 Principles. Pillar I contains Principles 1 to 10 and focuses on the State duty to protect human rights. Pillar II, Principles 11 to 24, deal with the corporate responsibility to respect human rights. Lastly, Pillar III Principles 25 to 31 address both States and corporations, and clarify that, while it is principally States that have an obligation to ensure that victims of human rights abuses have access to appropriate remedies, through State-based judicial and non-judicial mechanisms, businesses are also encouraged to create effective operational-level grievance mechanisms.[17]

3. With this general background in mind, it is worthy of note that, bar a few notable and valuable exceptions,[18] scholarship so far seems to have concentrated largely on the role that privately-owned transnational corporations may have had in the creation of certain 'governance gaps',[19] other types of non-State actors are recently becoming increasingly important in a globalised world.[20] In this context, Professor Ruggie noted in 2006, barely a year after his appointment that:

> [W]ays must be found to engage State-owned enterprises in addressing human rights challenges in their spheres of operation. They are becoming increasingly important players in some of the most troubling industry sectors yet appear to operate beyond many of the external sources of scrutiny to which commercial firms are subject.[21]

4. As the mandate of the Special Representative advanced on the topic of business and human rights generally, so did the coverage of State ownership. For example, later reports continued to make references to the challenges associated with the human rights dimension of State ownership and suggested ways how those challenges could be tackled.[22] The importance of this

international legal obligations as such…The realm is that of "soft law", of expectations, of anticipation not of binding international (as opposed to national) legal regulation.')

14 SHELTON, Dinah L. 'Soft law', handbook of international law. *Routledge Press,* 2008. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003387>. ('Non-binding norms or informal social norms can be effective and offer a flexible and efficient way to order responses to common problems. They are not law and they do not need to be in order to influence conduct in the desired manner.')

15 *OECD guidelines for multinational enterprises:* 2011 edition. Paris: OECD Publishing, 2011. p. 31-34.

16 INTERNATIONAL LABOUR ORGANIZATION. *Tripartite declaration of principles concerning multinational enterprises and social policy*: adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions). Geneva: ILO, 2017. p. 3-5.

17 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2011. (A/HRC/17/31). (n. 2). p. 25-26. Principles 29 and 30.

18 BACKER, Larry Catá. The human rights obligations of State Owned Enterprises (SOEs): emerging conceptual structures and principles in national and international law and policy. *Vanderbilt Journal of Transnational Law,* v. 51, 2017. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980533>.; BACKER, Larry Catá. *Between state, company, and market:* a preliminary engagement on the business and human rights obligations of states and State Owned Enterprises (SOEs). Available at: <https://ssrn.com/abstract=2869944>.; RAJAVUORI, Mikko. State ownership and the united nations business and human rights agenda: three instruments, three narratives. *Indiana Journal of Global Legal Studies*, v. 23, n. 2, summer, 2016. p. 665.

19 SIMONS, Penelope; MACKLIN Audrey. *The governance gap:* extractive industries, human rights, and the home state advantage. London: Routledge, 2014. p. 9-21; Zerk (n 7); CLAPHAM, Andrew. *Human rights obligations of non-state actors*. Oxford: OUP Oxford, 2006. p. 195-266.

20 UNITED NATIONS. *World investment report 2014:* investing in the SDGs: an action plan. 2014. p. ix; UNITED NATIONS. *World investment report 2017:* investment and the digital economy. 2017. p. 30. For example, UNCTAD estimates that there are approximately 1,500 State-owned multinational enterprises that operated outside their home State and which had a network of more than 86,000 affiliates. Furthermore, it should also be noted that sovereign foreign direct investment accounted for over 11% of the total global foreign direct investment in 2014. This figure does not however, include investments made by sovereign wealth funds, whose assets under management have reached close to USD 7.5trillion as of 2018. For further information on this see the 2014 UNCTAD World Investment Report quoted above at page 30.

21 John Ruggie, 'Promotion and Protection of Human Rights (Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises)' (2006) E/CN.4/2006/97 20.

22 RUGGIE, John G. S*tate responsibilities to regulate and adjudicate corporate activities under the united nations core human rights treaties*: an overview of treaty body commentaries: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. Kennedy School of Government; Harvard Law Schooll, 2007. (A/HRC/4/35/Add.1). p. 32-33; John Gerard Ruggie, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' Core Human Rights Treaties (Report of the Special Representative of the Secretary-General on the Issue of Human

issue was underlined, for instance, when it was noted that, by virtue of the connection between the State and its businesses, States may be held responsible for the acts of those entities, either under the duty to respect, if State-owned entities are to be considered as State organs or agents, or under the duty to protect, if Sate-owned entities are treated on par with private businesses.[23] Ultimately, specific provisions on the State-business nexus were included in UNGPS 4, 5 and 6, as Section 3 of this article analyses below.

5. Nevertheless, as some recent reports of the UN Working Group on Business and Human Rights (UN Working Group) have shown, while in some circumstances significant progress has been made by States as far as the State-business nexus is concerned,[24] in other circumstances State officials were not even aware that the UNGPs applied to entities that are owned or controlled by the State.[25] This issue has been succinctly summarised by Dante Pesce, Chair of the UN Working Group in the following manner:

> Governments are currently sending an incoherent message to businesses. On the one hand, they ask private businesses to respect human rights, and increasingly set out such expectations in law and policy, on the other hand – barring notable exceptions – they show no great desire to use the means at their disposal to ensure that those enterprises they own or control respect human rights. It is high time for States to show concrete leadership, and require the enterprises they own or control to be role models on human rights. Doing so is part of States' international legal obligations, and it will only reinforce the legitimacy of States' expectations towards private businesses. Yet these human rights impacts – and the duties of States to protect against them – remain largely ignored.

6. The lack of clear guidance concerning the application of the UNGPs to State-owned entities was also noted.[26] Furthermore, the UN Working Group has also recently issued recommendations to the G20 Group of States on how to ensure and advance sustainable supply chains, making specific reference to the role that States, as economic actors in their own right, have to play in this context. Of particular importance is the fact that

Rights and Transnational Corporations and Other Business Enterprises)' (John F Kennedy School of Government 2007) paras 10, 78-80; RUGGIE, John G. *Corporations and human rights:* a survey of the scope and patterns of alleged corporate-related human rights abuse: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2008. (A/HRC/8/5/Add.2). p. 9.; RUGGIE, John G. *Protect, respect and remedy:* a framework for business and human rights: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 2008. (A/HRC/8/5). p. 10-11, 25; RUGGIE, John G. *Summary of five multi-stakeholder consultations:* report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2008. (A/HRC/8/5/Add.1). p. 23; RUGGIE, John G. *State obligations to provide access to remedy for human rights abuses by third parties, including business*: an overview of international and regional provisions, commentary and decisions (report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2009. (A/HRC/11/13/Add.1). p. 33.; RUGGIE, John G. *Business and human rights:* further steps toward the operationalization of the "protect, respect and remedy" framework: report of the special representative of the secretary- general on the issue of human rights and transnational corporations and other business enterprises. 2010. (A/HRC/14/27). p. 7-8; RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2). p. 9-10; RUGGIE, John G. *Human rights and corporate law:* trends and observations from a crossnational study conducted by the special representative: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2011. (A/HRC/17/31/Add.2). p. 26, 30, 33, 40-41.

23 RUGGIE, John G. S*tate responsibilities to regulate and adjudicate corporate activities under the united nations core human rights treatie*s: an overview of treaty body commentaries: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. Kennedy School of Government; Harvard Law Schooll, 2007. (A/HRC/4/35/Add.1). (n. 22). p. 33.

24 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brsail: note by the secretariat. 2016. (A/HRC/32/45/Add.1). p. 6; UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea. 2017. (A/HRC/35/32/Add.1). p. 10-12.

25 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*: report of the working group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea. 2017. (A/HRC/35/32/Add.1). p. 5.

26 'State-Owned Enterprises Must Be "Role Model" in Respecting Human Rights – UN Report' (*UN News*, 17 June 2016) <https://news.un.org/en/story/2016/06/532442-state-owned-enterprises-must-be-role-model-respecting-human-rights-un-report>.; UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 51, 87, 98, 101.

the UN Working Group has noted that 'the current lack of attention paid to the human rights impact and the responsibilities' of entities that are connected with the State and 'the duty of Governments that own or control them' in this area is 'striking.'[27] This has prompted the UN Working Group to issue a report with specific recommendations to States about how to integrate the UNGPs in the activities and operations of entities that are owned and controlled by the State.[28] The contents of this report will be examined in in Sections 3 and 4 of this Article, which deal in detail with the content State--business nexus under the UNGPs. However, firstly it is required to determine which actors might fall within the ambit of the State-business nexus.

2. Who are the actors that fall within the ambit of the UNGPs State-business nexus?

7. When performing research on State ownership and the role of the State as an economic actor, one may encounter myriad different definitions and terminologies such as 'sovereign wealth funds', 'government company', 'national oil company', 'state trading company', 'canalizing agencies', 'export credit agencies', 'State--owned multinational enterprise', 'official investment insurance or guarantee agencies', 'development agencies', 'development finance institutions', etc. Even the term 'state-owned enterprise' is considered as providing only 'an approximate description of the complexity of forms and organisations that State companies may assume' and which have reached 'an apogee of fantasy and ingenuity in terminology and legal forms.'[29] For example, State-owned multinational enterprises have been defined by UNCTAD as 'separate legal entities established or acquired by governments to engage in commercial activities, including FDI operations, by way of having affiliates abroad or engaging in non-equity modes' and in which the government has at least a 10 percent ownership share.[30] Sovereign wealth funds are 'funds established, owned and controlled by local or central governments', and which acquire 'equity interests in companies listed in international markets, operating in sectors considered as strategic by their country of incorporation.'[31] Sovereign wealth funds are some of the largest and most important economic actors that exist today[32] and they have played a key role in the stabilisation of the markets during the 2007 financial crisis.[33] Export credit agencies are 'publicly funded and government-owned "institutions that support and subsidize national trade and investment activities, particularly in developing and emerging markets."'[34] National oil companies are also extremely important economic actors in this context, since they own and control the world energy supply,[35] and their activities are not necessarily limited to operations within national borders.[36]

8. Despite their varied terminology, and the fact that some of those entities engage in economic activities directly, as State-owned enterprises and national oil companies do, while others are only passive investors

27 INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (IHRB). *Letter to the Members of the G20 Employment Working Group*. 24 mar. 2017. p. 6.

28 Leading by Example: The State, State-Owned Enterprises and Human Rights (UNITED NATIONS. General Assembly. Human Right Council. *Leading by example:* the state, state-owned enterprises and human rights: report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45)

29 TONINELLI, Pierangelo Maria. *The rise and fall of state-owned enterprise in the western world*. Cambridge: Cambridge University Press, 2000. p. 4-5.

30 UNITED NATIONS. *World investment report 2017*: investment and the digital economy. 2017. (n. 20). p. 30.

31 BASSAN, Fabio. *The law of sovereign wealth funds*. Edward Elgar, 2011. p. 32.

32 SOVEREIGN wealth fund rankings: SWFI: Sovereign Wealth Fund Institute. Available at: <https://www.swfinstitute.org/sovereign-wealth-fund-rankings/>. For example, as of 20 June 2018, the assets under the management of sovereign wealth funds has reached USD 7,861.65 trillion.

33 BACKER, Larry Catá. Sovereign investing in times of crisis: global regulation of sovereign wealth funds, state owned enterprises and the chinese experience. *Transnational Law & Contemporary Problems,* v. 19, n. 1, 2009. p. 4, 15.

34 CAN, Özgür; SECK, Sara L. *The legal obligations with respect to human rights and export credit agencies*: final legal discussion paper: july 2006. Ottawa: Halifax Intiative Coalition, 2006. p. 23. Available at: <http://www.halifaxinitiative.org/content/legal-obligations-respect-human-rights-and-export-credit-agencies-june-23-2006>. Accessed: 20 jun. 2018; GIANTURCO, Delio E. *Export credit agencies:* the unsung giants of international trade and finance. Santa Barbára: Greenwood Publishing Group, 2001. p. 1.

35 HULTS, David R.; VICTOR, David G.; THURBER, Mark (Ed.). *Oil and governance:* state-owned enterprises and the world energy supply. Cambridge: Cambridge University Press, 2012. p. 3.

36 NATIONAL oil companies: beyond boundaries, beyond borders: an emerging class of multinational oil companies is changing the competitive landscape. Available at: <http://www.bain.com/publications/articles/national-oil-companies-beyond-boundaries.aspx>.; Mohammed Aly Sergie, 'Qatar Petroleum Expanding Overseas With Focus on Production' (*Bloomberg.com*) <http://www.bloomberg.com/news/articles/2015-06-23/qatar-petroleum-eyes-foreign-expansion-after-restructuring>. Accessed: 7 Nov. 2015.

in other entities, as is the case for sovereign wealth funds and export credit agencies, all those entities share a common characteristic: a sovereign State owns them. From the perspective of the UNGPs this is an important issue given that initially Professor Ruggie only referred to 'State-owned enterprises', in his first report that included references to what would ultimately become Principles 4, 5 and 6 of the State-business nexus. [37] Based on this, could it be the case that the UNGPs only apply to State-owned enterprises, thus excluding from its sphere of applications any other entities that are State-owned, such as sovereign wealth funds or export credit agencies? While a recent report prepared by the UN Working Group focuses mainly on State--owned enterprises, it also notes that sovereign wealth funds, export credit agencies and other similar entities can have the potential to impact human rights.[38] Furthermore, Principle 4 of the UNGPs refers to '*business enterprises* that are owned or controlled by the State or that receive substantial support and services from State agencies such as *export credit agencies* and *official investment insurance or guarantee agencies.'* The Commentary to the UNGPs further clarifies that the UNGPs are applicable to '*business enterprises controlled by the State'* and also to '*a range of agencies* linked formally or informally to the State' and which 'may provide support and services to business activities.'[39] Consequently, this means that the UNGPs would apply to all entities that are owned and controlled by the State, regardless of the formal way in which those entities are legally structured. As such, for the remainder of this article, all entities that are owned or controlled by the State, will be simply referred as State-owned entities (SOEs). This approach thus seeks to overcome, what certain leading scholars have called the 'mania for compartimentalisation',[40] that is encountered when one deals with the regulation of State ownership, despite the fact that such 'compartimentalisation' can only be justified for 'static purposes.'[41]

9. This makes sense, because the State, as an economic actor, should be a model corporate citizen, regardless of the way in which the entity, though which the State conducts the economic activity in that particular case, is ultimately structured from a legal point of view. To be sure, there will be differences in how the UNGPs would be implemented in the operations of sovereign wealth funds (since these entities operate principally as passive investors), when compared to the implementation of the UNGPs in the activities of a State-owned enterprise. For example, State-owned enterprises could have on-the-ground operations in conflict-affected areas and Principle 7 of the UNGPs specifically addresses the risk of gross human rights abuses in this situation, by requiring engagement with the business enterprises from 'the earliest stage possible.'[42]

3. Three perspectives on the UNGPs and the State-business nexus

10. The UNGPs offer three perspectives on the State-business nexus in Pillar I; Principles 4, 5 and 6, under the State duty to protect human rights. *The first perspective* is that covered by Principle 4 of the UNGPs and which states that:

> States should take additional steps to protect against human rights abuses by business enterprises that are *owned* or *controlled* by the State, or *that receive substantial support and services* from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[43]

37 RUGGIE, John G. *Promotion and protection of human rights:* interim report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2006. (E/CN.4/2006/97). p. 20.

38 'Leading by Example: The State, State-Owned Enterprises and Human Rights (UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45)' (n. 28) p. 6-7.

39 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2). p. 9.

40 BACKER, Larry Catá. The human rights obligations of State Owned Enterprises (SOEs): emerging conceptual structures and principles in national and international law and policy. *Vanderbilt Journal of Transnational Law*, v. 51, 2017. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980533>. p. 12.

41 BOLTON, Patrick; SAMAMA, Frederic; STIGLITZ, Joseph E. (Ed.). *Sovereign wealth funds and long-term investing*. New York*:* Columbia University Press, 2012. p. 210.

42 BACKER, Larry Catá. Corporate social responsibility in weak governance zones. *Santa Clara J. Int'l L.* v. 14, n. 297, p. 297-323, 2016. Available at: <http://digitalcommons.law.scu.edu/scujil/vol14/iss1/10>. See in this context also Principle 7 of the UNGPs.

43 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy"

11. Consequently, Principle 4 of the UNGPs addresses the State ownership function *directly* as well as *indirectly*. The role of the *direct* State ownership function is evidenced by the first half of Principle 4, which provides that States must take 'additional steps to protect against human rights abuses' by all businesses that have a connection with the State, either by virtue of the fact that the State *owns* that business, or in circumstances where the State *controls* that entity. The focus on ownership *and* control means that the approach taken by the UNGPs in this context is broad and – to a certain extent – mirrors the rules of State responsibility found in general international law, as codified by the ILC Articles,[44] as discussed further below. For example, the fact that States may be held responsible for human rights violations that have been perpetrated by entities that engage in business activities on behalf of the State, is well established and undisputed, as among others, the jurisprudence of the European Court of Human Rights shows.[45] Nevertheless, State responsibility does not operate automatically and just because an entity is owned by a State, it does not mean that a State is directly responsible for the acts of those entities in all circumstances. For State responsibility to arise three elements must be satisfied. Firstly, there must be an *internationally wrongful act or omission*. Secondly, that act or omission must constitute a *breach of an international obligation* of the State in question. Thirdly, the international wrongful act must be *attributable* to the State under the international law rules of State responsibility, as codified by the ILC Articles. As far as the first element is concerned, Article 1 of the ILC Articles states that 'every international wrongful act entails the international responsibility of that State.' In this context, the net is cast wide and State responsibility could arise for *any acts or omissions* that may be contrary to the obligations of that State under international law, *including* human rights violations.[46] The second element is satisfied if a breach of an international obligation occurs in that case. Article 12 of the ILC Articles states that a breach is an 'act or omission' which 'is not in conformity with what is required of it by that obligation.'[47]

12. As far as attribution is concerned – and thus the satisfaction of the third element – the ILC Articles have specific provisions that deal with attribution in Articles 4, 5 and 8.[48] Under Article 4 of the ILC Articles, attribution is based on the *status* of an entity as a State organ. In this circumstance, if a SOE is given the status of a State organ under the domestic law of a given State,[49] or is found to act as a *de facto* State organ,[50] all the acts of that entity will be automatically attributable to the State, without any further inquiry, by virtue of the operation of the principle of the unity of the State, all the acts of the various organs, agencies and instrumentalities are considered to be ultimately those of the State in question.[51] However, it should also be recalled that under the ILC rules of State responsibility, mere ownership alone by the State of a SOE is not sufficient to attribute the acts of that entity to the State in question or to make it a State organ[52] because, in international law, separate legal

framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (Emphasis added.). p. 9.

44 DRAFT articles on responsibility of states for internationally wrongful acts. 2001.

45 CASE of Heinisch v Germany. ECtHR, 2008. (Application n. 28274/08, Judgment 21 July 2011); CASE of Fadeyeva v Russia. ECHR, 2005. (Application n. 55723/00, 9 June 2005); CASE of Dubetska & ors v Ukraine. ECHR, 2003. (Application n. 30499/03); CASE of Yershova v Russia. ECHR, 2004. (Application n. 1387/04, 8 April 2010)

46 CRAWFORD, James. *State responsibility:* the general part. Cambridge: Cambridge Univ. Press, 2014. (1. Paperback ed.). p. 219-220.

47 UNITED NATIONS. International Law Commission. *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. 2008. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. p. 55. ('The phrase "not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.')

48 DRAFT articles on responsibility of states for internationally wrongful acts. 2001. (n. 44); UNITED NATIONS. International Law Commission. *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. 2008. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. p. 38-49.

49 UNITED NATIONS. International Law Commission. *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. 2008. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. p. 42. The Commentary clarifies that the term 'person or entity' is used in the broadest sense to include 'any person or entity.'

50 UNITED NATIONS. International Law Commission. *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. 2008. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. ('The State 'cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law [and consequently,] each case will have to be dealt with on the basis of its own facts and circumstances.')

51 UNITED NATIONS. International Law Commission. *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. 2008. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. p. 35.

52 Jaemin Lee, 'State Responsibility and Government-Affiliated Entities in International Economic Law: The Danger of Blurring

personality is generally observed, bar a finding of fraud or other malfeasance.[53] Consequently, with the focus in the UNGPs being on *ownership* and *control* Principle 4 would apply to all SOEs that are owned by the State. This ultimately means that States would have to ensure they take 'additional steps to protect against human rights abuses' in all circumstances, including in cases where the State is merely a shareholder and does not actually exercise any control over the business in question.

13. Attribution under Article 5 is based not on *status*, but on the *exercise of governmental authority*. Under Article 5 what is important is the exercise of governmental authority in that particular instance. Given that States can delegate the performance of certain activities that ultimately involve the exercise of governmental authority – such as policing and the maintenance of security and which are increasingly being performed by private entities – it was felt that States 'should not be able to evade their responsibility' as a matter of international law, by delegating those functions to privately-owned entities.[54] Consequently, under Article 5 of the ILC Articles, States can be responsible for the acts or omissions of fully private, as well as State-owned entities, as long as in that particular instance, there was an exercise of governmental authority. The provisions of Article 5 of the ILC are thus mirrored by Principle 5 of the UNGPs which, as discussed below, was designed to ensure that States exercise adequate oversight over all manner of entities (including private entities) that may be exercising elements of governmental authority, in cases where, for instance, previously State-owned businesses and functions associated with the State, such as the provision of basic services, have been privatised.

14. Under Article 8 of the ILC Articles, and which is likely to cover most SOEs, States are responsible for the acts or omissions of the entities that are under the *direction and control* of the State thus reflecting the element of control present in Principle 4 of the UNGPs. While the tests for attribution of acts or omissions that may fall under the scope of Article 8 of the ILC is based on 'effective control' being exercised over the entity in question – and which as indicated in jurisprudence is exceedingly onerous[55] – some scholars have noted that a lower standard of control may be required under international human rights law.[56] For example *Leo R. Hertzberg, Ulf Mansson, Astrid Nikula and Marko and Tuovi v Finland* was a case heard by the Human Rights Committee under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) (freedom of expression), Articles 1 (right of the to receive communications from a State party) and Article 2 (exhaustion of domestic remedies) of the Optional Protocol of the ICCPR.[57] The authors of the Communication complained that the Finnish authorities, including organs of the State-owned and controlled Finnish Broadcasting Company, interfered with their right to freedom of expression by imposing sanctions or censoring participants in radio and TV programmes that dealt with homosexua-

the Chinese Wall between 'State Organ'and 'Non-State Organ'as Designed in the ILC Draft Articles' (2015) 49 Journal of World Trade 117, 117.

LEE, Jaemin. State responsibility and government-affiliated entities in international economic law: the danger of blurring the chinese wall between 'state organ'and 'non-state organ'as designed in the ilc draft articles. *Journal of World Trade*, v. 49, Issue 1, 2015. p. 117.

53 CASE Concerning Barcelona Traction, Light and Power Company, Limited: Belgium v Spain. Judgment, ICJ Reports 1970. p. 3. [56].

54 UNITED NATIONS. International Law Commission. *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. 2008. Available at: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. p. 42.

55 INTERNATIONAL COURT OF JUSTICE. *Military and paramilitary activities in and against Nicaragua:* Nicaragua v United States of America. Merits, Judgment ICJ Reports 1986. p. 14. [116]; APPLICATION of the International Convention on the Elimination of All Forms of Racial Discrimination*: Georgia v Russian Federation*. Provisional Measures (No 2008/35). 15 oct. 2008. [400]. (For example, in Nicaragua, the International Court of Justice said that: The Court has taken the view … that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations of which the alleged violations were committed.')

56 MCCORQUODALE, Robert. The impact of international human rights law on state responsibility. In: KAMMINGA, Menno; SCHEININ, M. (Ed.). *The impact of human rights on general international law*. Oxford: Oxford University Press, 2009. p. 235-254.

57 HERTZBERG, Leo et al. *V. Finland:* communication n. 61/1979, UN Doc CCPR/C/OP/1 (1985), at page 124, paragraph 91). University of Minnesota, [1985].

lity. In its analysis of the merits of the Communication, the Human Rights Committee started 'from the *premise* that the State party is responsible for the action of the Finish Broadcasting Company (FBC), in which the State holds a dominant stake (90 percent) and which is placed under specific government control.'[58] While ultimately the Human Rights Committee held that there was no violation in this case, it is interesting to note that it started its analysis from the *premise* that by virtue of its State ownership of the FBC, Finland was responsible its actions.

15. Another important point to consider is the fact that UNGP 4 seems to focus on *ownership* broadly, which means that Principle 4 would be equally applicable in cases where the State is the full or majority owner of a SOE, as well as in those cases where the State is a minority shareholder. The focus in the second half of Principle 4 of the UNGPs on the *indirect* State ownership function reinforces this conclusion. That is, Principle 4 of the UNGPs would be applicable not only where the State *owns* or *controls* a given entity, but also in cases where completely independent business entities receive *support and services* from a SOE. The Commentaries to the UNGPs clarify this when they state that:

> Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting such harm, and they may add to the human rights challenges faced by the recipient State.[59]

16. The *second perspective* on the State-business nexus is provided by Principle 5 of the UNGPs and provides that 'States must exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact on upon the enjoyment of human rights.'[60] Although not directly apparent from its text, the Commentary explains that Principle 5 applies to those situations where the State has privatised the delivery of certain services 'which may have an impact upon the enjoyment of human rights', meaning that States must adequately oversee the activities of those enterprises by providing 'adequate independent monitoring and accountability mechanisms.'[61] Consequently, this shows that the State was once an owner, but has, in the meantime, privatised the provision of certain services, does not seem to dilute or diminish the obligations that States have to continually regulate and oversee those entities. The approach of Principle 5 of the UNGPs resonates with a considerable amount of academic research that has been undertaken concerning the adverse affects that privatisation could have on human rights, especially in sectors such as the provision of basic services, health, education, social security:

> Taking into account this idea of the state as the ultimate entity vested with human rights obligations, it is obvious that the state has the duty to impose limits and conditions upon privatisations. This duty leads to the need to take a human rights approach to privatisation; human rights concerns must be present in every process of privatisation from the very beginning. There are two aspects in which the state can take part; first of all, the decision to privatise a given service that affects human rights obligations and second, the functioning of the service once it has been privatised.[62]

17. The *third and last perspective* on the State-business nexus is dealt with in Principle 6 of the UNGPs, which states that 'States should promote respect for human rights by business enterprises with which they conduct

58 HERTZBERG, Leo et al. *V. Finland:* communication n. 61/1979, UN Doc CCPR/C/OP/1 (1985), at page 124, paragraph 91). University of Minnesota, [1985].

59 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2). p. 9.

60 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2). p. 9.

RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2). p. 10.

RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2).

61 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2).

62 FEYTER, Koen de; ISA, Felipe Gómes. *Privatisation and human rights in the age of globalisation.* [S.l.]: Intersentia, 2005. (Maastricht Series in Human Rights). p. 18; LUSTIG, Doreen; BENVENISTI, Eyal. *The multinational corporation as 'the good despot'*: the democratic costs of privatisation in global settings. 2013. Available at: <http://globaltrust.tau.ac.il/publications>.

commercial transactions.'[63] The scope of Principle 6 can be ascertained from the Commentary again, which draws attention to the fact that States conduct a 'variety of commercial transactions with business enterprises, *not at least* through their procurement activities.' The fact that the focus is on the *totality* of the commercial transactions in which a State may enter can be inferred from the use of the words *'not at least'* present in the Commentary to the UNGPs. Thus, while the UNGPs acknowledge that procurement activities is one of the main forms in which States may engage with *other businesses* in commercial transactions, procurement is not by any means the only such method. For instance, States may enter into a multitude of commercial transactions as vendors of raw materials, or they may provide products (such as bonds or currencies) and services (such as labour) to businesses generally.[64] Those transactions would also fall within the ambit of Principle 6. For example, one way through which States could practically implement the requirement of Principle 6 of the UNGPs is by ensuring that adequate consideration is given to human rights risks by integrating relevant contractual clauses in all contracts to which the State or SOEs are parties.[65] That being said, procurement is still one of the main areas through which States can ultimately influence the conduct of other businesses, as far as the integration of human rights considerations in their activities is concerned, simply because State bureaucracies are some of the largest consumers of goods and services. For example, worldwide public procurement is worth EUR 1 trillion per year in trade flows, while in the EU alone, this figure amounts to EUR 425 billion, or approximately 3.4% of EU GDP.[66] The EU Public Procurement Directives[67] are some of the latest efforts to ensure that Member States 'implement a range of preventative, monitoring and capacity building actions, necessary to respond to the expectations' laid out in the UNGPs.[68] The EU Public Procurement Directives seek to integrate human rights considerations across all phases of the procurement process, such as in pre-tender and in the market engagement phases, in the technical specifications phase, and in the selection, award and contracting phases. For example, all bidders that have failed to pay the required social security contributions,[69] or that have been convicted of child labour or other forms of trafficking,[70] or that do not comply with environmental, social and labour law obligations would be excluded from the tender process.[71]

18. This section has analysed the State-business nexus as covered by Principles 4, 5 and 6 of the UNGPs. It has shown that, by offering three perspectives on the State-business nexus, the UNGPs approach this concept very broadly. This approach is to a certain extent mirrored by the ILC Articles, which also seek to ensure that States are unable to avoid accountability by delegating functions that are normally associated with the State or through the outright control of private en-

63 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. p. 10.

RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. p. 9.

RUGGIE, John G. *Guiding principles on business and human rights:* implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2).p. 9. (Emphasis added.)

64 INSTITUTE FOR HUMAN RIGHTS AND BUSINESS. *State of play:* human rights in the political economy of states: avenues for application. IHRB, 2014. Available at: <https://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf>.

65 RUGGIE, John G. *Principles for responsible contracts:* integrating the management of human rights risks into state-investor contract negotiations: guidance for negotiators: report of the special representative of the secretary- general on the issue of human rights and transnational corporations and other business enterprises. 2011 (A/HRC/17/31/Add.3)

66 INSTITUTE FOR HUMAN RIGHTS AND BUSINESS. *Protecting rights by purchasing right:* the human rights provisions, opportunities and limitations under the 2014 EU public procurement directives. IHRB: London, 2015. (Occassional paper series paper number 3). p. 8.

67 DIRECTIVE 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [OJ L 94/1 (28 March 2014) (the "Concessions Directive")] 20142014; DIRECTIVE 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [OJ L 94/65 (28 March 2014) (the "Public Sector Directive")]. 2014; DIRECTIVE 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [OJ L 94/243 (28 March 2014) (the "Utilities Directive")].

68 Institute for Human Rights and Business (n. 67) 9.

69 Public Sector Directive Art. 57(2); Recital 105 and 106 of the Utilities Directive; Art. 38(5) of the Concessions Directive.

70 Public Sector Directive Art. 57(1)(f); Utilities Directive Art. 80; Art. 38(4)(f) of the Concessions Directive.

71 Public Sector Directive Art. 57(4)(a); Utilities Directive Art. 80; Art. 38(7)(a) of the Concessions Directive.

tities. Under the UNGPs, the State has a duty to take 'additional steps' to ensure that the businesses that are directly and indirectly connected with the State protect against human rights abuses (UNGP Principle 4). Furthermore, just because a State was once the owner of a business does not mean that the obligations of the State to ensure that adequate oversight with regard to human rights, ended on the moment of privatisation (UNGP Principle 5). Consequently, States' obligations in this context are continuous. States should also ensure that other businesses with whom they conduct commercial transactions respect human rights, and for this purpose the net is cast wide to include the *totality of the commercial transactions* to which States or SOEs may become parties as vendors or purchasers (UNGP Principle 6).

4. The content of the State duty to protect human rights in the context of the State-business nexus

19. Having considered the range of actors to whom the State-business nexus may be applicable, as well as the scope of this concept, which was approached from three perspectives, this section seeks to further analyse the content of the State duty to protect human rights in the context of the State-business nexus. For this purpose it will argue that the content of the State duty to protect human rights in the context of the State-business nexus is composed of two elements. The first element is the requirement to take 'additional steps' to protect against human rights abuses by businesses that are connected directly or indirectly with the State. The second element requires States to ensure that SOEs perform human rights due diligence on all their operations and activities, an element that could be considered as forming an integral part of the States' broader due diligence obligation to prevent human rights violations and which is generally required by international law..

4.1. The first element: the requirement to take 'additional steps' by States as far as their SOEs are concerned

20.It should be noted that when the State-business nexus is considered, apart from UNGPs 4, 5 and 6, it is clear that other Principles may come into play, such as the foundational principles outlined in UNGP 1, which deals with the general State duty to protect human rights; UNGP 2 which requires States to ensure that the 'expectation' that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations (a Principle which, through its policy-setting function, has the potential to influence corporate culture); UNGP 3, which sets out the State's general regulatory and policy function; and UNGP 8, which urges States to ensure that adequate 'policy coherence is achieved vertically as well as horizontally. For example, the Commentary to the UNGP clarifies the meaning of the expected policy coherence in the following way:

> Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights.[72]

21. But bearing in mind that in the context of the State-business nexus, States must take 'additional steps' to ensure that the entities that are directly or indirectly connected with the State do not perpetrate human rights abuses, what is the ultimate meaning of this term? What sort of 'additional steps' must States take in this regard that they would not usually have to take in the context of all corporations that are domiciled in their territory or jurisdiction? Does the inclusion of the requirement for 'additional steps', within the ambit of Principle 4 of the UNGPs, mean that more is expected from States? While there is nothing in scholarship that explicitly deals with this question, or anywhere in the UNGPs, the UN Working Group has dealt with this issue from two perspectives.

22. *Firstly,* during 2015 and 2016, the Working Group issued a report to the Human Rights Council that that focused on the State duty to protect human rights in the context of the State-business nexus titled 'Leading by example – The State, State-owned enterprises, and Hu-

72 RUGGIE, John G. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. (n. 2). p. 12.

man Rights' ('Report').[73] This Report gives the following reasons why 'additional steps' must be taken by States in this area: 'policy coherence, legal obligations, reputation and credibility.'[74] While the issue of policy coherence and the State's legal obligations as a matter of international law in light of the ILC Articles have already been covered above, as far as reputation and credibility are concerned, the situation can be framed by asking the following question: if States are unwilling to ensure that the businesses that they own or control, or with whom they engage in commercial transactions respect human rights, then how could States expect any better from the private sector? In this context, this Report outlines the normative and policy framework that should underpin State action in relation to human rights, by examining the State duty to protect,[75] the corporate responsibility to respect human rights,[76] the link between corporate governance and human rights,[77] urges SOEs to 'lead by example' and makes suggestions how the requirement to take 'additional steps' might be operationalized.[78] The mechanics for operationalising the 'additional steps' focus on specific areas that target mainly issues of strategy and corporate governance. For example, the Report suggests that Sates: (i) set out clearly what expectations they have from SOEs in the area of human rights and have mechanisms in place to manage those expectations;[79] (ii) ensure that the relationship between the company boards and the State is clarified;[80] (iii) ensure that there are oversight and follow up mechanisms in place for SOEs;[81] (iv) aim for capacity building in this area;[82] (v) require human rights due diligence as well as disclosure, transparency and reporting mechanisms are put in place;[83] (vi) ensure effective remedy.[84] A handful of States have already started to make changes in this sense. For example, Sweden has recently changed its Official State Ownership Policy and has included business sustainability among some of its key targets. The Policy states that 'State-owned enterprises should act as role models within the area of sustainable business and should otherwise behave in a manner that promotes public confidence.'[85] The UNGPs as well as other corporate social responsibility initiatives such as the OECD Guidelines, Global Compact and the goals of the Agenda 2030 are specifically integrated in the Swe-

73 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45)

74 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*: report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 1.

75 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*: report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 7.

76 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 9.

77 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 10.

78 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*: report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 12-21.

79 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 12.

80 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 14-15.

81 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 16.

82 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 17.

83 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 17-18.

84 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*: report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45). p. 19.

85 GOVERNMENT OFFICES OF SWEDEN. Ministry of Enterprise and Innovation. *The state's ownership policy and guidelines for state-owned enterprises 2017*. Available at: <https://www.government.se/reports/2017/06/the-states-ownership-policy-and-guidelines-for-state-owned-enterprises-2017/>. p. 4.

dish State Ownership Policy.[86] Norway has made similar progress in this context and the aim of the Norwegian Government is for State ownership 'to be an example of best practice internationally,' and SOEs must act as 'exemplary' corporate citizens in four areas: climate and the environment, human rights, employee and worker rights and anticorruption.[87] Norway's State Ownership Policy also integrates the UNGPs and there is a clear expectation from all SOEs to ensure that human rights are respected not only in their own operations but also by their business partners.[88]

23.Secondly, the UN Working Group has recently announced that it will currently focus on the 'operation of "economic diplomacy tools" such as export credit, investment guarantees, export promotion and trade missions, as well as public procurement', with the ultimate aim to develop concrete recommendations to be presented to the Human Rights Council in 2018. Those recommendations will be focusing on the requirement of the UNGPs for States to take 'additional steps' in order to ensure the protection and promotion of human rights in the 'State-business nexus'.[89] The latest recommendations were published at the time of writing this article, but overall the two initiatives seems to suggest that, at least at UN level, a new paradigm is now forming, whereby more is expected from SOEs than from privately-owned corporations as far as the responsibility to respect human rights is concerned. In this context, some scholars have remarked that SOEs 'occupy a dual place within the UNGPs', in that they may be considered as instrumentalities of the State and thus 'potentially subject to the State duty to protect' while at the same time they are 'commercial ventures being subject to the corporate responsibility to respect."[90] This means that in the case of SOEs, all Pillars of the UNGPs may be applicable concomitantly since as Principle 14 of the UNGPs states 'the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, *ownership* and structure.' However, a further differentiation seems to be made by the UN Working between SOEs and privately owned entities when it states that 'in addition to' to the responsibility of SOEs to respect human rights, they are expected to observe 'the highest standards of business conduct on par with listed companies."[91] However, despite the focus in this article on SOEs, the UN Working Group has clarified that, just because States may have to take 'additional steps' to ensure that SOEs respect human rights, this does not mean that States should be less concerned with the activities of privately-owned entities:

> This does not mean that States should pay less attention to ensuring respect for human rights by fully private enterprises. The ultimate goal is the full respect for human rights by all enterprises, irrespective of size, sector, operational context, structure or ownership. As States work towards that goal, there are still persuasive reasons for them to lead by example. This will only strengthen their legitimacy in setting regulations and expectations towards private businesses.[92]

4.2. The second element: due diligence 'requirements' by SOEs as a integral element of States' due diligence obligations

24. This section deals with the second element of the content of States' obligations to protect human rights in the context of the State-business nexus. That is, in accordance with Principle 4, States may 'require' their SOEs to perform human rights due diligence on their operations, '*where*' this is considered as an '*appropriate'* step. Consequently, it is clear that as it currently

86 UNITED NATIONS. Human Rights Concil. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development:* report of the working group on the issue of human rights and transnational corporations and other business enterprises. 2016. (A/HRC/32/45).

87 NORWEGIAN MINISTRY OF TRADE, INDUSTRY AND FISCHERIES. Diverse and value-creating ownership: Meld. St. 27 (2013–2014): report to the storting (white paper): recommendation of the Ministry of Trade, Industry and Fisheries of 20 june 2014, approved in the Council of State the same day. 2014. (The Solberg Government) <https://www.regjeringen.no/en/dokumenter/meld.-st.-27-2013-2014/id763968/>.

88 NORWEGIAN MINISTRY OF TRADE, INDUSTRY AND FISCHERIES. Diverse and value-creating ownership: Meld. St. 27 (2013-2014): report to the storting (white paper): recommendation of the Ministry of Trade, Industry and Fisheries of 20 june 2014, approved in the Council of State the same day. 2014. (The Solberg Government) <https://www.regjeringen.no/en/dokumenter/meld.-st.-27-2013-2014/id763968/>. p. 84.

89 UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS. The state as an economic actor and human rights: further unpacking practical implications of international business and human rights principles for the "state-business nexus".[S.l.:s.n., 20--?]

90 BACKER, Larry Catá. *The human rights obligations of State Owned Enterprises (SOEs).* (n. 18). p. 1-2.

91 'Leading by Example: The State, State-Owned Enterprises and Human Rights (Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises). (n. 28). p. 10.

92 Human Rights Council (n. 74). p. 21.

stands, this '*requirement*' is not mandatory because of the presence of the words '*where appropriate*.' However, even if those words would not have been included in UNGP Principle 4, it is unlikely that States would have been '*required*' to perform mandatory due diligence on *all* the operations of their SOEs. As explained in the introduction to this article, the UNGPs are a 'soft law' instrument that do not create any hard obligations, but may ultimately influence States as well as corporations to change their behaviour.[93] Nevertheless, the requirements that States must take '*additional steps*' under Principle 4 of the UNGPs have to be viewed in light of the broader obligations to 'protect, respect and fulfill'[94] that States already have under the international human rights law.[95] Those obligations are both of a negative and positive nature.[96] For example, under the *duty to respect* human rights, States have a negative obligation to refrain from interfering with the enjoyment of any human rights.[97] By way of example, States would violate the negative duty to respect human rights, if they would prioritise business interests over human rights, without an adequate justification for doing so.[98] The *duty to protect* and the *duty to fulfill* human rights are of a positive nature, which means that this duty imposes requirements for a *standard of conduct* rather than a *standard of result*.[99] In ensuring an adequate *standard of conduct,* States must take appropriate steps to *prevent, investigate, punish* and provide appropriate *redress* when human rights violations have in fact occurred.[100] While States' discretion in how exactly to go about this issue is preserved, in practice such Steps are implemented by taking legislative, administrative, judicial, financial, educational and social measures,[101] a fact that is also reinforced in the text of Principle 3 of the UNGPs.[102] Furthermore, as evidenced by jurisprudence, overall the positive obligation to protect against human rights abuses is composed of several different elements, such as *substantive obligations*, which are normally implemented through legislation,[103] *procedural obligations* to investigate and punish human rights abuses[104] and an *obligation to monitor* high-risk activities.[105] Consequently, in the context of States' positive duty to protect human rights and the State-business nexus, the obligation to monitor high-risk activities is likely to imply an obligation to conduct due diligence

93 SHAW, Malcolm N. *International law.* 7. ed. Cambridge: Cambridge Univ Press, 2014. (n. 6). p. 182-183.

94 SHUE, Henry. *The interdependence of rights:* the right to food. Leida: Martinus Nijhoff Publishers, 1984. p. 83-84.

95 SCHUTTER, Olivier de. *International human rights law:* cases, materials, commentary. 2. ed. Cambridge: Cambridge University Press, 2014. p. 280-291.

96 UNITED NATIONS. Office of the United Nations High Commissioner for Human Rights. *Principles and guidelines for a human rights approach to poverty reduction strategies.* 2012. (HR/PUB/06/12). p. 48.

97 UNITED NATIONS. General Comment n. 31 (2004) on Art 2 of the ICCPR: the Nature of the general legal obligation imposed on states parties to the covenant, 2004 para 6. ('The legal obligation under article 2, paragraph 1 is both negative and positive in nature. State Parties must refrain from violation of the rights recognised by the Covenant, and any restriction on those rights must be permissible under the relevant provision of the Covenant.')

98 UNITED NATIONS. Economic on Economic, Social and Cultural Rights. General comment n. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 2017. p. 12; AUGENSTEIN, Daniel. *State responsibilities to regulate and adjudicate corporate activities under the European Convention on Human Rights:* Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, 2011.

99 UNITED NATIONS. *Human Rights Council:* promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development: business and human rights: towards operationalizing the "protect, respect and remedy" framework: report of the special representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 2009. (A/HRC/11/13). p. 13.

100 UNITED NATIONS. *Human Rights Council:* promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development: business and human rights: towards operationalizing the "protect, respect and remedy" framework: report of the special representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 2009. (A/HRC/11/13). p. 14.

101 General Comment 3, The nature of States parties obligations (Art. 2, par.1 of the ICESCR): 14/12/90. 1990 para 7. UNITED NATIONS. Office of the High Commissioner for Human Rights. CESCR General Comment 3, The nature of States parties obligations: art. 2, par. 1 of the ICESCR. 14 dez. 1990.

102 UNGP Principle 3 states that: 'In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations; (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.'

103 CASE of López Ostra v Spain. ECHR, 1990. (Application n. 16798/90). p. 51-53; CASE of Tatar v Romaina. ECHR, 2001. (Application n. 67021/01). p. 88.

104 CASE of Hatton & ors v United Kingdom. ECHR, 1997. (Application n. 36022/97). p. 104.

105 LAGOUTTE, Stephanie. *The state duty to protect against business-related human rights abuses:* unpacking Pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business. Copenhagen: Danish Institute for Human Rights, 2014. (Ano 2014/1). p. 13.

on those activities. For example, if States *own* or *control* SOEs, or *conduct* commercial transactions with entities that operate in certain high-risk activities, States would have an obligation, as a matter of international law, to monitor the activities of those entities *by* performing continuous due diligence, as discussed above in the context of Principles 4, 5 and 6 of the UNGPs.

25. Since the UNGPs have been endorsed in 2011, there has been an increased focus on the concept of due diligence in the context of the corporate responsibility to respect human rights under Pillar II of the UNGPs. However, it should be recalled that due diligence is a principle that is well entrenched in international law, and which forms a core part of the State's duty to protect human rights, as has been established in cases such as *Velàsquez – Rodriguez v Honduras* where the Inter-American Court of Human Rights stated that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[106]

26. In this context, as it was clarified by the International Court of Justice, due diligence implies the obligation to 'employ all means reasonably available' to avoid a negative outcome.[107] However, *States' due diligence obligations* should not be confused with the concept of 'human rights due diligence', which is a relatively newer concept introduced by the UNGPs, and which can be expressly found in UNGPs 17 to 21.[108] This is because, as mentioned above, States' due diligence obligations arise as a matter of international law,[109] while 'human rights due diligence' is a voluntary mechanism that targets business enterprises generally and which ensures that businesses 'can identify, prevent, mitigate and account for the harms that they may cause, and through which judicial and regulatory bodies, can assess and enterprise's respect for human rights.'[110] Furthermore, a recent empirical study, which analysed State practice that spanned more than 100 jurisdictions, has concluded that due diligence is 'not a creation of the UN Human Rights Council nor [is it] a voluntary measure for corporate social responsibility', because it 'originates from the legal tools that States are already using to ensure that business behaviour meets social expectations, including standards set in law.'[111]

27. Another issue to consider – which further supports the argument that States are have an obligation as a matter of international law to perform due diligence in the context of the State-business nexus – is that it is only reasonable to assume that a State *should be aware* about how its SOEs operate, given the fact that it is the State that ultimately sets out the operational strategy for all its SOEs, as the official State Ownership Policies of Sweden and Finland have already showed. There are further examples, in this regard, which support the argument that States are very well aware of the manner in which their SOEs operate. For example, in China the State-owned Assets Supervision and Ad-

106 *VELÀSQUEZ Rodriguez v Honduras:* Judgment of july 29, 1988, Inter-AmCtHR (Ser C) n. 4 (1988). University of Minnesota, [1988]. p. 172.

107 APPLICATION of the Convention on the Prevention and Punishment of the Crime of Genocide: Bosnia and Herzegovina v Serbia and Montenegro. Judgment, ICJ Reports 2007. p. 43 [430]. ([I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide; the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible.)

108 For example, UNGP Principle 17 states that 'in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises, should carry out human rights due diligence.' Human rights due diligence is thus viewed as a 'process' which involves 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.'

109 BONNITCHA, Jonathan; MCCORQUODALE, Robert. The concept of "due diligence" in the un guiding principles on business and human rights. *European Journal of International Law*, v. 28, Issue 3, p. 899-919, nov. 2017. p. 904-905.

110 SCHUTTER, Olivier de et al. *Human rights due diligence:* the role of states. 2012. Available at: <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf>.; Bonnitcha and McCorquodale (n. 110). p. 907. For example, Bonnitcha and McCorquodale argue that there could be some negative consequences of the fact that due diligence is viewed as a process rather than a legal requirement by businesses. Firstly, it is believed that this 'encourages the incorrect view that implementing due diligence processes is sufficient to discharge businesses' responsibility to respect human rights' (at 910). Secondly, the authors believe that 'the failure to distinguish between the two different meanings of due diligence creates confusion about he situations in which businesses that infringe human rights can be said to have breached their responsibility to respect human rights and, therefore, to have a responsibility to provide a remedy within the scheme established by the Guiding Principles.')

111 SCHUTTER, Olivier de et al. *Human rights due diligence:* the role of states. 2012. Available at: <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf>. p. 4.

ministration Commission (SASAC) is the agency that sets the strategy for all of China's SOEs.[112] SASAC has recently issued certain Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities.[113] Those Guidelines require that SOEs operate their business in a legal and honest manner, make sustainable profits, improve their products and services, fulfill their corporate social responsibilities, engage with communities, conserve resources, and protect the environment and the legal rights of their employees in their operations. The main measures that SOEs should take is to increase awareness of corporate social responsibility, set up procedures in this regard, including associated reporting, and increase dialogue and international cooperation. The Guidelines are clear that in doing so it will help China in 'establishing a "responsible" public image'.[114] The Ministry of Commerce and the Ministry of Environmental Protection have also issued a Guidance on Environmental Protection in Foreign Investment and Cooperation, which states that all enterprises operating abroad should: have measures in place to ensure environmental protection; respect the religions and customs of the host State; respect the environmental laws of the host State; and should conduct environmental impact assessments.[115]

28. SOEs are also 'encouraged to study and learn from environmental principles, standards and practices of international organisations and multinational financial institutions.'[116] The China Banking and Regulatory Commission has also issued the Green Credit Guidelines whose purpose is to require banks that finance overseas investment to strengthen environmental and corporate social responsibility requirements.[117] Article 21 of the Green Credit Guidelines requires banks to ensure that the businesses they lend to respect the host State laws and regulations concerning the environment and 'make a promise in public that appropriate international practices or international norms will be followed'. Some other sector specific instruments, such as the Guidelines for Social Responsibility in Outbound Mining Investments do expressly incorporate the UNGPs and state that those companies must 'observe the UN Guiding Principles on Business and Human Rights during the entire lifecycle of the mining project.'[118] In late 2017, the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters entered into a formal agreement with the International Council on Mining and Metals to 'help promote sustainable development in Chinese companies' overseas mining investments.[119]

29. Overall, this section has shown that the concept of due diligence sits at the heart of the second element of the State-business nexus. While the UNGPs do not impose additional obligations on States and the language used therein does not indicate that States would have to *always* perform due diligence in the context of the State-business nexus, it was argued that States may be required to so anyway, in order to comply with their obligations under international law to 'protect, respect and fulfill' human rights. This is because States, as part of the positive duty to respect human rights, must monitor high-risk activities. Furthermore, it is only reasonable to assume that States *should know* how the entities that they own or control operate, given that they ultimately set the operational strategy for all those entities.

112 SASAC About SASAC - SASAC Main Functions - SASAC. Available at: <http://en.sasac.gov.cn/n1408028/n1408521/index.html>.

113 STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION COUNCIL. *Guidelines to the State-owned enterprises directly under the central government on fulfilling corporate social responsibilities.* Available at: <http://en.sasac.gov.cn/n1408035/c1477196/content.html>.

114 STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION COUNCIL. *Guidelines to the State-owned enterprises directly under the central government on fulfilling corporate social responsibilities.* Available at: <http://en.sasac.gov.cn/n1408035/c1477196/content.html>.

115 MINISTRY OF COMMERCE PEOPLES´S REPUBLIC OF CHINA. *MOFCOM and MEP jointly issued guidance on environmental protection in foreign investment and cooperation.* 2013. Available at: <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201303/20130300043146.shtml>.

116 MINISTRY OF COMMERCE PEOPLES´S REPUBLIC OF CHINA. *MOFCOM and MEP jointly issued guidance on environmental protection in foreign investment and cooperation.* 2013. Available at: <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201303/20130300043146.shtml>.

117 NOTICE of the CBRC on issuing the green credit guidelines. Available at: <http://www.cbrc.gov.cn/EngdocView.do?docID=3CE646AB629B46B9B533B1D8D9FF8C4A>.

118 CHINA. China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters. *CCMCMC Guidelines for Social Responsibility in Outbound Mining Investments.* 2014

119 INTERNATIONAL COUNCIL ON MINING E METALS (ICMM). *Chinese mining body aligns with icmm to promote mining with principles.* 2017. Available at: <https://www.icmm.com/en-gb/news/2017/icmm-signs-mou-with-cccmc>.

5. Conclusion

30. This article has sought to understand how the UNGPs address the State-business nexus. It has been shown that this concept entered into the narrative of the UNGPs relatively early on and that Professor Ruggie understood that States must also be engaged in addressing human rights challenges in their own right as economic actors, and not just in their capacity as States. This ultimately led to the inclusion in the UNGPs of Principles 4, 5 and 6. In this context, it has been shown that, although the UNGPs were not initially clear who exactly were the actors that fell within the ambit of the State-business nexus, later developments suggested that the approach adopted is very broad and that it includes all manner of entities that are owned or controlled by States, regardless of how they are formally structured from a legal point of view. Furthermore, a close examination of the State-business nexus leads to the conclusion that there are three perspectives from which this concept is approached in the UNGPs. Principle 4 applies to those entities that are *owned* or *controlled* by the State or that *receive substantial support and services from the State*. Principle 5 applies equally to *privately owned entities* that may operate in certain sectors that were previously State-owned. Principle 6 applies to *all other entities* with whom States may enter into *commercial transactions*. It has been argued that the coverage by the UNGPs of the State-business nexus from three perspective mirrors – to a certain extent – the broad approach adopted by the ILC Articles 4, 5 and 8, which also seek to ensure that States are ultimately accountable for the acts of those entities, when it is not initially apparent how those entities fit in the structure of the State. An investigation into the content of the State-business nexus concluded that this concept is composed of two elements. The first element requires States to take 'additional steps' to ensure that the entities that are owned, controlled or 'that receive substantial support and services' from the State behave as model corporate citizens. The second element of the State-business nexus deals with the 'requirement' to perform due diligence in certain circumstances. In this context, it has been argued that, while a strict interpretation of this element in the context of the UNGPs does not indicate that this is a mandatory requirement, its interpretation in light of the broader State obligations to 'protect, respect and fulfill' human rights seems to indicate that this is nevertheless the case. This would ultimately mean that States have an obligation to perform due diligence on all the activities of their SOEs as part of their obligation to monitor high-risk activities. This conclusion is also supported by a reasonable expectation that States *should know* how the entities that they own or control operate, given that in the great majority of cases, it is the State that ultimately sets out the operational strategy of those entities.

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Hardening *soft law*: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights?

Endurecimento do *soft law*: as leis emergentes de divulgação social corporativa são capazes de gerar uma conformidade substancial com os direitos humanos?

Justine Nolan

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Hardening *soft law*: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights?*

Endurecimento do *soft law*: as leis emergentes de divulgação social corporativa são capazes de gerar uma conformidade substancial com os direitos humanos?

Justine Nolan**

Abstract

The aim of this paper is to examine the potential effectiveness and limitations of the emerging corporate social disclosure laws that aim to increase transparency about human rights risks in global supply chains. Globalization has led to the emergence of low cost, efficient (but risky) supply chains that span multiple sourcing countries which exhibit a wide range of economic, political, social, labor and environmental standards. The five laws examined seek to provide mechanisms that aim to reduce the negative human rights impact of business in supply chains. They introduce varying demands on business to map, track and disclose how and where their products are being made. This paper first briefly highlights the preponderance of soft law that defines the business and human rights regulatory framework and guides corporate behavior. It then examines three mandated disclosure laws, the Dodd-Frank Act, the California Transparency in Supply Chains Act and the UK Modern Slavery Act and two due diligence focused laws, the Australian Illegal Logging Prohibition Act and the French Duty of Corporate Vigilance Law. After which, it proposes criteria to strengthen the development and implementation of these laws. It concludes by noting that while these laws are hardening the human rights expectations of business, for them to generate substantive (and not just procedural) human rights compliance they must include: detailed requirements on reporting and due diligence; collaboration with external stakeholders; and compliance mechanisms. Through analysis of these regulatory developments this paper seeks to provide greater understanding of how to shape regulatory responses to governance gaps in transnational supply chains.

Keywords: Business. Human rights. Modern slavery. Disclosure. Due diligence. Transparency.

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Resumo

O objetivo deste artigo é examinar a potencial eficácia e limitações das leis emergentes de divulgação social corporativa que visam aumentar a transparência sobre os riscos de direitos humanos nas cadeias de fornecimento globais. A globalização levou ao surgimento de cadeias de suprimentos eficientes, mas de baixo custo, que abrangem múltiplos países fornecedores que exibem uma ampla gama de padrões econômicos, políticos, sociais, trabalhistas e ambientais. As cinco leis examinadas procuram fornecer mecanismos que visam reduzir o impacto negativo dos direitos humanos dos negócios nas cadeias de fornecimento. Eles introduzem demandas variadas nas empresas para mapear, rastrear e divulgar como e onde seus produtos estão sendo feitos. Este artigo primeiro destaca brevemente a preponderância da soft law que define a estrutura regulatória dos negócios e dos direitos humanos e orienta o comportamento corporativo. Em seguida, examina três leis de divulgação obrigatórias, a Lei Dodd-Frank, a Lei de Transparência na Cadeia de Suprimentos da Califórnia e a Lei de Escravidão Moderna do Reino Unido e duas leis focadas em devida diligência, a Lei de Proibição de Madeira Legal e o Direito Francês de Vigilância Corporativa. Depois disso, propõe critérios para fortalecer o desenvolvimento e a implementação dessas leis. Conclui-se observando que, embora essas leis estejam endurecendo as expectativas de direitos humanos nos negócios, para que elas gerem conformidade com os direitos humanos substantivos (e não apenas processuais), elas devem incluir: requisitos detalhados sobre relatórios e *due diligence*; colaboração com partes interessadas externas; e mecanismos de conformidade. Por meio da análise desses desenvolvimentos regulatórios, este documento busca fornecer uma compreensão maior de como moldar as respostas regulatórias às lacunas de governança nas cadeias de fornecimento transnacionais.

Palavras-chave: Negócios. Direitos humanos. Escravidão moderna. Revelação. Devida diligencia. Transparência.

tiplicity of countries with varying economic, political, social, labor and environmental standards. Increasing attention is being paid to the potential negative impacts corporate operations may have on the rights of workers in these global supply chains. This heightened attention has led, in part, to increased consideration of how such negative impacts can best be prevented and addressed and raises questions about the appropriate regulatory roles that should be assigned to government, business and/or civil society.

The application of human rights to corporate operations has long depended on the slow and steady evolution of voluntary initiatives that seek to garner corporate compliance with international human rights standards. The implementation and monitoring of such initiatives has largely relied on self-regulation by business, alongside the coercive voice of civil society. Writing in 2008, then United Nations (UN) Special Representative for Business and Human Rights noted that 'the root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.'[2] That is, corporations often operate in countries that do not have the capacity or will to protect the rights of those within their jurisdiction; as a result, their activities are difficult to monitor and regulate, and wrongs often remain without redress. In response, civil society has often taken the lead in encouraging, coercing and often shaming corporations to address their impact on human rights.

The relatively recent development of state-based legislative initiatives that focus on generating greater transparency in supply chains (and sometimes requiring companies to conduct due diligence) is starting to change this dynamic and hardening human rights requirements for business. What is less clear, is whether such disclosure and due diligence requirements are capable of linking transparency with accountability and generating substantive (not just procedural) human rights compliance.

1. Introduction

Global supply chains now 'account for more than 450 million jobs worldwide'[1] and are present in a mul-

1 G20 MINISTERIAL DECLARATION. *Towards an inclusive future*: shaping the world of work: G20 labor and employment ministers meeting. 2017. Available in: <http://www.g20.utoronto.ca/2017/170519-labour.html>.

2 HUMAN RIGHTS COUNCIL. *Protect, respect and remedy*: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. 2008. Available in: <http://www.refworld.org/docid/484d2d5f2.html>.

Over the last 30 years, there has been an emphasis on the development of 'soft law' aimed at regulating the impact of business practices on human rights, for instance, through multi-stakeholder initiatives, institutional declarations or guidelines, or industry codes of conduct.[3] What this aims to do in practice is to harness the power of business to positively impact human rights by providing frameworks and guidance that assist companies in understanding what constitutes responsible business conduct. The utility of these initiatives has not been so much their ability to act as a tool of legal accountability but rather, to engage with companies and enable them to better understand the contemporary responsibilities of business with respect to human rights. The 'rules' for guiding responsible business conduct (such as they exist) have been sourced not only from codified law (generally jurisdictionally confined, such as domestic health and safety laws) but also stem from sources as diverse as privately drafted codes of conduct to internationally formulated guiding principles - so-called soft law standards that help guide corporate respect for human rights. Regulation in this context 'goes beyond legal rules and mechanisms and also comprises political, social, economic and psychological pressures.'[4] The adoption by the UN Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights,[5] firmly entrenched the concept of a corporate responsibility to respect human rights.[6] This responsibility stems from a social expectation (not legal obligation) to respect human rights and soft nature of this responsibility is reflected in the recommendatory nature of the language employed.[7] The Guiding Principles embody an approach which employs a mix of soft and hard law (with the latter reserved for the state duty component) to encourage respect for human rights. Stevelman argues that they are based on a complementary 'synthesis of hard and soft law – the soft law mandates pick up on the space left by voids in hard law, and support and amplify the tents of hard law where they do overlap.'[8]

During this period of the ongoing development of the business and human rights framework, the potential regulatory role of government has at times appeared to be subservient to that of the regulatory power of civil society or the self-regulatory role of business in seeking compliance with human rights.[9] While it remains the

3 RATNER, S. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, v. 111, 2001-2002; KINLEY, D.; TADAKI, J. From talk to walk: the emergence of human rights responsibilities for corporations at international law. *Virginia Journal of International Law*, v. 44, n. 4, 2004; UTTING, P. *Rethinking business regulation*: from self-regulation to social control. 2005. Available in: <http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/f02ac3db0ed406e0c12570a10029bec8/$FILE/utting.pdf>.

4 CHARLESWORTH, H. A regulatory perspective on the international human rights system. In: DRAHOS, P. *Regulatory theory:* foundations and applications. Australia: ANU Press, Acton ACT, 2017. p.357–374. p. 361.

5 HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework. 2011. Available in: <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

6 The Special Representative commented in 2010 that the corporate responsibility to respect rights is a notion that has been gradually emerging and is 'acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself.' RUGGIE, J. *The UN "Protect, Respect and Remedy" framework for business and human rights*. 2010. Available in: <http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>. This stands in contrast to earlier views by economist Milton Friedman who argued that it was a 'fundamental misconception of the character and nature of the free economy' for a corporation to have any concern other than maximization of profit. FRIEDMAN, M. *Capitalism and Freedom*. Chicago: University of Chicago Press, 1962. p.133; HENDERSON, D. *Misguided virtue:* false notions of corporate social responsibility. Institute of Public Affairs. 2001. p. 147. Available in: <https://iea.org.uk/publications/research/misguided-virtue-false-notions-of-corporate-social-responsibility>. p.147.

7 For example, Guiding Principle No. 13 ("The responsibility to respect human rights requires that business enterprises: ... (b) *Seek to* prevent or mitigate adverse human rights impacts"); Guiding Principle No. 23 ("In all contexts, business enterprises *should*: ... (b) *Seek* ways to honour the principles of internationally recognized human rights when faced with conflicting requirements"), Guiding Principles n5.

8 STEVELMAN, F. Global finance, multinationals and human rights: with commentary on backer's critique of the 2008 report by John Ruggie. *Santa Clara Journal of International Law,* v. 9, n. 1, p. 101-145, 2011. p. 116. For an overview of the challenges of utilizing private regulation and soft law in this field see: LOCKE, R. *The promise and limits of private power*. Cambridge: Cambridge University Press, 2013; SOBCZAK, A. Are codes of conduct in global supply chains really voluntary: from soft law regulation of labour relations to consumer law. *Business Ethics Quarterly,* v. 16, n. 2, p. 167-184, 2006; PARIOTTI, E. International soft law, human rights and non-state actors: towards the accountability of transnational corporations? *Hum Rights, v.* 10, p.139–155, 2009; BACCARO, L.; MELE, V. For Lack of Anything Better? International Organizations and Global Corporate Codes. *Public Administration*, v. 89, n. 2, p. 451–470, 2011; DEVA, S. *Regulating corporate human rights violations*. London: Routledge, 2012; and CRAGG, W. *Business and human rights*: a principle and value-based analysis. 2012. Available in: <https://www.researchgate.net/publication/290790009_Business_and_Human_Rights_A_Principle_and_Value-Based_Analysis>.

9 LOCKE, R. *The promise and limits of private power*. Cambridge: Cambridge University Press, 2013.

primary duty of government to protect human rights (including protecting individuals from harm by third parties such as corporations), the unwillingness and/or inability of many governments to fulfil their human rights obligations has led to protection gaps that critically impact workers in supply chains.[10] However, the development of recent corporate disclosure laws (such as the United Kingdom's (UK) 2015 Modern Slavery Act) and due diligence requirements (such as the French Corporate Duty of Vigilance Law[11]) focused on supply chains, has reignited interest in the complementary regulatory role of government in this field. Such laws are hardening responsible business conduct principles, that have more traditionally been cast in a soft format. At a meeting of the G20 group of countries in 2017,[12] there was clear acknowledgement that it is the responsibility of governments to 'communicate clearly on what we [government] expect from businesses with respect to responsible business conduct'.[13]

This article provides an overview of some of the recent corporate social disclosure and due diligence legislative initiatives aimed at increasing transparency in global supply chains. The article distinguishes between those laws that focus purely on disclosure and those that include an explicit requirement of due diligence and a state-based compliance mechanism. It illustrates how these laws are (to varying extents) hardening the human rights expectations of business that have previously and predominantly been set out in soft law frameworks. This article first examines three mandated disclosure laws (the United States' (US) Dodd-Frank Act, the California Transparency in Supply Chains Act and the UK's Modern Slavery Act) and two laws that expressly incorporate a due diligence requirement alongside their mandated social disclosures (the Australian Illegal Logging Prohibition Act and the French Duty of Corporate Vigilance Law). The first three laws have been selected because they are the first three major laws to adopt this approach and deliberately target corporate social disclosure as a mechanism to improve the transparency of corporate human rights impacts in global supply chains. The last two laws are examined to highlight their due diligence component and considers the distinction between this approach versus simple disclosures. The article then turns to examine what corporate social disclosure and human rights due diligence laws *should* include in order to be an effective tool that will assist in preventing corporate human rights abuses. It questions whether some of the current legislative trends are focused more on promoting procedural disclosure and as such, may not significantly contribute to long term substantive human rights improvement.

2. The emergence of mandated corporate social disclosure and due diligence laws

With the introduction of section 1502 of the Dodd Frank Act in 2010,[14] US policy makers put business on notice that companies need to be more transparent about their sourcing strategies and mandated corporate social disclosure as a means of achieving this. This law creates a reporting requirement for publicly traded companies in the US with products containing specific conflict minerals. The purpose of this provision is to provide greater transparency about how the trade in minerals is potentially fueling and funding the armed struggle in the Democratic Republic of the Congo; functionally, it relies on the adverse reputational impact of such a disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.[15] The law was quickly followed by the passage of California's Transparency in Supply Chains Act (CTSCA) in 2010, which came into effect in 2012.[16] The CTSCA requires large retail and manufacturing firms to disclose efforts to eradicate slavery and human trafficking from their supply chains and is another example of mandated corporate social disclosure. The adoption of the UK's

10 2008 Report, n2.

11 *Loi de Vigilance* No. 2017-339 of 2017.

12 The G20 (or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies (19 countries plus the European Union). See: HAMBURG. *G20 summit 2017*. Available in: <http://www.hamburg.com/g20-2017/>.

13 G20 MINISTERIAL DECLARATION. *Towards an inclusive future*: shaping the world of work: G20 labor and employment ministers meeting. 2017. Available in: <http://www.g20.utoronto.ca/2017/170519-labour.html>.

14 *Dodd Frank Wall Street Reform and Consumer Protection Act*, 2010 Section 1502.

15 Section 1502 does impose penalties for not reporting or complying in good faith. Also, the information filed by companies is subject to s18 of the *Securities Exchange Act* 1934 which attaches liability for any false or misleading statements.

16 BIRKEY, R. et al. Mandated social disclosure: an analysis of the response to the California transparency in supply chains act 2010. *Journal of Business Ethics*, p. 1-15, 2016. Available in: <https://link.springer.com/article/10.1007%2Fs10551-016-3364-7>.

Modern Slavery Act in 2015 focused broader corporate attention on the use of legislative disclosure requirements to address the human rights impacts of business. Section 54 of the Modern Slavery Act requires specified commercial organizations which supply goods or services in the UK to disclose information about their efforts to address modern slavery in their supply chains.[17] The rationale behind these types of reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake human rights focused examination of their supply chain practices.

Each of these three laws is quite specific in its focus, with the Dodd-Frank Act inquiring only about the presence of conflict minerals and the UK and Californian laws focusing on disclosures about modern slavery.[18] The laws only require companies to report on their sourcing and (possibly) their due diligence practices but do not require them to act on their findings or expressly conduct due diligence to facilitate such reporting on corporate souring practices.[19] The assumption in this disclosure model appears to be that the transparency gained from disclosure will incentivize corporate action to address human rights risks, because of the greater visibility of these risks that will be evident to investors and consumers. It relies on the voices of external stakeholders to hold companies to account by assessing and critiquing the corporate reports. The model marks a shift from state regulators' traditional role in overseeing purely financial (as opposed to social) disclosures but shifts the responsibility of regulation to non-state actors.[20]

Initial analysis of the various statements submitted under these laws indicate that, to date, the corporate responses tend to be more symbolic than substantive. For example, in a study by Sarfaty analyzing the first statements issued under section 1502 of the Dodd-Frank Act, she concluded that the reports issued a low level of compliance with the requirements of the law.[21] Even accounting for the fact that this type of social disclosures represents a new learning paradigm for companies, the analysis is revealing of how many companies failed to follow the basic procedural requirements of the transparency provision.

Similarly, early analysis of the CTSCA and the Modern Slavery Act also indicates a tendency toward the production of reports that minimally meet the procedural 'tick the box' requirements of the laws. Year on year analysis of compliance with the CTSCA shows some slight improvement with compliance requirements but still indicates that 48% of companies are not complying with the basic disclosure requirements of the law.[22] Another study concluded that 'analysis of the extensiveness of the disclosure suggests that, overall, the responses tend to be more symbolic than substantive'.[23] Various studies conducted on the corporate statements issued under the Modern Slavery Act also indicate mixed results. While select corporate statements have been praised, more generally the law has engendered a corporate response that falls short of any serious effort to address modern slavery in their supply chains.[24] With both the

17 See Appendix A for more details about these laws.

18 Modern slavery is not defined in international law but is predominantly used as an umbrella term to encompass various forms of coercion that are prohibited in international legal instruments including slavery, forced labor, trafficking in persons and forced marriage. The relevant offences under the United Kingdom's Modern Slavery Act include slavery, servitude, forced or compulsory labor and human trafficking. *Modern Slavery Act* 2015 UK Part 1.

19 Recent litigation in the US has confirmed this approach with specific reference to the CTSCA: *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015); *Hodson v Mars, Inc* No 4:2015cv04450 (N.D. Cal, February 17, 2016); *Sud v Costco Wholesale Corporation* No 3:2015cv03783 (N.D. Cal, January 24, 2016).

20 NELSON, A. The materiality of morality: conflict minerals. *Utah Law Review*, p. 291-241, 2014.

21 SARFATY, G. Shining a light on global supply chains. *Harvard International Law Journal*, v. 56, n. 2, p.419-463, 2015. p. 423. Sarfaty's study of the first set of Conflict Minerals Reports submitted to the Securities Exchange Commission up to June 2014 argues that these reports exhibited a low level of compliance with due diligence requirements and identified several obstacles to achieving broader compliance, including that: '(i) international norms on supply chain due diligence are in their infancy; (ii) the proliferation of certification standards and in-region sourcing initiatives are still evolving and often competing; and (iii) inadequate local security and weak governance inhibit the mapping of mineral trade and the tracing of minerals in the region'.

22 BAYER C.; HUDSON, J. *Corporate compliance with the California transparency in supply chains act*: anti-slavery performance in 2016. 2017. p. 5. Available in: <https://static1.squarespace.com/static/5862e332414fb56e15dd20b9/t/58bf06e346c3c478cf76d619/1488914152831/CA-TISCA.v.24_secured.pdf>.

23 BIRKEY, R. et al. Mandated social disclosure: an analysis of the response to the California transparency in supply chains act 2010. *Journal of Business Ethics,* p. 1-15, 2016. Available in: <https://link.springer.com/article/10.1007%2Fs10551-016-3364-7>.

24 BENJAMIN, T.; PURVIS, J. G. Corporate supply chain transparency: California's seminal attempt to discourage forced labour. *The International Journal of Human Rights*, v. 20, n. 1, p. 55-77, 2016; ERGON ASSOCIATES. *Reporting on modern slavery*: the current state of disclosure. 2016. Available in: <http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>; CORE COALITION; BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE. *Register of slavery & human trafficking corporate statements re-*

Californian and UK laws there is no central repository where the corporate statements are held, and in the UK there is no official public list detailing which companies need to report. These shortcomings make the job of conducting a comparative analysis of reports more challenging and are not conducive to enabling consumers, investors and civil society more broadly to act as compliance enablers. In addition, the lack of comparably structured statements complicates comparability analysis both within sectors and from year to year.[25] Compliance with the disclosure requirements set out in the Dodd-Frank Act, the CTSCA and the Modern Slavery Act depend largely on the pressure exerted by external parties – consumers, investors, civil society – to induce compliance. As the table in Appendix 1[26] illustrates, these three laws do not build in express penalties in the form of fines or criminal liability for non-compliance, but rather rely on a mix of public and private regulatory techniques to achieve compliance. While research on mandated corporate environmental disclosures (which have been operating in various jurisdictions for a longer time) shows that reporting may improve over time, the development of more substantive responses is influenced by a number of factors, including the potential reputational risk of exposure faced by companies who do not comply with reporting requirements.[27] For this type of regulatory model to be effective, the disclosure requirements should be cast in such a way so that the risk of detection of non-compliance can be more easily uncovered by external stakeholders.

Ultimately, the imposition of these corporate disclosure requirements is part of the larger challenge of determining 'when, how, and why might we expect improvement in the treatment of workers in global supply chains?'[28] The Dodd-Frank Act, the CTSCA and the Modern Slavery Act are three examples of mandated social disclosure laws that appear to draw, in part, on the regulatory theories of responsive regulation[29] and networked governance,[30] which (broadly) argue that regulators should first consider the extent to which business is effective at regulating itself when determining the extent to which a regulator will intervene. The laws seek to draw a compromise between the strong regulation of business on the one hand and deregulation on the other and instead look to optimize a mix of public and private regulation to achieve compliance. In this context, these three laws focus on compliance in a narrow sense of being 'obedient to a regulatory obligation,'[31] with the primary obligation being to report. Compliance may also be considered in a broader sense of acting in a way that will achieve a policy goal, such as eradicating modern slavery. This broader sense of compliance is more readily apparent in the two due diligence laws discussed below which require explicit corporate behavior responses (by conducting due diligence).

Each of the three laws discussed above, incorporate a mix of both hard and soft approaches to addressing human rights risks in supply chains. The mandated transparency requirement hardens expectations around reporting of social issues, but the ambiguity around compliance softens the approach. The role of the government in these regimes is essentially to act as the orchestrator of private actors to encourage compliance and is a move away from the more traditional 'command and control' approach that is more likely to figure in much domestic legislation. However, it is not obvious that this tactic is proving to be effective nor that disclosure alone will guarantee improved outcomes. A 2017 review by the UK Joint Committee on Human Rights on the operation of the Modern Slavery Act reinforces

leased to date to comply with uk modern slavery act 2016.

25 KNOW THE CHAIN. *Five years of the California transparency in supply chains act*. 2015. Available in: <https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf>.

26 The information in the table in Appendix I is drawn from the laws themselves and also summaries of the laws provided in the following reports: FAIR LABOR ASSOCIATION. *Supply chain traceability and transparency:* shifting industry norms, emerging regulations, and greater interest from civil society. 2017. Available in: <http://www.fairlabor.org/blog/entry/supply-chain-traceability-and-transparency>. and BUSINESS HUMAN RIGHTS AND RESOURCE CENTRE; ITUC CSI IGB. *Modern slavery in company operations and supply chains*: mandatory transparency, mandatory due diligence and public procurement due diligence. 2017. Available in: <https://www.ituc-csi.org/modern-slavery-in-company>.

27 BERTHELOT, S.; CORMIER, D.; MAGNAN, M. Environmental disclosure research: review and synthesis. *Journal of Accounting Literature*, v. 22, p. 1–44, 2003. p. 2.

28 BERLINER, D. et. al. Governing global supply chains: what we know (and don't) about improving labor rights and working conditions. *Annual Review of Law and Social Science,* v. 11, n. 1, p. 193–209, 2015.

29 AYRES, A.; BRAITHWAITE, J. *Responsive regulation:* transcending the deregulation debate. New York: Oxford University Press, 1992.

30 GRABOSKY P. Beyond responsive regulation: the expanding role of non-state actors in the regulatory process. *Regulation and Governance,* v. 7, n. 1, p.114-123, mar. 2013.

31 PARKER, C.; NIELSEN, V. Lehmann. Compliance: 14 questions. In: DRAHOS, P. *Regulatory theory:* foundations and applications. Australia: ANU Press, Acton ACT, 2017. p. 357–374.

this assumption. The Committee cited evidence that 35% of statements under the Modern Slavery Act did not discuss risk assessment processes, and two thirds of statements did not identify priority risks.[32] Rather, most companies were simply disclosing general information about their existing policies.[33] Ultimately, the Joint Committee recommended the introduction of legislation mandating human rights due diligence as a means of hardening compliance with human rights expectations.[34]

Due diligence is a concept that is gaining traction in the business and human rights field. Human rights due diligence is an integral component of the Guiding Principles and its effective development and implementation is noted as a shared responsibility of both government and business. Government action to encourage companies to respect human rights should include providing clarity around concepts such as due diligence and setting standards for communicating these efforts to the broader community. The concept of due diligence was introduced in the Guiding Principles as a mechanism by which companies might discharge their responsibility to respect rights and reflects the continued reliance on, what had been to date (as at and prior to 2011, when the principles were introduced), a largely self-regulatory process to address corporate human rights violations. Human rights due diligence, as set out in the Guiding Principles, is basically comprised of four key elements. Namely, businesses are expected to: (1) assess their actual and potential adverse human rights impacts; (2) integrate these findings internally and take appropriate preventative and mitigating action; (3) track the effectiveness of their response; and (4) publicly communicate how they are addressing their human rights impacts.[35] Guiding Principle 17 sets out the basic parameters of the recommended due diligence process and notes that human rights due diligence may cover impacts a business causes, contributes or is directly linked to it via its operations and relationships, and will vary in complexity according to the size of the business and the severity of risk.[36]

A key feature that distinguishes human rights due diligence from traditional corporate due diligence, is its ongoing nature and that it focuses primarily on detecting the risks that the company may impose on others, as opposed to risks to the company.[37] While due diligence as set out in the Guiding Principles applies to a range of situations in which businesses may potentially impact human rights, one of the most common (and significant) human rights challenges faced by business today is that associated with its reliance on global supply chains. However, none of the three supply chain regulatory approaches analyzed above that mandate social disclosures expressly impose a legal obligation on companies to conduct such due diligence.

Since the advent of the Guiding Principles in 2011, there have been significant advances in further defining and refining the concept of due diligence, and in some instances (discussed below), legally mandating companies to conduct such assessments. Recently, detailed guidance has begun to emerge (developed by both state and non-state actors) which attempts to outline what a comprehensive supply chain due diligence program should look like. The OECD's work in this area has been ongoing for many years and its most recent guidance documents reflect and expand on the framework set out in the Guiding Principles. [38] The Dutch Agreement on Sustainable Garment and Textile, established in 2016, is an example of a sector specific soft law ap-

32 ERGON ASSOCIATES. *Reporting on modern slavery*: the current state of disclosure. 2016. Available in: <http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>. HOUSE OF LORDS, HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS. *Human rights and business 2017:* promoting responsibility and ensuring accountability. p.37-38. Available in: <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

33 Written evidence from the Equality and Human Rights Commission in the UK Joint Committee Report, n32, p38.

34 UK Joint Committee Report, n32, p59.

35 Guiding Principles n5, Principle 15(b), 17-21

36 Guiding Principles n5, Principle 17.

37 MCCORQUODALE, R.; BONNITCHA, J. The concept of "Due Diligence" in the UN guiding principles on business and human rights. *European Journal of International Law,* v. 28, 2017.

38 The OECD has been particularly active in this space and has produced a 2018 report on responsible business conduct along with sector specific guidelines. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Due diligence guidance for responsible business conduct OECD publishing*. 2018. Available in: <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas*. 2016. Available in: <http://dx.doi.org/10.1787/9789264252479-en>; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Due diligence guidance for responsible supply chains in the garment and footwear sector*. 2017. Available in: <https://mneguidelines.oecd.org/oecd-due-diligence-guidance-garment-footwear.pdf>.

proach to facilitating human rights due diligence. [39] It is a sector-based agreement between sector associations, member companies, government, trade unions and civil society organizations by which they work together to identify and address risks to human rights (including labor rights), environmental impacts, impacts related to corruption and taxation practices and other negative impacts covered by the OECD Guidelines for Multinational Enterprises and the Guiding Principles. Through policies such as this, the Dutch government aims to encourage the implementation of due diligence on a voluntary basis. To date, two agreements have been reached, one in the garment and textile sector and the other in banking. Alongside these high level governmental and inter-governmental led efforts to encourage voluntary due diligence are guidelines that have been developed by civil society to further define and refine human rights due diligence.[40]

However, despite the proliferation of discussions on due diligence, its practical implementation appears limited. A 2017 report by the Corporate Human Rights Benchmark reported low levels of due diligence practice and reporting. [41] Similarly, a survey conducted by Norton Rose Fulbright and the British Institute of International and Comparative Law[42] found that over 50% of companies surveyed had never undertaken a specific human rights due diligence process, These initial results indicate that six to seven years since the adoption of the Guiding Principles, a majority of companies are either not conducting or adequately reporting on their human rights due diligence practices.

This lack of progress might be attributed in part to the non-binding nature of due diligence requirements at both the international and domestic level, however some recent legislative initiatives are seeking to change that. The two laws, described in Appendix 1, that expressly focus on due diligence as a tool to drive compliance with social norms are the Illegal Logging Prohibition Act of 2012 from Australia and the French Corporate Duty of Vigilance Law of 2017. The Illegal Logging Prohibition Act incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring the imported timber had not been illegally logged.[43] If an importer or processor intentionally, knowingly, or recklessly imports or processes illegally logged timber, they could face significant penalties, including up to five years imprisonment and/ or heavy fines, however the criminal penalties do not apply to non-compliance with the due diligence requirements. The regulations attached to the Act provide clear guidance as to what will constitute compliance with the due diligence requirements. [44]

39 SOCIAAL-ECONOMISCHE RAAD. *Agreement on Sustainable Garment and Textile*. Available in: <http://www.indianet.nl/pdf/AgreementOnSustainableGarmentAndTextile.pdf>; SOCIAAL-ECONOMISCHE RAAD. *Dutch Banking sector agreement on international responsible business conduct regarding human rights*. 2016. Available in: <https://www.ser.nl/~/media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx>.

40 For example, the Ethical Trading Initiative has developed a Human Rights Due Diligence Framework, the Danish Institute for Human Rights has its Human Rights Impact and Assessment Guidance and Toolbox, and Shift has also developed guidance around due diligence. See: DANISH INSTITUTE FOR HUMAN RIGHTS. *Human Rights Impact and Assessment Guidance and Toolbox*. Available in: <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/introduction/welcome_and_introduction_final_may2016.pdf_223791_1_1.pdf>.; SHIFT. *Respecting human rights through global supply chains shift workshop report n. 2*. 2012. Available in: <https://www.shiftproject.org/media/resources/docs/Shift_UNGPssupplychain2012.pdf>.

41 Its 2017 report tracking the performance of 98 publicly traded companies in the agricultural products, apparel and extractives sectors found that only one-third of companies had attempted to identify their human rights risks, 20% had integrated and acted on those risks, 18% had tracked the effectiveness of those risks and only 2% of companies had publicly communicated their effectiveness. CORPORATE HUMAN RIGHTS BENCHMARK. *Key Findings 2017*. 2017. Available in: <https://www.corporatebenchmark.org/>. The report tracks the performance of 98 publicly traded companies in the agricultural products, apparel, and extractives sectors. Companies are chosen on the basis of size, revenues, geographic and industry balance. The CHRB has a long-term goal of eventually assessing the top 500 global companies: CORPORATE HUMAN RIGHTS BENCHMARK. *Friends of the CHRB*. Available in: <https://business-humanrights.org/en/corporate-human-rights-benchmark-0/friends-of-the-chrb>.

42 The survey covered 152 companies from a range of sectors. MCCORQUODALE, R. et. al. Human rights due diligence in law and practice: good practices and challenges for business enterprises. *Business and Human Rights Journal,* v. 2, n. 2, p. 195-224, jul. 2017.

43 TURNER, R. J. Transnational supply chain regulation: extra-territorial regulation as corporate law's new frontier. *Melbourne Journal of International Law*, v. 17, n. 1, p.188-209, 2016.

44 The *Illegal Logging Prohibition Amendment Regulation* 2012 provides that: step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country-specific guideline (once they are prescribed); step 3 is risk assessment (section 13); and, step 4 is risk mitigation (section 14), which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act* 2012 (Cth) as timber 'harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was

While narrowly targeted on a single sector, the Act has both an environmental and human rights focus as the impacts of illegally logged timber can be widespread.[45]

The French Corporate Duty of Vigilance Law is much broader in scope (in that it applies to all human rights) but narrower in its application (it will apply to France's largest companies as determined by the number of employees). It also incorporates human rights due diligence as a key mechanism for improving respect for human right in supply chains. The broad purpose of the law is to require relevant businesses to identify risks and prevent serious violations of human rights and fundamental freedoms to better protect the health and safety of both people and the environment. As noted in Appendix 1, the law sets out the broad parameters of what adequate due diligence should look like and includes compliance mechanisms that incorporate potential regulatory roles for both public and private actors.

While the Australian and French laws also incorporate social disclosure requirements there are two key distinctions between these due diligence focused laws and the three mandated social disclosure laws discussed above. Firstly, the Australian and French laws recognize that disclosure alone is likely to be insufficient to drive improved respect for human rights in supply chains. While transparency is part of what the laws require, they also focus on the substantive actions business entities must take to understand and address human rights risks. That is, they require companies to conduct due diligence, and in so doing, develop plans and engage in detailed risk identification, assessment and mitigation. Secondly, both laws include mechanisms that go beyond primarily relying on naming and shaming tactics from private actors to drive compliance. Not to say such tactics are not useful, but rather that alone, they are likely to be insufficient. As noted by Charlesworth 'the idea of responsive regulation—first developed in the context of business regulation—is [that it is] built on pyramids of supports and pyramids of sanctions.'[46] And indeed, Ayres and Braithwaite when developing their responsive regulatory theory, argued that '[r]egulatory agencies will be able to speak more softly when they are perceived as carrying big sticks.'[47] What is missing from the three social disclosure laws discussed above, is the stick. Mechanisms to encourage corporate compliance with human rights may be offered both in the form of positive inducements (such as compliance being a necessary qualification for public procurement contracts) and negative deterrents (such as fines or criminal liability). Given the low levels of compliance seen so far in relation to the Dodd-Frank Act, the CTSCA and the Modern Slavery Act, it is arguably necessary for the state to incorporate legal inducements or penalties in their compliance toolbox, alongside mechanisms that facilitate compliance pressure from private actors. Encouragingly, there are a handful of other laws emerging, in some jurisdictions, which also go beyond mandated transparency to include express due diligence requirements and compliance mechanisms, some with a narrow focus such as forced or child labor and others referencing human rights more broadly.[48]

3. Towards substantive compliance with human rights

Mandated transparency coupled with human rights due diligence are essential components of any legislative initiative to regulate human rights impacts in corporate supply chains. However, one should not assume that simply institutionalizing transparency or due dili-

harvested' (Section 7). The due diligence requirements, as outlined in the Illegal Logging Prohibition Regulation 2012, came into effect on 30 November 2014. From 1 January 2018, businesses and individuals may face penalties for failing to comply with the due-diligence requirements. Conducting the requisite due diligence can be used as a defense to negligence.

45 As well as causing environmental harm, illegal logging involves human rights abuses like violence against local communities, forced labor, and pollution of vital water supplies.

46 CHARLESWORTH, H. A regulatory perspective on the international human rights system. In: DRAHOS, P. *Regulatory theory:* foundations and applications. Australia: ANU Press, Acton ACT, 2017. p.357–374. p. 368.

47 AYRES, A.; BRAITHWAITE, J. *Responsive regulation:* transcending the deregulation debate. New York: Oxford University Press, 1992. p. 6.

48 Other legislative measures which require supply chain due diligence include: the US Trade Facilitation Act which allows US Customs to seize imported goods if an importer is unable to provide a certificate proving which measures were taken ensure that the goods were not produced using forced labor. Under the proposed Dutch Child Labour Bill, companies would be required to issue a statement declaring that they have exercised due diligence to prevent their goods and services being made using child labor. BUSINESS HUMAN RIGHTS AND RESOURCE CENTRE; ITUC CSI IGB. *Modern slavery in company operations and supply chains*: mandatory transparency, mandatory due diligence and public procurement due diligence. 2017. p. 15. Available in: <https://www.ituc-csi.org/modern-slavery-in-company>.

gence will automatically lead to improvements in corporate behavior. What is key, is ensuring that the laws encourage a move toward substantive compliance with human rights rather than simply cosmetic compliance.[49] Substantive compliance here is understood to mean actions that are undertaken to satisfy the true objective of the law - for example, practical steps to address and reduce modern slavery in supply chains - rather than simply directing actions toward the objective of increasing transparency about the problem. To do that, and substantively address the risks of modern slavery, these laws must: (1) incorporate clear and detailed guidance on disclosure and due diligence requirements; (2) require collaboration with external stakeholders; and (3) provide for compliance mechanisms to couple transparency and due diligence with accountability.

3.1. Disclosure guidance

Detailed reporting requirements can assist in providing useful information to external stakeholders that allows civil society, potential business partners, investors and the public to evaluate company performance and identify best practice.[50] Providing detailed guidance of what is expected of all companies will also help ensure that those businesses that do disclose in some detail are not punished in the market-place for doing so, as it will 'level the playing field' of disclosure. Detailed information is also necessary to help regulators evaluate whether self-regulation on an issue is working or if some other approach is required. These disclosure requirements must include outcomes, not just processes. The law should include clear guidance for companies on what and how they report to enable the production of consistent and comparable reports that can be measured and improvements tracked over time. The lack of initial guidance provided to UK companies has been a criticism of the Modern Slavery Act.[51] Currently section 54(5) of the Modern Slavery Act outlines what a statement may include, but there is no prescribed form of content or length for a statement. It is suggested that companies report on six broad areas: business and supply chain structure, polices, due diligence, risk assessment, effectiveness and training. These topics for reporting are discretionary. Statements submitted to date lack consistency and many companies are not providing substantive disclosure in most of the suggested areas. Uniform obligatory reporting criteria should be included so that companies do not pick and choose which elements to report against.

An essential element of what companies should be reporting on is their due diligence efforts. Reporting is simply the final step in the process of identify, assessing and addressing risks, and tracking the effectiveness of those responses. For reporting to be legitimate it must be based on effective due diligence. The Guiding Principles provide a broad framework that sets out the general parameters of what companies should take into account in conducting human rights due diligence assessments.[52] They state that the 'process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.'[53] However, the term 'impacts' – the crucial element to which due diligence is addressed – is not defined and it may be clearer to refer to violations of international human rights, the terminology employed in the French law.[54] As a high-level document, the Guiding Principles employs imprecise language and anticipates that human rights due diligence will be further elaborated upon through negotiated standard-setting processes at a more concrete level (for example, on an sector by sector basis as has been done by the OECD). Supply chain arrangements are not static[55] and will vary from sector to sector and as such those laws that are narrowly targeted on a specific sector (such as the Illegal Logging Act) may be able to provide more precision in detailing what due diligence entails. However, the fundamental principles of due diligence (referred to in both the French and Australian Acts) include tracking and reporting on: risk identification, risk assessment and risk mitigation.

49 KRAWIEC, K. D. Cosmetic compliance and the failure of negotiated governance. *Washington University Law Quarterly*, v. 81, p. 487-544, 2003.

50 PARKER, C. *The open corporation:* effective self-regulation and democracy. Cambridge: Cambridge University Press, 2002.

51 ERGON ASSOCIATES. *Reporting on modern slavery*: the current state of disclosure. 2016. Available in: <http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>.

52 Guiding Principles, n5 Principles 17-20.

53 Guiding Principles, n n5, Principle 17.

54 *Loi de Vigilance* No. 2017-339 of 2017 Article 1. See also, DEVA, S. Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the guiding principles. In: DEVA, S.; BILCHITZ, D. *Human rights obligations of business:* beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013.

55 GEREFFI, G.; HUMPHREY, J.; STURGEON, T. The governance of global value chains. *Review of International Political Economy*, v. 12, n. 1, p. 78–104, 2005. p. 96.

3.2. Collaboration

General guidance provided by the OECD on due diligence stresses the need for companies to adopt a collaborative approach in their due diligence and reporting efforts. For example, the OECD's Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector emphasizes that due diligence is both an interactive and shared process, noting that enterprises 'should engage meaningfully with affected stakeholders as part of the due diligence process. Such engagement should be two-way, conducted in good faith and responsive.'[56] The OECD advises that business should engage with other companies in the sector, relevant multi-stakeholder institutions and directly with workers and their chosen representatives such as trade unions.[57] This broad concept of collaboration is distinct from social auditing, a process by which a company verifies supplier compliance with human rights standards, typically set out in a code of conduct. While the precise nature of a social audit will vary depending on the industry in question and the organisation undertaking the audit, it generally involves a physical inspection of a facility (for example a factory, farm, mine or vessel), combined with a review of documents (to the extent that records are kept) and some interviews with management and employees. [58] Social auditing may sometimes be a useful tool to identify non-compliance with human rights, and as such, a component, rather than the focal point of human rights due diligence. However sole reliance on social auditing to satisfy legal requirements reflects a limited vision of supply chain human rights due diligence.[59] Broader and ongoing collaboration with external stakeholders on the other hand, allows for an external check to ensure that the systems that are being implemented will be effective as they can provide input into the design and implementation of those systems.[60] Companies may lead, but cannot complete the task of undertaking substantive human rights due diligence in isolation.

3.3. Compliance

Theoretically, it is realistic to assume that without any mechanism to encourage compliance with the legal requirements of transparency and due diligence, the uptake by companies may be limited.[61] This has played out in practice via the implementation of the Modern Slavery Act in the UK. The review of the operation of the law by the UK Joint Committee on Human Rights in 2017 suggested not only the inclusion of mandatory due diligence to strengthen the current reporting requirements, but also the introduction of civil (and criminal) penalties where human rights violations have occurred.[62] Both the French and the Australian due diligence laws provide for the imposition of civil penalties where companies have failed to implement due diligence plans. Compliance here is not linked simply to

56 OECD Apparel Guidance, n38 p.23.

57 OECD Apparel Guidance, n38 p.24-26.

58 See for example, ISEAL ALLIANCE. *Assuring compliance with social and environmental standards:* code of good practice. p. 5. Available in: <https://www.isealalliance.org/online-community/resources/assurance-code-version-10>. (ISEAL Alliance Code of Good Practice). The ISEAL Alliance is a multi-stakeholder initiative whose aim is to strengthen the sustainability standards of MSIs (and other standard setting and accreditation bodies

59 There is now a growing body of evidence indicating that social auditing is, in and of itself, an ineffective tool for achieving meaningful and consistent human rights improvements. REINECKE, J.; DONAGHEY, J. The 'Accord for Fire and Building Safety in Bangladesh'"in response to the Rana Plaza disaster. In: MARX, A. et. al. (Ed.). *Global governance of labour rights:* assessing the effectiveness of transnational public and private policy initiatives. New York: Edward Elgar Publishing, 2015; LOCKE, R.; AMENGUAL, M.; MANGLA, A. Virtue out of necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains. *Politics & Society*, v. 37, n. 3, 2009; O'ROURKE, D. Multi-stakeholder regulation: privatizing or socializing global labor standards? *World Development*, v. 34, n. 5, p. 899-907, 2006; CLEAN CLOTHES CAMPAIGN. *Looking for a quick fix*: how weak social auditing is keeping workers in sweatshops. 2005. p. 26-28, 32-39. Available in: <https://cleanclothes.org/resources/publications/05-quick-fix.pdf/view>.; LEBARON, G.; LISTER, J. *Speri Global Political Economy Brief n. 1*: ethical audits and the supply chains of Global Corporations. 2016. Available in: <http://speri.dept.shef.ac.uk/wp-content/uploads/2016/01/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf>; INTERNATIONAL LABOUR ORGANIZATION. *Fishers first*: good practices to end labour exploitation at sea. 2016. Available in: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_515365.pdf>

60 GUNNINGHAM, G.; GRABOSKY, P. *Smart regulation:* designing environmental policy. New York: Oxford Clarendon Press, 1998. p. 247.

61 Regulatory theory assumes the necessary inclusion of a gradation of mechanisms, ranging from self-regulation to external enforcement by the state, may be necessary in order for regulation to be effective, see AYRES, A.; BRAITHWAITE, J. *Responsive regulation:* transcending the deregulation debate. New York: Oxford University Press, 1992.

62 HOUSE OF LORDS, HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS. *Human rights and business 2017:* promoting responsibility and ensuring accountability. p. 37-38. p. 22. Available in: <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

a failure to report, but a failure to implement. Such laws could (as in the case of the Australian law) provide that demonstrated good faith due diligence could be raised as a defence to, or at least a proportional mitigation of liability.[63] Guidance in this respect could be obtained from various anti-bribery and corruption laws that have been implemented both nationally and internationally. The UK Bribery Act 2010, for example, takes into account the fact that companies implemented 'adequate procedures' to prevent bribery in their operations as a defence to a charge of a company's failure to prevent bribery.[64] Provisions incorporating both penalties for, and defences to, alleged misconduct could give business a strong incentive to exercise due diligence, without depriving them of the ability to defend themselves, or depriving victims of a remedy for serious violations of human rights.[65] Compliance mechanisms could also be offered in a way by the state that motivates corporate compliance, so that reporting and due diligence requirements must be met as a condition of tendering for any public procurement contracts. Transparency and due diligence must be coupled with accountability in order to make the process meaningful.

4. Conclusion

The emergence of news laws to address the human rights risks in global supply chains provide a real opportunity to develop robust reporting and human rights due diligence standards that are capable of effecting positive change. The establishment of such legal standards is challenging in that it involves the necessary involvement of a multiplicity of stakeholders and implementation across borders. However, such laws can and should build on the slow and steady evolution of soft law that has been used to guide, cajole and sometimes coerce companies to respect human rights in their supply chains. Whether in the form of multi-stakeholder codes of conduct or high-level institutional guidelines, there is an emerging consensus of what companies must do to respect human rights. These emerging reporting and due diligence legal requirements provide an opportunity to entrench those norms to ensure compliance is widespread. In developing laws to address supply chain risks, consideration should be given to ensuring that the reporting framework requires due diligence to be conducted, encourages collaboration with a variety of stakeholders and incorporates compliance mechanisms so that the efforts taken to address human rights risks are substantive rather than those that might engender a more process oriented cosmetic form of compliance with human rights.

63 MICHALOWSKI, S. Due diligence and complicity: a relationship in need of clarification. In: DEVA, S.; BILCHITZ, D. *Human rights obligations of business:* beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 218-242.

64 CASSEL, D.; RAMASASTRY, A. *White paper*: options for a treaty on business and human rights. 2015. p. 99. Available in: <https://scholarship.law.nd.edu/ndjicl/vol6/iss1/4/>. Also, courts and the US Department of Justice take certain factors into consideration when assessing criminal fines for companies prosecuted under the U.S. Foreign Corrupt Practices Act including: whether high-level personnel were involved in or condoned the conduct, whether the organization had a pre-existing compliance and ethics program, voluntary disclosure, cooperation, and acceptance of responsibility.

65 CASSEL, D.; RAMASASTRY, A. *White paper*: options for a treaty on business and human rights. 2015. p. 99. Available in: <https://scholarship.law.nd.edu/ndjicl/vol6/iss1/4/>.

Appendix A – Social Disclosure and Due Diligence Laws

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Law	US Dodd Frank Wall Street Reform and Consumer Protection Act, 2010 Section 1502	California Transparency in Supply Chains Act, 2010	Australia Illegal Logging Prohibition Act 2012	UK Modern Slavery Act, 2015 Section 54	France Corporate Duty of Vigilance Law, 2017
Companies covered	Companies that use tantalum, tin, gold or tungsten if: the company files report with the SEC under the Exchange Act and the minerals are 'necessary to the functionality or production' of a product manufactured or contracted to be manufactured by the company.	Manufacturers and retailers doing business in California with gross receipts more than $100 million	Applies to any person or company that imports timber or timber products into Australia, or any domestic processor of Australian grown raw logs	Commercial organizations that provides goods or services and carry on business in the UK with a global net turnover of £36 million or more	French companies with 5,000 staff in France or 10,000 staff globally

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Transparency	Publicly traded companies must submit to the SEC whether the minerals originate from the DRC or adjoining areas.	Companies must publicly disclose on their website their efforts to eradicate forced labor and human trafficking in their supply chains including: 1. Use of third party risk assessment 2. Independent supplier audits 3. Tier 1 supplier certifications 4. Internal accountability mechanisms 5. Internal training	Importers of regulated timber products must provide declarations, at the time of import, to the Customs Minister about the due diligence that they have undertaken. The Act provides for inspectors to exercise monitoring, investigation and enforcement powers.	Disclose in a statement on its websites to 'what extent, if any,' the company: 1) verifies its product supply chains; 2) audits its suppliers; 3) requires certifications from direct suppliers; 4) maintains internal accountability; and 5) trains company employees and management	The vigilance plan and its effective implementation report shall be publicly disclosed and included in the extra-financial report required for major French multinational corporations.

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Due diligence	No requirement to conduct due diligence but if the minerals are from DRC/area then companies must describe to the SEC the due diligence measures taken to determine the source of the minerals.	None	Regulations set out detailed due diligence requirements including: information gathering; risk identification; risk assessment and risk mitigation. 2017 amendments will streamline due diligence process for timber products certified under the Forest Stewardship Council and Programme for the Endorsement of Forest Certification schemes.	None	Companies must establish and implement a due diligence plan that states the measures taken to identify and prevent the occurrence of human rights and environmental risks resulting from their activities, the activities of companies they control and the activities of sub-contractors and suppliers; actions taken to mitigate risk; and an alert mechanism.

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Enforcement	Companies subject to liability for fraudulent or false reporting. Not liable if can prove statement made in good faith. No requirement to divest from conflict mines. The law only requires companies to report on their mineral sourcing and due diligence practices. Focus not on fines or penalties. It is designed to increase disclosure and create a 'name and shame' mechanism with the aim of transparency driving change.	Administrative order: Incomplete compliance or noncompliance with disclosure requirement may result in injunctive relief issued by the California Attorney General.	If an importer or processor intentionally, knowingly or recklessly imports or processes illegally logged timber they could face significant penalties, including up to five years imprisonment and/or heavy fines. However, there are no criminal penalties (e.g. imprisonment) that can be applied for a breach of the due diligence requirements only civil.	Administrative order: The secretary of state may seek injunction through the High Court requiring compliance.	Subject to sanctions on three grounds: if they default on commitments made in their plan; if there are faults in the plan or its implementation; or if they fail to produce a plan at all. Administrative orders, civil liability: 1. Formal notice to comply must be followed within 3 months 2. Injunction order to comply if continued noncompliance; 3. Vulnerability to civil liability claims

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Del Documento de Elementos al Draft 0: apuntes jurídicos respecto del posible contenido del proyecto de Instrumento Vinculante sobre empresas transnacionales y otras empresas con respecto a los derechos humanos

From the Document of Elements to the Draft 0: legal notes regarding the possible content of the draft of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

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Del Documento de Elementos al Draft 0: apuntes jurídicos respecto del posible contenido del proyecto de Instrumento Vinculante sobre empresas transnacionales y otras empresas con respecto a los derechos humanos*

From the Document of Elements to the Draft 0: legal notes regarding the possible content of the draft of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

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Resumen

En la cuarta reunión del Grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, que debe celebrarse en octubre de 2018, siguiendo el objetivo establecido por la Resolución 26/9 de elaborar un Instrumento Jurídicamente Vinculante, comenzarán las negociaciones sustantivas sobre un proyecto de texto articulado (Draft 0), elaborado por la Presidencia del Grupo. Los trabajos anteriores y los comentarios aportados por Estados, organizaciones sociales y academia, señalan una serie de temas especialmente controvertidos, que han centrado las sesiones precedentes y previsiblemente centrarán la cuarta sesión y los contenidos más debatidos del Draft 0. Entre estos temas destacan materias como el reconocimiento de obligaciones directas a las empresas, el ámbito de aplicación del Instrumento, la inclusión de definiciones en el texto sobre cuestiones especialmente complejas como el concepto de control o de cadena de suministro o el contenido y los límites del acceso a la justicia, etc. Además, parece necesario incluir de manera explícita en el debate sobre el contenido del texto otras cuestiones como la necesaria integración enfoque de género, la relación del instrumento con los Acuerdos Marco Internacionales o la necesidad de incluir una mención específica a las empresas que actúan en territorios en conflicto. El objetivo del presente artículo es el análisis de las aportaciones de los actores participantes en el proceso y de la doctrina especializada, así como un breve recorrido por el derecho comparado y los marcos de *hard* y *soft law* existentes, a efectos de analizar los ejes más relevantes del debate a la luz de las aportaciones realizadas y contribuir al mismo con propuestas de regulación de utilidad para el comienzo de las discusiones sustantivas del articulado del Instrumento.

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Palabras clave: Instrumento jurídicamente vinculante. Draft 0. Empresas transnacionales. Derechos humanos. Extraterritorialidad. Resolución 26/9.

Abstract

At the fourth meeting of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, to be held in October 2018, substantive negotiations will take place with regard to a Draft 0, prepared by the Chairperson-Rapporteur of the Group, following the goal set by Resolution 26/9 of developing an international legally binding instrument. The previous works and the comments provided by States, social organizations and academics, point to some controversial topics, which have been in the center of the preceding sessions and will foreseeably be in the focus of the fourth session and the most debated contents of Draft 0.

Some of these central topics are the recognition of direct obligations to be imposed on corporations, the scope of the application of the Instrument, the inclusion of definitions on particularly complex issues such as the concept of corporate control or supply chain or the content of the right to access to justice, etc. In addition, the future Instrument could include other issues such as the gender-based approach, the relationship of the instrument with the International Framework Agreements between Unions and transnational companies or the need to include specific mention to corporations operating in territories in conflict. The objective of this article is the analysis of the contributions of the actors involved in the process and the specialized legal doctrine, as well as doing a brief reference to the existing hard and soft law, in order to analyze the most important themes of the debate and to contribute to the beginning of the substantive discussions of the legally binding instrument.

Key Words: Legally Binding Instrument, Draft 0, transnational corporations, human rights, extraterritoriality, Resolution 26/9

1. Introducción

El 26 de junio de 2014, el Consejo de Derechos Humanos de Naciones Unidas (CDH) adoptó la Resolución 26/9, titulada "Elaboración de un instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos". Al adoptar esta Resolución, el CDH creaba el grupo de trabajo intergubernamental de composición abierta (OEIGWG por sus siglas en inglés) sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, cuyo mandato será elaborar un instrumento jurídicamente vinculante (IJV) para regular las actividades de las empresas transnacionales y otras empresas en el derecho internacional de los derechos humanos.

Con este objetivo general, la Resolución establece cuatro directrices, una respecto del objetivo, que no es otro que la elaboración del Instrumento, y tres respecto del procedimiento. Sobre esta última cuestión, cabe señalar que la Resolución enmarcó las obligaciones de los tres primeros grupos de trabajo del OEIGWG, que se celebraron en Ginebra, del 6 al 10 de julio de 2015; del 24 al 28 de octubre de 2016 y del 23 al 27 de octubre de 2017[1]. Las tres sesiones han sido presididas por Ecuador.

Los dos primeros grupos de trabajo, tal y como se establece en la Resolución, se consagraron a deliberaciones constructivas sobre el contenido, el alcance, la naturaleza y la forma del futuro instrumento internacional; en el tercero, la Presidencia del Grupo de Trabajo presentó un "Documento de Elementos para el proyecto de instrumento internacional jurídicamente vinculante sobre empresas transnacionales y otras empresas con respecto a los Derechos Humanos", preparado bajo el mandato de la Resolución 26/9 y sobre la base de las dos primeras sesiones, a efectos de permitir el inicio de las negociaciones sustantivas[2].

Según se plasmó en las recomendaciones del Presi-

1 Los informes se encuentran en la página electrónica: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

2 UNITED NATIONS. *Elementos para el proyecto de instrumento internacional jurídicamente vinculante sobre empresas transnacionales y otras empresas com respecto a los derechos humanos*. Disponible en: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs_SP.pdf>. Acceso el: 10 jun. 2018.

dente del grupo, incluidas en el informe del Tercer Grupo de Trabajo, presentado ante el CDH en su sesión de marzo de 2018[3], la cuarta reunión de trabajo del Grupo debe celebrarse en octubre de 2018 y en la misma se debatirá sobre un proyecto de texto articulado (Draft 0) que será presentado por la Presidencia del Grupo con una antelación de cuatro meses antes de la celebración de la reunión (junio de 2018). Este borrador, que a fecha de 15 de julio todavía no había sido presentado, debe estructurarse teniendo como base los debates de las sesiones anteriores y muy en particular el "Documento de Elementos para el proyecto de instrumento internacional jurídicamente vinculante sobre empresas transnacionales y otras empresas con respecto a los Derechos Humanos".

A lo largo de este texto va a realizarse una aproximación jurídica a los posibles contenidos del IJV. Para ello se va a proceder a revisar los debates celebrados en el marco del proceso de la Resolución 26/9, los textos fundamentales aportados durante el proceso, en particular el Documento de Elementos, los documentos relevantes del sistema de derechos humanos de Naciones Unidas, así como la doctrina, ya abundante, al respecto.

La finalidad de este análisis y de las propuestas de que se contienen en las siguientes páginas es servir de apoyo al proceso de negociaciones sustantivas sobre el llamado Draft 0, que debe dar comienzo en la cuarta sesión de octubre de 2018. Para ello, van a tratarse en la siguientes páginas algunos de los temas que se han convertido en nudos gordianos de la discusión, como son el reconocimiento de obligaciones directas a las empresas, el ámbito de aplicación, la inclusión de definiciones, los límites del acceso a la justicia, etc.). Más allá de estas cuestiones, van a apuntarse otras que, pese a no haberse convertido en protagonistas, son imprescindibles de cara al futuro contenido del IJV. Así, la cuestión de la correcta integración enfoque de género, la relación del Instrumento con los Acuerdos Marco Internacionales celebrados entre sindicatos y empresas transnacionales o la necesidad de incluir una mención específica a las empresas que actúan en territorios en conflicto son elementos que se plantean como necesarios en el futuro tratado.

3 UNITED NATIONS. *Informe del tercer período de sesiones del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos*. 2018. Disponible en: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/53/PDF/G1801753.pdf?OpenElement>. Acceso el: 10 jun. 2018.

Como punto de partida del análisis jurídico va a dedicarse el primer epígrafe de contenido al análisis del proceso político y en concreto al desarrollo de la tercera sesión del OEIGWG, celebrado en Ginebra en octubre de 2017.

2. El proceso político: la tercera sesión como un punto de partida

El proceso comenzado con la adopción de la Resolución 26/9 ha levantado, como podía esperarse, un amplio número de cuestionamientos de carácter político y jurídico. Centrándonos en este apartado en los equilibrios políticos que rodean a este proceso, es necesario recordar que la Resolución 26/9 obtuvo 20 votos a favor, 13 abstenciones, y 14 en contra. Entre los actores contrarios a su adopción, la Unión Europea se ha destacado por postura permanentemente crítica con el proceso en sí y con el contenido de la propia Resolución 26/9, cuestionando la oportunidad y la idoneidad de su objetivo y su ámbito subjetivo.

El nivel de crítica al proceso por parte de la Unión Europea ha ido subiendo de intensidad. El número de Estados participantes en cada grupo de trabajo da una idea de la creciente importancia del tema y el interés que está suscitando. A la reunión del primer grupo acudieron 62 Estados más la Unión Europea[4]. El segundo

4 Al primer período de sesiones asistieron representantes de Argelia, Argentina, Austria, Bangladesh, Bolivia, Brasil, Bulgaria, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, Egipto, El Salvador, Etiopía, Estado de Palestina, la Federación de Rusia, Filipinas, Francia, Ghana, Grecia, Guatemala, Haití, Honduras, la India, Indonesia, Irán, Iraq, Italia, Kenia, Kuwait, Letonia, Libia, Liechtenstein, Luxemburgo, Malasia, Marruecos, México, Myanmar, Namibia, Nicaragua, el Pakistán, los Países Bajos, Paraguay, Perú, Qatar, la República Árabe Siria, la República de Corea, la República Dominicana, la República de Moldavia, la Santa Sede, Singapur, Sudáfrica, Suiza, Tailandia, Trinidad y Tobago, Túnez, Ucrania, el Uruguay, Venezuela y Vietnam. También participaron la Unión Europea (UE), la Organización de Cooperación y Desarrollo Económicos (OCDE), el Consejo de Europa, la Entidad de las Naciones Unidas para la Igualdad de Género y el Empoderamiento de las Mujeres (ONU Mujeres), el Fondo de las Naciones Unidas para la Infancia (UNICEF), la Organización Internacional del Trabajo (OIT), la Conferencia de las Naciones Unidas sobre Comercio y Desarrollo (UNCTAD) y el Centro del Sur. El informe entero de esta primera sesión puede encontrase en: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/25/PDF/G1601825.pdf?OpenElement. Un resumen realizado por el Centro del Sur puede encontrarse en https://es.southcentre.int/question/comienzan-discusiones-historicas-entorno-a-la-elaboracion-de-un-instrumento-juridicamente-vinculante-sobre-las-empresas-y-los-derechos-humanos/ y en el SOUTH BULLETIN. Columbus: South Center, 2015. Disponible en: <https://www.southcentre.int/wp-content/uploads/2015/11/SB87-

grupo reunió a ochenta estados más la UE[5] y el tercero a 97[6]. En este tercer grupo se puso de manifiesto un fuerte aumento de presencia de países africanos y miembros de la UE, en concreto, la sesión final del tercer grupo contó con la presencia de 22 Estados miembros de la UE, que secundaron las reticencias mantenidas por el negociador que representaba en la sala la posición de los 28.

Como se ha señalado, el trabajo del tercer grupo debía centrarse en la discusión del Documento de Elementos. Sin embargo, el debate fundamental que se manifestó de manera transversal durante toda la semana de trabajo giró fundamentalmente en torno a dos cuestiones: la relación entre los Principios Ruggie y el proceso de la Resolución 26/9 y la propia continuidad de los trabajos del OEIGWG[7].

Para desatascar la primera cuestión y permitir el comienzo de la sesión y la aprobación del programa, la Presidencia del Grupo admitió abrir un debate sobre los Principios Ruggie, manteniendo la afirmación, ya señalada por Ecuador en distintos foros internacionales, de la total compatibilidad entre el proceso de desarrollo de los Principios, fundamentalmente a través de los Planes Nacionales de Actuación, y la aprobación del Instrumento Jurídicamente Vinculante.

Una vez comenzado el debate de fondo, los bloques de opinión en cuanto a los contenidos del Documento de Elementos se evidenciaron pronto. Por un lado, apoyando el contenido del Documento e incluso pidiendo un posicionamiento más avanzado en cuanto a los instrumentos y mecanismos de control y responsabilidad de las empresas se colocaron Ecuador, Sudáfrica y sus aliados (fundamentalmente el Grupo Africano y diversos estados de América Latina). Cabe señalar que, uno de los argumentos interesantes repetidos en la tercera sesión del grupo de trabajo por, entre otros países, Ecuador, fue la necesidad de extender los esfuerzos nacionales, como por ejemplo las normas del Reino Unido (*Modern Slavery Act*, de 2015), de California (*California Transparency in Supply Chains Act*, de 2010) o de Francia (La *Loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre*, de 2017), respeto del establecimiento de responsabilidades a las empresas en materia de derechos humanos. Un instrumento como el que se propone tendría, según se señaló durante el debate por la misión de Ecuador, la virtud de universalizar esas experiencias nacionales y crear un marco internacional de igualdad, con mecanismos compartidos, con responsabilidades comunes y con obligación de colaboración permanente.

En sentido contrario, y con una postura crítica respecto del contenido se posicionaron la Unión Europea y sus Estados miembros, junto con Australia y Rusia, coincidiendo en ocasiones con México o Brasil, entre otros. Entre los temas más cuestionados por este bloque de países, podemos destacar: el ámbito de aplicación subjetivo, la atribución de obligaciones directas a las empresas concernidas por el Instrumento; el establecimiento de obligaciones extraterritoriales respecto del control y sanción de las actividades de las empresas que den lugar a violaciones de los derechos humanos; la afirmación de la prioridad del respeto a los Derechos

88_EN.pdf>. Acceso el: 10 jun. 2018.

5 A esta reunión asistieron los siguientes Estados: Argelia, Argentina, Australia, Austria, Bangladesh, Bielorrusia, Bélgica, Bolivia, Botswana, Brasil, Chile, China, Colombia, Costa Rica, Cuba, República Checa, República Democrática del Congo, República Dominicana, Ecuador, Egipto, El Salvador, Etiopia, Finlandia, Francia, Georgia, Alemania, Ghana, Grecia, Guatemala, Haití, Honduras, India, Indonesia, Irán, Iraq, Irlanda, Italia, Kenia, Japón, Kazakstán, Libia, Luxemburgo, Mauritania, Mauricio, Malaysia, México, Mongolia, Marruecos, Palestina, Myanmar, Namibia Nicaragua, Países Bajos, Nigeria, Noruega, República de Corea, Pakistán, Panamá, Perú, Portugal, Qatar, Rumania, Federación Rusa, Ruanda, Saint Kitts and Nevis, Arabia Saudí, Serbia, Eslovaquia, Singapur, Sudáfrica, España, Suiza, Tayikistán, Tailandia, Túnez, Turquía, Ucrania, Emiratos Árabes Unidos, Reino Unido, Uruguay, Venezuela. Además participó: la Santa Sede, la Unión Europea (UE) y el Consejo de Europa.

6 Argelia, Angola, Argentina, Australia, Austria, Azerbaiyán, Bahrein, Bangladesh, Bielorrusia, Bélgica, Bolivia, Botswana, Brasil, Burundi, República Centro Africana, Chile, China, Colombia, Costa Rica, Cuba, Chipre, República Checa, República Democrática del Congo, Ecuador, Egipto, Estonia, Etiopía, Finlandia, Macedonia, Francia, Georgia, Alemania, Ghana, Grecia, Guatemala, Haití, Honduras, India, Indonesia, Irán, Iraq, Israel, Irlanda, Italia, Costa de Marfil, Jamaica, Jordania, Kazakstán, Kenia, Lesoto, Liechtenstein, Lituania, Luxemburgo, Madagascar, Malta, Mauritania, México, Mónaco, Marruecos, Mozambique, Myanmar, Namibia, Países Bajos, Nicaragua, Nigeria, Noruega, Pakistán, Panamá, Perú, Filipinas, Portugal, Palestina, Qatar, República de Corea, Moldavia, Federación Rusa, Ruanda, Arabia Saudí, Singapur, Eslovaquia, Eslovenia, Somalia, Sudáfrica, España, Sudán, Suecia, Suiza, Siria, Tailandia, Trinidad y Tobago, Turquía, Ucrania, Emiratos Árabes Unidos, Reino Unido, Uruguay, Venezuela y Zambia. Además participó: la Santa Sede, la UNCTAD, la Unión Europea (UE) y la Cámara Internacional de Comercio, entre otras organizaciones.

7 Para un desarrollo de los debates que tuvieron lugar en la tercera sesión se remite tanto al informe ya citado como al texto de SEITZ, Karoline. *One step further towards global regulation of business report of the third session of the UN working group on a binding instrument on transnational corporations and other business enterprises with respect to human rights ("treaty")*. Berlim: Rosa Luxemburg Stiftung, 2018. Disponible en: <http://www.rosalux-nyc.org/towards-global-regulation-of-business/>. Acceso el: 10 jun. 2018.

Humanos frente a los tratados de comercio e inversión y la inclusión de las entidades financieras dentro del ámbito del IJV, etc. Además, también con una postura crítica, se ha posicionado de manera destacada la Organización Internacional de Empresarios. En concreto, esta Organización llegó a afirmar que es imposible establecer responsabilidades directas respecto del respeto a los derechos humanos a las empresas, afirmando que este tipo de iniciativas podía acabar con la competitividad y la inversión extranjera[8].

Más allá de esta oposición frontal de la OIE, y de manera general, es posible afirmar que la sociedad civil que participa en el proceso ha realizado una valoración positiva del documento[9]. Como señala el documento de valoración que el centro de investigación brasileño HOMA publicó antes de la tercera sesión, a modo estudio comparativo del Documento de Elementos de la Presidencia y de la propuesta de Instrumento de la Campaña[10], el texto de la Presidencia mantuvo las líneas rojas, pero a la vez fue menos ambicioso que el de la campaña, con un carácter menos incisivo y más "prudente", lo cual se justifica en su carácter de propuesta de base para el inicio del debate sustantivo.

Permeando el debate sobre los contenidos del Documento fue poniéndose de manifiesto el problema de fondo, que no era otro que el cuestionamiento de la continuidad a futuro de los trabajos del OEIGWG. Este tema fue puesto sobre la mesa de manera explícita el último día de sesiones del Grupo, ya en el debate sobre las conclusiones, en una intervención de la representante de Estados Unidos. Esta delegación afirmo que la Resolución 26/9 únicamente menciona tres sesiones de trabajo lo que implica, a su juicio, la imposibilidad de celebrar una cuarta y subsiguientes sesiones. Según la opinión de Estados Unidos, compartida por otras delegaciones, la no previsión explícita de otras sesiones más allá de la tercera implica la finalización automática de los trabajos del grupo.

En opinión de quien suscribe, y de una mayoría de los Estados presentes en aquél debate, el mandato que la Resolución 26/9 otorga al Grupo es claro, este debe dedicarse a la elaboración de un instrumento jurídicamente vinculante para regular las actividades de las empresas transnacionales y otras empresas en el Derecho Internacional de los Derechos Humanos. La Resolución no establece en ningún caso ni límites temporales ni un número máximo de sesiones. En este sentido, la falta de una mención explícita de una cuarta y subsiguientes sesiones en la Resolución, posiblemente en la lógica de no prejuzgar el ritmo de las deliberaciones tras el tercer año, no implica la imposibilidad de una cuarta sesión sino la apertura respecto de los contenidos de la misma.

Una vez abierta la discusión durante la parte final de la negociación el viernes 27 de octubre de 2017, la postura de Brasil y de Rusia fue crucial para decantar la balanza hacia la necesidad de no impedir la convocatoria de la cuarta sesión y continuar los debates. Por su parte, la Unión Europea mantuvo sus reticencias hasta el final de la sesión. Finalmente, el informe fue adoptado *ad referéndum,* sin mencionar la cuarta sesión en las Conclusiones, pero incluyendo la convocatoria de la misma en las recomendaciones de la Presidencia, que quedaron como sigue:

a) Invitar a los Estados y las distintas partes interesadas a que presenten sus observaciones y propuestas sobre los elementos del proyecto de documento a más

8 Tanto en esta sesión como en las anteriores, la IOE se ha posicionado frontalmente en contra de dos cuestiones fundamentales, la extraterritorialidad y la posibilidad de establecer un mecanismo internacional de control. Otras organizaciones, como el World Business Council for Sustainable Development, la Cámara Internacional de Comercio o el Business and Industry Advisory Committee en la OCDE, han enviado insumos sosteniendo la postura de la UE respecto de los dos temas comentados, incluyendo el rechazo de la extraterritorialidad. Los insumos están disponibles en: INTERNATIONAL ORGANISATION OF EMPLOYERS. *IOE follow-up response to OHCHR's call for comments and proposals on the draft "elements" document for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>. Consultado el: 10 jun. 2018.

9 Según la valoración escrita presentada por FIAM: "[...] the document of elements for the draft legally binding instrument presented by the Chairperson Rapporteur for this open-ended intergovernmental working group (OEIGWG) reflects the wide spectrum of contributions made by civil society during the past two sessions. The document therefore represented a sufficiently broad base for the intergovernmental negotiations which began during the third session of the OEIGWG, in conformity with resolution 26/9 adopted by the Human Rights Council in 2014. This written contribution provides comments on the language, conceptual categories and elements presented". FIAM. *Written contribution by FIAN International for the 3rd session of the OEIGWG on transnational corporations and other business enterprises with respect to human rights: comments to the elements document presented by the Chairperson-Rapporteur*. 2018. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

10 HOMA. *The Campaign Draft "Treaty on Human Rights and Transnational Corporations and Supply Chain" and The OEIGWG Chairmanship Elements for a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*: a Comparative Analysis Disponible en: <http://homacdhe.com/wp-content/uploads/2017/10/COMPARATIVE-ANALYSIS.pdf>.

tardar a finales de febrero de 2018;

b) Presentar un proyecto de instrumento jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, sobre la base de las aportaciones de los Estados y otros interesados pertinentes, por lo menos cuatro meses antes del cuarto período de sesiones del grupo de trabajo, con miras a la celebración de negociaciones sustantivas durante su cuarto período de sesiones anual y los períodos de sesiones anuales ulteriores hasta el cumplimiento de su mandato;

c) Convocar un cuarto período de sesiones del grupo de trabajo, que se celebrará en 2018, y celebrar consultas oficiosas con los Estados y otros interesados pertinentes en relación con su programa de trabajo.

Las consultas oficiosas (consultas informales abiertas) en relación con el programa de trabajo comenzaron, por impulso de la presidencia del Grupo, el día 17 de mayo, convocándose sesiones de consultas posteriores. Como puede observarse por las preguntas planteadas en la "guía para las consultas"[11], el nuevo presidente del Grupo, el embajador Luís Gallegos, ha decidido comenzar a debatir el fondo de los contenidos de un posible instrumento durante estas consultas. Debe recordarse que, según las recomendaciones del presidente anterior, las mismas debían circunscribirse a la consecución de un consenso sobre el programa de trabajo de la cuarta sesión[12].

Para terminar este breve análisis del proceso cabe realizar dos observaciones. La primera respecto de la postura de la Unión Europea y la reacción generada desde el Parlamento Europeo; la segunda respecto de la posición de los actores sindicales.

Como se recordó a lo largo de la tercera sesión, el Parlamento Europeo ha manifestado en numerosas ocasiones su pleno apoyo al proceso de la Resolución 26/9[13]. Además, en la recta final de la tercera sesión, y ante la postura mantenida por el representante de la

11 Esta guía delimita fundamentalmente tres temas: jurisdicción, responsabilidad jurídica y medidas preventivas. A pesar de la pertinencia de estas cuestiones para el futuro instrumento es evidente que nada tienen que ver con el programa de la cuarta sesión sino con el mismo fondo de la discusión que deberá llevarse a cabo durante la misma.

12 Es importante recordar que la Presidencia del Grupo en 2015 y 2016 fue ocupada por la que en aquel momento era Embajadora de Ecuador ante Naciones Unidas en Ginebra, posteriormente Ministra de Exteriores y en la actualidad, Presidenta de la Asamblea General de Naciones Unidas, María Fernanda Espinosa. Su sustituto en la Misión de Ecuador en Ginebra fue Gillaume Long, que antes ocupó el puesto de Canciller. Tras la dimisión de Long en enero de 2018, se nombró al Embajador de carrera Luís Gallegos. Por otro lado, y para sostener el proceso, en abril de 2018 se aprobó por acuerdo ministerial la creación del "Equipo de Trabajo del instrumento internacional jurídicamente vinculante sobre empresas transnacionales y derechos humanos, dependiente de la Subsecretaría de Asuntos Multilaterales del Ministerio de Relaciones Exteriores y Movilidad Humana, en la ciudad de Quito". El equipo está coordinado por quien sea designado para tales funciones por el/la Subsecretario/a de Asuntos Multilaterales.

13 Entre otras pueden citarse las siguientes resoluciones:
- Resolución del Parlamento Europeo, de 14 de diciembre de 2016, sobre el Informe anual sobre los derechos humanos y la democracia en el mundo y la política de la UE al respecto (2015) (2016/2219(INI)). En su apartado 84 recoge que "Acoge con satisfacción los trabajos iniciados para la elaboración de un tratado vinculante de las Naciones Unidas sobre las empresas y los derechos humanos; lamenta los comportamientos obstructivos en relación con este proceso, y pide a la Unión y sus Estados miembros que participen constructivamente en estas negociaciones";
- Resolución del Parlamento Europeo, de 14 de febrero de 2017, sobre la revisión del Consenso Europeo sobre Desarrollo (2016/2094(INI)). En el apartado 56, el Parlamento señala que "Considera indispensable que el nuevo Consenso haga referencia a un sólido compromiso de la Unión por implantar un marco internacional jurídicamente vinculante para que las empresas se responsabilicen de sus prácticas abusivas en los países donde operan, ya que afectan a todos los ámbitos de la sociedad —desde la explotación del trabajo infantil a la ausencia de un salario digno, desde vertidos de petróleo a la deforestación masiva, desde el acoso a los defensores de los derechos humanos a la apropiación de tierras";
- Resolución del Parlamento Europeo, de 14 de abril de 2016, sobre el sector privado y el desarrollo (2014/2205(INI)). En el apartado 8, el Parlamento anima a la Unión a apoyar el proceso para la consecución de un instrumento que "aclare las obligaciones de las empresas transnacionales con respecto a los derechos humanos, y de las empresas con respecto a los Estados, y prevea el establecimiento de soluciones eficaces para las víctimas en aquellos casos en los que es evidente que la jurisdicción nacional es incapaz de sancionar a esas empresas de forma eficaz";
- Resolución del Parlamento Europeo, de 21 de enero de 2016, sobre las prioridades de la UE para los periodos de sesiones del Consejo de Derechos Humanos de las Naciones Unidas en 2016 (2015/3035(RSP). En el apartado 28, se llama a la participación de forma "constructiva";
- Resolución del Parlamento Europeo, de 19 de mayo de 2015, sobre la financiación para el desarrollo (2015/2044(INI)). En su apartado 36 pide que se establezca un marco jurídico vinculante para las empresas, incluidas las corporaciones transnacionales, que incluya un mecanismo para tratar las quejas;
- Resolución del Parlamento Europeo, de 12 de marzo de 2015, sobre las prioridades de la UE para el Consejo de Derechos Humanos de las Naciones Unidas en 2015 (2015/2572(RSP)). En su apartado 32 pidió a los Estados miembros que participaran en el proceso, como veremos, no se atendió esta petición.
- Informe sobre la responsabilidad de las empresas por violaciones graves de los derechos humanos en terceros países de 19 de julio de 2016 (2015/2315(INI))
-Informe sobre la iniciativa emblemática de la Unión en el sector de la confección (2016/2140(INI))

UE en el OEIGW, 28 miembros del Parlamento Europeo enviaron una carta a Jean-Claude Juncker y Federica Mogherini exigiendo que la Unión Europea apoyara la continuidad del proceso y abandonara la postura obstruccionista.

De cara a la cuarta sesión del OEIGWG, desde el Parlamento Europeo van a llevarse a cabo dos importantes iniciativas.

Por un lado, los presidentes de las Comisiones de desarrollo, comercio internacional y relaciones internacionales, con la subcomisión de derechos humanos han elevado una pregunta para respuesta oral con debate en plenario (O-0000/2018 – B8-0000/2018). La pregunta versa sobre el aporte de la UE al proceso de la Resolución. En el cuerpo de la misma se señala que, a pesar del apoyo del Parlamento Europeo al proceso y sus requerimientos para un apoyo genuino desde la UE, la representación de la Unión ha expresado su preocupación sobre cómo se están desarrollando los trabajos y parece tener reticencias que le impiden vincularse de manera activa al proceso. De hecho, hasta el momento la UE no tiene un mandato de negociación que le pueda servir como base para las negociaciones.

Con esta introducción en concreto se le pide a la alta Representante, Federica Mogherini, que explique cuales son las principales razones que están impidiendo que la UE y sus Estados miembros participen de manera activa en el proceso. Además, se le requiere acerca de la existencia o no de una postura común para la cuarta sesión, preguntándole además si, en el caso de existir esta o estar construyéndose, tienen ya decidido cual va a ser la vía para la participación en la construcción de esta postura de los actores sociales y del propio Parlamento Europeo.

Por añadidura, y más allá del concreto proceso de la 26/9, se le pregunta acerca de los esfuerzos que se han hecho para conseguir un enfoque coherente en la Unión respecto del acceso a recursos para las víctimas de violaciones de derechos humanos vinculadas a las actividades empresariales. Junto con esta cuestión se plantean dos cuestiones más, en primer lugar le pregunta al Consejo si considera apropiado el establecimiento de una serie de guías respecto de esta cuestión, para proporcionárselas a los tribunales estatales; en segundo lugar, y atendiendo al Informe de la Comisión de 25 de enero de 2018[14] sobre la implementación de la Recomendación de la Comisión de 11 de junio de 2013 sobre los principios comunes aplicables a los mecanismos de recurso colectivo de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión[15], se inquiere acerca del papel positivo que podría jugar el IJV respecto de la mejora de la implementación de estos mecanismos.

Por otro lado, el 4 de mayo de 2018 la Comisión de Desarrollo del Parlamento Europeo inició los debates de un proyecto de Resolución titulado "Resolución del Parlamento Europeo respecto de la postura de la Unión Europea en el Tratado Vinculante de Naciones Unidas sobre empresas transnacional y otras empresas con características transnacionales con respecto de los derechos humanos" (2018/2656(RSP). Debe recordarse que la opinión que mantiene la UE en el CDH se conforma en Consejo, concretamente en uno de sus comités preparatorios, el llamado COHOM (*Working Party on Human rights*), que se encarga de los aspectos relacionados con los derechos humanos de las relaciones exteriores de la UE y coordina la posición de los Estados miembros en los foros multilaterales de derechos humanos y en particular en el Consejo de Naciones Unidas sobre la cuestión. La versión de Resolución aprobada en la Comisión de Desarrollo, que será debatida en el plenario de septiembre, contiene, entre otras cuestiones, los siguientes posicionamientos:

Apoya firmemente la plena implementación de los Principios Rectores y hace un específico llamamiento para que se adopte, además de los Planes Nacionales, un plan de acción para la UE.

Reafirma la urgente necesidad de actuar de manera efectiva y coherente en todos los niveles, nacionales, europeo e internacional, para abordar de manera eficaz las violaciones de los derechos humanos cometidas por las empresas transnacionales, los problemas jurídicos derivados de la dimensión extraterritorial de las empresas

14 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU). Brussels, 25.1.2018. COM(2018) 40 final.

15 RECOMENDACIÓN de la comision. *Diario Oficial de la Unión Europea,* Bruselas, 11 jun. 2013. Disponible en: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:32013H0396>.

transnacionales las empresas y la incertidumbre relacionada con el lugar donde debe exigirse la responsabilidad por las violaciones de los derechos humanos;

Considera necesario establecer la primacía de los derechos humanos en el derecho internacional mediante un sistema claro en virtud del cual las obligaciones en materia de derechos humanos prevalezcan sobre otros tipos de obligaciones contradictorias;

Acoge con gran satisfacción en este contexto el trabajo iniciado en las Naciones Unidas por el Grupo de trabajo intergubernamental (OEIGWG) para crear un instrumento vinculante;

Lamenta cualquier comportamiento obstructivo en relación con este proceso y con las sesiones del OEIGWG;

Recuerda que el Parlamento expresó su apoyo inequívoco a este proceso en ocho resoluciones diferentes;

Destaca la importancia de que la UE participe activamente en este proceso intergubernamental;

Reitera una vez más su llamamiento a la UE y a los Estados miembros para que participen de manera genuina y constructiva en estas negociaciones;

Pide a los Estados miembros de las Naciones Unidas que velen por que las negociaciones conducentes al tratado se lleven a cabo de forma transparente y que se consulte con las víctimas;

Pide a la UE que garantice que cualquier revisión o futuro documento estratégico vinculado al Marco Estratégico de la UE y al Plan de acción sobre derechos humanos y democracia incluyan objetivos claros y puntos de referencia mensurables para la participación de la UE en las negociaciones del IJV;

Decide seguir de cerca el proceso de negociaciones del OEIGWG;

Como puede observarse, la postura del Parlamento Europeo, a la espera de que se apruebe la propuesta de Resolución es perfectamente clara[16] y difiere de la mantenida por la representación de la Unión en las sesiones del OEIGWG.

Por último, cabe hacer una referencia a la postura que las organizaciones sindicales internacionales y regionales han mantenido a lo largo del proceso. La Confederación sindical internacional (CSI) ha apoyado la adopción y desarrollo de los Principios Rectores, lo cual no es en absoluto incompatible, y así lo demuestra la práctica, con el apoyo posterior demostrado por las grandes confederaciones sindicales respecto de la necesidad de la "creación y ratificación de un instrumento vinculante que regule de manera efectiva la actuación de las ETN".

En este sentido, la European Trade Union Confederation (ETUC) publicó en julio de 2017 una resolución sobre comercio e inversión en la que afirmó que

> los estados tienen la responsabilidad de adoptar los pasos necesarios, en línea con sus obligaciones sobre los derechos humanos, para prevenir abusos y asegurar a las personas afectadas por abusos cometidos por las empresas, el acceso a la reparación efectiva, tanto en vía jurisdiccional como no jurisdiccional. Además, los estados miembros de la UE deben apoyar el desarrollo del tratado internacional sobre empresas y derechos humanos[17].

Por su parte, la International Trade Union Confederation (ITUC) publicó una nota informativa sobre el proceso de la Resolución 26/9 y el instrumento vinculante[18], en la que se realizan afirmaciones como las siguientes:

> El movimiento sindical mundial, que lleva mucho tiempo reclamando un marco regulador internacional, recibió favorablemente la resolución. Desde entonces, la Confederación Sindical Internacional (CSI) y algunas de las Federaciones Sindicales Internacionales (FSI) han participado en los dos primeros periodos de sesiones del IGWG y han contribuido activamente al proceso de desarrollo de un tratado significativo sobre las empresas y los derechos humanos.

Advierte, no obstante, la nota que los sindicatos prefieren un tratado vinculante fuerte que pueda realinear de forma efectiva la asimetría normativa entre las reglas legalmente exigibles que protegen los intereses de las

16 Debe recordarse que la opinión que mantiene la UE en el CDH se conforma en Consejo de la Unión Europea, concretamente en uno de sus comités preparatorios, el llamado COHOM (*Working Party on Human rights*), que se encarga de los aspectos relacionados con los derechos humanos de las relaciones exteriores de la UE y coordina la posición de los Estados miembros en los foros multilaterales de derechos humanos y en particular en el Consejo de Naciones Unidas sobre la cuestión.

17 ETUC Resolution for an EU progressive trade and investment policy. 2017. Disponible en: <https://www.etuc.org/documents/etuc-resolution-eu-progressive-trade-and-investment-policy-adopted-executive-committee#.Wlx6B5OdXBI>.

18 ITUC. *Nota informativa sobre el tratado vinculante*. Disponible en: <http://www.ccoo.es/969f014792eba2ea6d4a80e3d2275eeb000001.pdf>.

corporaciones mediante cláusulas de arbitraje de diferencias estado-inversor y tribunales de arbitraje, y los enfoques de legislación blanda sobre las obligaciones de las empresas transnacionales de respetar los derechos humanos. Sin embargo, el desarrollo del Instrumento no debe, en opinión de los sindicatos, ser una excusa para la no aplicación de los Principios Rectores. En concreto, la CSI apuesta por un Instrumento que contenga líneas fundamentales como las siguientes: extraterritorialidad, diligencia debida, obligaciones directas a las empresas y un mecanismo de supervisión internacional.

3. Del Documento de elementos al Proyecto de Instrumento: contenidos posibles y principales puntos de debate jurídico

Como ya se ha comentado, siguiendo las recomendaciones del Presidente del Grupo, Ecuador debe presentar un proyecto de instrumento jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos (Draft 0), sobre la base de las aportaciones de los Estados y otros interesados pertinentes.

A efectos de analizar cual podría ser el contenido de dicho borrador, el llamado "Draft 0", las siguientes páginas una serie de propuestas basadas en diversas fuentes: el análisis de la doctrina científica especializada[19], los numerosos documentos de los órganos creados en virtud de tratados internacionales de derechos humanos o de Relatores especiales; el Documento de Elementos presentado por la Presidencia del Grupo de Trabajo en la sesión de 2017; la propuesta de Instrumento elaborada por la Campaña Global[20]; las aportaciones realizadas al tercer grupo de trabajo de 2017 y los comentarios y sugerencias realizados por Estados y organizaciones sociales siguiendo el llamamiento del Presidente del grupo, incluido en el informe de la tercera sesión[21].

19 Entre la doctrina especializada que se ha analizado deben destacarse las siguientes obras: DE SCHUTTER, Olivier de. The challenge of imposing human rights norms on corporate actors. In: SCHUTTER, Olivier de (Ed.). *Transnational corporations and human rights*. Oregon: Hart Publishing, Oxford and Portland, 2006. SCHUTTER, Olivier de. *The elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*: a comment. 2017. Disponible en:<https://www.business-humanrights.org/sites/default/files/documents/ElementsTBHRDe%20Schuttercomments23.10.2017.pdf>. SCHUTTER, Olivier de. Towards a new treaty on business and human rights. *Business and Human Rights Journal*, 1, 2016. DEVA, Surya; BILCHITZ, David (Ed.). *Building a treaty on business and human rights: context and Contours*. Cambridge: Cambridge University Press, 2017. DEVA, Surya. Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles. In: DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business*: beyond the corporate responsibility to respect?. Cambridge: Cambridge University Press, 2013. CANTÚ, Humberto (Coord.). *Derechos humanos y empresas*: reflexiones desde América Latina. Costa Rica: Instituto Interamericano de Derechos Humanos, 2017. ÖZDEN, Melik. *Impunidad de empresas transnacionales*. Ginebra: CETIM, 2017. ROBÉ, Jean Paul; LYON-CAEN, Antoine; VERNAC, Stephan. (Dir.). *Multinationals and the constitutionalisation of the world power system*. Abingdon: Routlege, 2016. CABOT, Francisco Javier Zamora. Extraterritoriality: outstanding aspects. In: ZAMORA, Francisco Javier et al. (Ed.). *Implementing the U.N. guiding principles on business and human rights*. Geneva / Zurich: Schulthess Éditions Romandes, 2017. MARULLO, María Chiara; CABOT, Francisco Javier Zamora. (Ed.). *Empresas y derechos humanos*. Nápoles: Scientifica, 2018. CABOT, Francisco Javier Zamora. Las empresas multinacionales y su responsabilidad en materia de derechos Humanos: una visión de conjunto. *Papeles el tiempo de los derechos*, n. 6, 2013. CABOT, Francisco Javier Zamora. Las empresas multinacionales y su responsabilidad en materia de derechos Humanos: una visión de conjunto. *Papeles el tiempo de los derechos*, n. 1, 2012. CABOT, Francisco Javier Zamora. Acaparamiento de tierra (land grabbing) y empresas multinacionales: el caso Mubende-Neumann. *Papeles el tiempo de los derechos*, n. 5, 2013. CABOT, Francisco Javier Zamora; CÍVICO, Jesús García; PALLARÉS, Loresna Sales. (Ed.). *La responsabilidad de las multinacionales por violaciones de derechos humanos*. Alcalá: Universidad de Alcalá, Servicio de Publicaciones, 2013. PALLARÉS, Lorena Salés; MARULLO, Maria Chiara. El «ángulo muerto» del Derecho Internacional: las empresas transnacionales y sus cadenas de suministro. *Persona y Derecho*, v. 78, 2018. ZUBIZARRETA, Juan Hernández. *Las empresas transnacionales frente a los derechos humanos*: historia de una asimetría normativa. Victoria: Egoa, 2009. GUAMÁN, Adoración; GONZÁLEZ, Gabriel. *Empresas transnacionales y derechos humanos*. Bomarzo: Albacete, 2018.

20 El texto de esta propuesta de la Campaña se elaboró mediante un procedimiento participativo donde intervinieron las organizaciones y asociaciones que forman parte de la misma, así como diversos juristas y académicas/os expertos en la cuestión. El documento resultante, denominado CONTRIBUCIÓN escrita del Centro Europa-Tercer Mundo (CETIM) y del Institute for Policies Studies/Transnational Institute a la 3ª sesión del grupo de trabajo intergubernamental sobre empresas transnacionales y otras empresas comerciales con respecto a los derechos humanos. 2017. Disponible en: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/CETIM-TNI_SP.pdf>.

21 La convocatoria de comentarios y sugerencias se envió así mismo mediante nota verbal por la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, fijando como fecha límite para el envío el 28 de febrero de 2018. La nota puede encontrarse en el siguiente enlace: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/CallsComments-DraftElements_SP.pdf. Los Estados que han enviado comentarios son los siguientes: Argentina; Azerbaijan; Mexico; Qatar; Singapore. También se recibieron 14 contribuciones de organizaciones no gubernamentales y otros actores relevantes para el proceso. Todas ellas pueden encontrarse en: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContribution-

Para sistematizar las cuestiones principales sobre las que está girando el debate y las aportaciones realizadas, el presente epígrafe se estructura en cinco grandes ejes: el debate acerca de la atribución de responsabilidades directas a las empresas; la delimitación del ámbito de aplicación del Instrumento; la inclusión de definiciones dentro del IJV; el acceso a la justicia, sus mecanismos y la exigencia de responsabilidad por actos cometidos en otro Estado; la relación entre los Acuerdos Marco Internacionales (AMI) y el IJV; y por último, los "olvidos" del Documento de elementos, relacionados fundamentalmente con la inclusión efectiva del enfoque de género, los territorios en conflicto y los colectivos que requieren una protección especial.

No van a tratarse, sin embargo, temas que aun siendo fundamentales han sido poco cuestionados, como son, por ejemplo, la inclusión de medidas de cooperación internacional o la elección de la ley francesa sobre vigilancia debida de 2017 como modelo para la inclusión del deber de diligencia en el Documento de elementos. En este ámbito de la diligencia debida en materia de derechos humanos, el IJV podría contener unas disposiciones similares a las del Documento, si bien en su desarrollo deberían tenerse en cuenta los documentos de la OCDE[22] y establecer de manera clara la obligación para los Estados de aprobar normas que establezcan de manera vinculante las obligaciones de diligencia debida para las empresas, a efectos de conseguir el deseado efecto "level playing field", tan señalado dentro de los objetivos del IJV.

Tampoco va a realizarse, por ser un tema de tal entidad que requiere un estudio propio y separado, un análisis respecto de qué tipo de mecanismo de control a nivel internacional debe establecerse en el IJV. El Documento de elementos abrió una doble opción, la más conservadora, un Comité, y la más rupturista, un organismo jurisdiccional (ya sea a través de la creación de una Corte Internacional sobre Empresas Transnacionales y Derechos Humanos ya sea mediante el establecimiento de una sala especial sobre Empresas Transnacionales y Derechos Humanos en tribunales o cortes internacionales o regionales ya existentes). Se trata de una decisión fundamental y la opción que más peso tiene, tanto entre la doctrina como entre los Estados es la que prefiere evitar, al menos en un primer momento, la opción jurisdiccional y caminar en primer lugar hacia un Comité, dejando en todo caso la puerta abierta para posteriores avances. En este sentido, es especialmente útil atender a la experiencia del Comité creado por la Convención Internacional para la protección de todas las personas contra las desapariciones forzadas de 2006. En todo caso, si se adoptara esta opción, deberían establecerse mecanismos claros para permitir el acceso al Comité de las víctimas y sus representantes en forma de actores colectivos, así como la participación de la sociedad civil en las distintas funciones del Comité.

Antes de comenzar el análisis propuesto es importante recordar que el contenido del Documento de elementos consta de nueve partes. En primer lugar, el Documento contiene un Marco General, donde se incluyen los posibles contenidos del Preámbulo, los Principios, los Propósitos y los Objetivos del futuro Instrumento Vinculante. A continuación el Documento centra la atención en el ámbito de aplicación (derechos, actos y actores); el tercer apartado son las obligaciones generales, distinguiendo entre las de los Estados, las de las ETN y otras empresas de negocios (según se establece en la Resolución 26/9) y aquellas de las Organizaciones Internacionales; el cuarto apartado se centra en las medidas preventivas; el quinto se centra en la responsabilidad jurídica, incluyendo la administrativa, civil y penal; el sexto apartado se refiere al acceso a la justicia, recursos efectivos y garantías de no repetición; el séptimo se refiere a la jurisdicción, tema clave porque en el se integra, aunque no se refiera expresamente, la cuestión de la extraterritorialidad; el octavo la cooperación internacional, es decir, a los mecanismos de cooperación transfronteriza en investigación, jurisdicción y ejecución de sentencias; en el noveno se ubican las distintas opciones para desarrollar los necesarios mecanismos de promoción, implementación y monitoreo y el décimo incluye las Disposiciones finales.

Como comentario global sobre esta estructura, que en general ha recibido comentarios positivos entre la doctrina, cabe señalar que parece poco apropiada la división entre principios, propósitos y objetivos, dado que el contenido de estos apartados podría dividirse adecua-

sDraftElements.aspx. Ambos documentos consultados el 10 jun. 2018.

22 En particular, las siguientes: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing, Paris. 2016. DUE diligence guidance for meaningful stakeholder engagement in the extractive sector. Paris: OECD Publishing, 2017. DUE diligence guidance for responsible business conduct. Paris: OECD Publishing, 2018. DUE diligence guidance for responsible business conduct. Paris: OECD Publishing, 2018.

damente entre el Preámbulo y un artículo denominado "finalidad". De igual manera, como veremos, la división entre responsabilidad jurídica, acceso a la justicia y jurisdicción tampoco parece clara, por lo que se propondrá una agrupación diferente donde tome protagonismo el concepto del acceso a la justicia.

3.1. La atribución de obligaciones directas a los actores empresariales en texto del IJV

Desde su publicación, el Documento de elementos ha recibido críticas por la utilización de la expresión "violaciones o abusos", tanto en los artículos dedicados directamente a las empresas como en relación a las obligaciones atribuidas a los Estados. Se trata, como es evidente, de una discusión terminológica ligada a uno de los nudos gordianos de los trabajos del OEIGWG, como es la atribución de responsabilidades directas a las empresas, sin que esto implique un reconocimiento de las mismas como sujeto de derecho internacional.

No se desconoce que, la práctica tradicional en la materia determina la utilización del término "violaciones" en relación con los Estados mientras que para las empresas se utiliza habitualmente el de "abusos". En este sentido, destaca la contribución de FIAM[23] que apuesta por aceptar esta división para mantener la claridad de la identificación del Estado como el principal responsable de asegurar el respeto a los derechos humanos, aunque reconoce que en determinadas situaciones la utilización de nueva terminología es útil y necesaria para seguir avanzando.

Evidentemente estamos ante un debate que va mucho más allá del *nomen iuris* y se vincula con la posibilidad, incluso la oportunidad, de atribuir responsabilidades a las personas jurídicas en normas internacionales. Se trata de una cuestión abundantemente tratada por la doctrina[24], los documentos del sistema de Naciones Unidas y diversos instrumentos de derecho internacional.

En concreto, como afirmación marco, es posible citar al Consejo de Derechos Humanos de las Naciones Unidas, que en su Observación General Nº 31, respecto del Pacto Internacional de Derechos Civiles y Políticos, señaló que

> las obligaciones positivas de los Estados Partes de velar por los derechos del Pacto sólo se cumplirán plenamente si los individuos están protegidos por el Estado, no sólo contra las violaciones de los derechos del Pacto por sus agentes, sino también contra los actos cometidos por personas o entidades privadas que obstaculizarían el disfrute de los derechos del Pacto en la medida en que son susceptibles de aplicación entre personas o entidades privadas[25].

Por su parte, el Comité de Derechos Económicos, Sociales y Culturales (CDESC) señaló en 2011 que

las actividades empresariales pueden perjudicar al disfrute de los derechos reconocidos en el Pacto. Los ejemplos de problemas en este sentido son múltiples, desde el trabajo infantil y las condiciones de trabajo peligrosas hasta los efectos nocivos para el derecho a la salud, el nivel de vida, incluido el de los pueblos indígenas, y el medio ambiente natural, y los efectos destructivos de la corrupción, pasando por las restricciones de los derechos sindicales y la discriminación que sufren las trabajadoras[26]".

23 FIAM. *Written contribution by FIAN International for the 3rd session of the OEIGWG on transnational corporations and other business enterprises with respect to human rights*: comments to the elements document presented by the Chairperson-Rapporteur. 2018. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

24 En relación con los crímenes ambientales, se ha señalado acertadamente que la dificultad de atribuir la responsabilidad a los autores de estos crímenes implica una laguna en el derecho internacional, cuyos instrumentos se revelan como insuficientes. Una insuficiencia que también se manifiesta en la dificultad de ofrecer respuestas desde el derecho internacional a las actividades ilícitas que se cometen por actores económicos con carácter transnacional. Sobre esta cuestión se remite en extenso a MARTIN-CHENUT, Kathia et al. Rumo à internacionalização da proteção penal do meio ambiente: dos ecocrimes ao ecocídio. *Revista de Direito Internacional*, Brasília, v. 12, n. 1, 2015. Sobre la atribución de responsabilidad a las empresas transnacionales y sus dificultades y posibilidades pueden destacarse, además de las obras señaladas en notas anteriores, contribuciones como: FORNASIER, Mateus de Oliveira; FERREIRA, Luciano Vaz. A regulação das empresas transnacionais entre as ordens jurídicas estatais e não estatais. *Revista de Direito Internacional*, Brasília, v. 12, n. 1, 2015. ÖZDEN, Melik. *Impunidad de empresas transnacionales*. Ginebra: CETIM, 2017.

25 CONSEJO DE DERECHOS HUMANOS. *Observación general No. 31*: la índole de la obligación jurídica general impuesta a los Estados Partes en el Pacto. 2004. Disponible en: <http://hrlibrary.umn.edu/hrcommittee/Sgencom31.html>.

26 CONSEJO DE DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES. *Declaración sobre las obligaciones de los Estados partes en relación con el sector empresarial y los derechos económicos, sociales y culturales*. 2011. En un sentido similar, v. gr. Asamblea General, Report of the Special Rapporteur on the situation of human rights defenders: "Non-State actors are thus included and therefore have a responsibility to promote and respect the rights enshrined in the Declaration and, consequently, the rights of human rights defenders", A/65/223, para. 9; Committee on Economic, Social and Cul-

Además, en su Observación General Nº12, este comité ya había señalado que "la obligación de proteger requiere que el Estado Parte adopte medidas para velar por que las empresas o los particulares no priven a las personas del acceso a una alimentación adecuada[27]". Reconociendo esta situación, es una afirmación ya común entre los documentos generados por los organismos de control de los instrumentos internacionales de derechos humanos, que la obligación de proteger requiere que los Estados adopten medidas para velar por que las empresas o los particulares no priven a las personas del acceso a los derechos humanos[28].

Así, el CDESC[29] ha remarcado que las empresas tienen responsabilidades respecto a la realización de los derechos humanos, entre otros, de los siguientes derechos: salud[30], alimentación[31], agua[32], seguridad social[33], derecho al trabajo[34], el derecho a unas condiciones de trabajo dignas, adecuadas, justas y favorables[35].

En esta misma línea también cabe destacar los siguientes textos:

Informe del Relator especial sobre la situación de los defensores de derechos humanos ante la Asamblea General, A/65/223 (párrafo 9) donde se afirmó que "*Non-State actors are thus included and therefore have a responsibility to promote and respect the rights enshrined in the Declaration and, consequently, the rights of human rights defenders*".

Informes del Relator Especial sobre la libertad de expresión, David Kaye, quien en repetidas ocasiones ha llamado a que los Estados regulen de forma efectiva a las empresas, y a estas a respetar los derechos humanos en el marco de sus operaciones[36]. Es especialmente destacable el informe de este Relator de 6 de abril de 2018 sobre la cuestión de la regulación del contenido en línea generado por los usuarios[37]. En este informe el Relator enfatiza la idea de que las actividades de las empresas del sector de las TIC afectan, entre otros, a los derechos a la privacidad y a la participación pública y a las libertades de religión y de creencias, de opinión y de expresión, de reunión y de asociación. Para evitar la vulneración de los derechos humanos, el Relator indica que

> los Principios Rectores sobre las Empresas y los Derechos Humanos, junto con unas directrices específicas para el sector elaboradas por la sociedad civil, los órganos intergubernamentales, la Global Network Initiative y otros interesados, constituyen unos enfoques de referencia que todas las empresas de Internet deberían adoptar.

Es interesante la utilización reiterada de los Principios Rectores por este Relator, cuya conclusión en realidad enfatiza la necesidad de que estos sean adoptados por las empresas, constatando a la vez que, al tratarse de normas sin fuerza obligatoria, en realidad no lo están siendo. Aparece aquí de manera clara la permanente paradoja que rodea a los Ruggie: su principal fortaleza, que no son vinculantes y por tanto han sido capaces de generar consenso[38], es su mayor debilidad.

Informe del Relator Especial sobre libertad de aso-

tural Rights, Concluding observations, on the third periodic report of Azerbaidjan (2013), E/C.12/AZE/CO/3, para. 15; Comisión de derechos humanos, Informe presentado por la Sra. Hina Jilani, Representante Especial del Secretario General sobre la situación de los defensores de los derechos humanos, E/CN.4/2004/94/Add.1.

27 COMITÉ DE DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES. *Observación general no. 12:* aplicación del pacto internacional de los derechos económicos, sociales y culturales, el derecho a una alimentación adecuada. 1999. Artículo 1. pár. 15.

28 Entre otros documentos que contienen esta afirmación, vid., respecto del derecho a la alimentación adecuada: Committee on Economic, Social and Cultural Rights, E/C.12/1999/5, General Comment No. 12 (1999): The right to adequate food, para. 15.

29 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment no. 24*: on State obligations under the international covenant on economic, social and cultural rights in the context of business activities. 2017. par. 2.

30 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment no. 14*: the right to the highest attainable standard of health. 2000. par. 35, 42.

31 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment no. 12*: the right to adequate food. 1999. par. 19-20.

32 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. G*eneral comment no. 15*: the right to water. 2002. par. 23-24.

33 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. G*eneral comment no. 19*: the right to social security. 2008. par. 45, 71.

34 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment no. 18:* the right to work. 2006. par. 52.

35 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment no. 23*: the right to just and favorable conditions of work. 2016. par. 74-75.

36 KAYE, Davir. *Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión*. Disponible en: <https://www.ohchr.org/sp/issues/freedomopinion/pages/opinionindex.aspx>.

37 KAYE, Davir. *Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión*. Disponible en: <https://www.ohchr.org/sp/issues/freedomopinion/pages/opinionindex.aspx>.

38 De entre la enorme cantidad de literatura sobre los Principios Rectores y su implementación pueden destacarse: WOOD, C. Engaging the U.N. guiding principles on business and human rights: the interamerican commission on human rights & the extractive sector. *Revista de Direito Internacional*, Brasília, v. 12, n. 1, 2015.

ciación y reunión, Maina Kiai, de 28 de abril de 2015[39]. En este informe, centrado en el contexto de la industria extractiva, el relator remarca la necesidad de responsabilizar a las empresas con marcos vinculantes para la protección de los derechos humanos[40].

Pero más allá de los textos que reconocen la existencia de violaciones de derechos humanos cometidas por las empresas y la necesidad de una actuación estatal, es bien sabido que existe ya un cuerpo consolidado de instrumentos internacionales que establecen responsabilidades para las empresas de manera directa, entre las que podemos señalar las siguientes[41]:

El Tratado Internacional de Responsabilidad Civil por Daños derivados de la Contaminación por Petróleo de 1969, que obliga a los dueños de los barcos a responsabilizarse de los daños (art. 3.1).

El Convenio sobre el Derecho del Mar de 1982, que prohíbe no solo a los Estados sino también a las empresas la apropiación de recursos marinos.

El Protocolo para la Eliminación del Comercio Ilícito de Productos de Tabaco[42], que incluye la obligación de diligencia debida para todos los participantes de la cadena de suministro de tabaco, incluyendo controles y sanciones por las autoridades competentes a nivel estatal. Debe recordarse que el Convenio Marco de la OMS para el control del Tabaco establece en su Art. 5.3 que:

> A la hora de establecer y aplicar sus políticas de salud pública relativas al control del tabaco, las Partes actuarán de una manera que proteja dichas políticas contra los intereses comerciales y otros intereses creados de la industria tabacalera, de conformidad con la legislación nacional.

Con respecto a la Convención sobre los Derechos del Niño, el Comité de los Derechos del Niño[43] ha señalado que

> el Comité considera que las obligaciones y las responsabilidades de respetar los derechos del niño se extienden en la práctica más allá de los servicios e instituciones del Estado y controlados por el Estado y se aplican a los actores privados y a las empresas. Por lo tanto, todas las empresas deben cumplir sus responsabilidades en relación con los derechos del niño y los Estados deben velar por que lo hagan. Además, las empresas no deben mermar la capacidad de los Estados para cumplir sus obligaciones hacia los niños de conformidad con la Convención y sus protocolos facultativos.

El Código Internacional de Comercialización de Sucedáneos de la Leche Materna, OMS/UNICEF, de 1981. De entre la disposiciones de este Código directamente aplicables a las empresas podemos citar, entre otras, las siguientes:

> art. 5.2 Los fabricantes y los distribuidores no deben facilitar, directa o indirectamente, a las mujeres embarazadas, a las madres o a los miembros de sus familias, muestras de los productos comprendidos en las disposiciones del presente Código;
>
> art 7.3 Los fabricantes o los distribuidores no deben ofrecer, con el fin de promover los productos comprendidos en las disposiciones del presente Código, incentivos financieros o materiales a los agentes de la salud o a los miembros de sus familias ni dichos incentivos deben ser aceptados por los agentes de salud o los miembros de sus familias.

La Convención de las Naciones Unidas contra la corrupción, hecha en Nueva York el 31 de octubre de 2003, que integra en su artículo 26 la obligación de los Estados de establecer la responsabilidad de las personas jurídicas por su participación en delitos tipificados con arreglo a la Convención.

La Convención de Naciones Unidas contra la Delincuencia Organizada, cuyo artículo 10 establece que la responsabilidad de las personas jurídicas podrá ser de índole penal, civil o administrativa.

39 KIAI, Maina. *Informe del Relator Especial sobre los derechos a la libertad de reunión pacífica y de asociación*. 2015.

40 En concreto son remarcables los apartados 23 y 24 de su texto: "23. No existe ningún instrumento internacional que imponga obligaciones jurídicas a las empresas. Sin embargo, se entiende que, al ser universales, indivisibles e interdependientes, los derechos humanos han de ser respetados por todos. El Relator Especial toma nota de la resolución 26/9 del Consejo de Derechos Humanos relativa a la elaboración de un instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, en la que se destaca la responsabilidad primordial de los Estados de proteger contra las vulneraciones de los derechos humanos cometidas por terceros en su territorio. El Relator Especial considera conveniente disponer de un instrumento negociado que establezca obligaciones vinculantes para las empresas y que incorpore normas aplicables a todas las empresas, tanto nacionales como transnacionales. Una carencia considerable de las obligaciones voluntarias de las empresas es que no garantizan suficientemente la rendición de cuentas tanto de los Estados como de las empresas frente al incumplimiento de esas obligaciones, ni alientan a los gobiernos a vigilar estrictamente aquellas conductas de las empresas susceptibles de vulnerar los derechos humanos".

41 Para un mayor desarrollo de este tema se remite al análisis de: ÖZDEN, Melik. *Impunidad de empresas transnacionales*. Ginebra: CETIM, 2017.

42 El Protocolo para la eliminación del comercio ilícito de productos de tabaco, primer protocolo del Convenio, fue aprobado el 12 de noviembre de 2012 en la quinta reunión de la Conferencia de las Partes, en Seúl.

43 COMITÉ DE LOS DERECHOS DEL NIÑO. O*bservación general nº 16*: sobre las obligaciones del Estado en relación con el impacto del sector empresarial en los derechos del niño. 2013. par. 8.

El Protocolo Facultativo relativo a la venta de niños, la prostitución infantil y la utilización de niños en la pornografía[44], cuyo artículo 3.4 establece que

> con sujeción a los preceptos de su legislación, los Estados Partes adoptarán, cuando proceda, disposiciones que permitan hacer efectiva la responsabilidad de personas jurídicas por los delitos enunciados en el párrafo 1 del presente artículo. Con sujeción a los principios jurídicos aplicables en el Estado Parte, la responsabilidad de las personas jurídicas podrá ser penal, civil o administrativa[45].

Por añadidura, otros textos de derechos humanos han subrayado la responsabilidad de todas las empresas, transnacionales y de otra índole, de respetar los derechos humanos, incluidos el derecho de los defensores de los derechos humanos a la vida, la libertad y la seguridad de la persona, y su ejercicio de los derechos a la libertad de expresión, reunión y asociación pacíficas y participación en los asuntos públicos, que son esenciales para la promoción y protección de todos los derechos humanos, incluidos los derechos económicos, sociales y culturales, y el derecho al desarrollo[46].

En base a todo lo antedicho, el texto del Instrumento podría afirmar en primer lugar que los sujetos vinculados son los Estados parte y las organizaciones de integración económica regional que lo ratifiquen (como ya se indicó en el Documento de elementos y a efectos de facilitar su adopción por la Unión Europea); en segundo lugar, y respecto del ámbito de aplicación, el Instrumento podría indicar que sus disposiciones se aplicarán a los Estados y a las empresas, según se determine en las distintas partes del texto y, evidentemente, dependiendo de la delimitación del ámbito de aplicación por el que se opte (todas las empresas, empresas con actividad transnacional o empresas transnacionales).

3.2. La delimitación del ámbito de aplicación del IJV: ¿empresas con actividad transnacional, empresas transnacionales o todas las empresas?

Es bien sabido que el debate acerca de cómo interpretar la frase "empresas transnacionales y otras empresas de negocios"[47] se convirtió desde el inicio en uno de los nudos gordianos de la discusión en el seno de las diferentes sesiones del OEIGWG. La división de opiniones radica en entender que el Instrumento debe aplicarse en exclusiva a las empresas transnacionales, postura que sostienen diversos Estados y una buena parte de las organizaciones sociales participantes; o que, en cambio, no deben dejarse fuera las empresas nacionales por lo que el ámbito subjetivo debe incluir a "todas las empresas", postura defendida por la Unión Europa, apoyada por diversos Estados y algunas entidades y ONG. En los siguientes párrafos se van a analizar los argumentos dados para sostener las dos posiciones así como la tercera vía, la utilización del término "empresa con actividad transnacional", línea que sigue igualmente el Documento de Elementos.

La primera opción apuesta por que el IJV se enfoque únicamente hacia las empresas transnacionales. Esta idea ha sido sustentada con fuerza por la Campaña Global y por opiniones de académicos como Carlos Correa[48]. Este autor ha señalado que el objetivo de la Resolución 26/9 es acabar con la impunidad de las empresas transnacionales derivada de las lagunas en materia de jurisdicción y de las estructuras complejas de estas empresas. Así las cosas, la inclusión de todas las empresas implicaba un cambio en el objetivo de la norma, estableciendo además una tarea prácticamente imposible de abarcar y de controlar, debido a la enorme cantidad de empresas existentes. El texto presentado por la Campaña Global se sitúa en esta línea, incluyendo en su ámbito de aplicación únicamente a las empresas transnacionales.

La segunda opción apuesta por incorporar en el ámbito subjetivo a todas las empresas sin distinción. Esta

44 Asamblea General - Resolución A/RES/54/263 del 25 de mayo de 2000. Entrada en vigor: 18 de enero de 2002.

45 Además de las normas anteriores, señala Özden otra serie de instrumentos que contienen la obligación del Estado de asegurar un determinado comportamiento de los actores privados. En este sentido es posible destacar la Convención sobre la eliminación de todas las formas de discriminación contra la mujer, art. 2.e); la Convención sobre los derechos de las personas con discapacidad (art. 4.1.e); la Declaración de Naciones Unidas sobre los Derechos de los Pueblos Indígenas, y en general la normativa de la OIT, que, evidentemente, establece obligaciones para las empresas. Vid. ÖZDEN, Melik. *Impunidad de empresas transnacionales*. Ginebra: CETIM, 2017.

46 CONSEJO DE DERECHOS HUMANOS. *Resolución 31/32*: protección de los defensores de los derechos humanos, ya sean personas, grupos o instituciones, que trabajan en el ámbito de los derechos económicos, sociales y culturales. 2016. par. 17.

47 Debe recordarse que en el texto de la Resolución 26/9, a efectos de delimitar el ámbito subjetivo se añadió una nota al pie que señala lo siguiente: "El término "otras empresas" se refiere a todas las empresas cuyas actividades operacionales tienen carácter transnacional y no se aplica a las empresas locales registradas con arreglo a la legislación nacional pertinente".

48 CORREA, Carlos. Scope of the proposed international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. *Policy Brief*, n. 28, 2016.

postura ha sido defendida por la Unión Europea, de manera invariable en cada uno de los grupos de trabajo, así como por Estados como México[49], y también por distintas organizaciones sociales que participan de manera activa en el proceso. En este sentido, la Treaty Alliance Germany[50] o Amnistía Internacional[51], expresaron en sus contribuciones escritas su apuesta por un Instrumento que incluya en su ámbito de actuación a todas las empresas para, en su opinión, asegurar una protección similar frente a las violaciones y vulneraciones cometidas por empresas transnacionales y domésticas.

Esta preocupación ha sido compartida por FIAM[52]. La contribución de esta entidad desarrolla de manera muy pertinente las razones que exigen una especial atención a las empresas transnacionales. En este sentido, con el que se coincide plenamente, FIAM ha remarcado que las actividades de las ETN presentan un especial desafío en cuanto a la regulación, supervisión, adjudicación y ejecución de decisiones judiciales. Sus estructuras complejas y flexibles, su movilidad entre distintas jurisdicciones y su creciente poder les permite una impunidad que se refleja en los numerosos casos de abusos y que requiere una acción urgente.

Poniendo sobre la mesa estos argumentos, el documento de FIAM sostiene igualmente que, desde la perspectiva de las personas y comunidades afectadas, no es relevante el carácter transnacional o no de la empresa que vulnera el derecho, por lo que en todo caso debe evitarse que un enfoque basado en la actividad transnacional que pueda suponer una puerta abierta para vulneraciones de derechos humanos por empresas locales o para que algunos Estados puedan articular estándares inferiores respecto del respeto de los derechos humanos para las empresas locales. Para evitar esto, FIAM propone la utilización de la siguiente cláusula

> ningún elemento de este instrumento puede ser usado por un Estado para imponer estándares más bajos a sus empresas locales. Los individuos y las comunidades afectados por las actividades de las empresas nacionales tendrán los mismos derechos que los afectados por ETN y OBE [53].

Consciente de la dificultad tanto política como jurídica de adoptar una de las opciones anteriores, el Documento de elementos optó por delimitar el ámbito de aplicación sorteando la definición de ETN y centrándose en la actividad en lugar de en las características subjetivas de la entidad. Así, bajo la rúbrica de "actividades concernidas por el Instrumento", el Documento coloca en el centro del ámbito de aplicación la expresión "actividad económica transnacional", indicando que esta actividad puede ser realizada por "empresas, asociaciones, corporaciones, compañías, otras asociaciones, personas naturales o jurídicas o cualquier combinación de ellas, independientemente del modo de creación o control o propiedad, e incluyen sus sucursales, subsidiarias, afiliadas u otras entidades directa o indirectamente controladas por ellos.

Esta finta jurídica ha sido aplaudida por doctrina relevante como el profesor De Schutter, que aportaba, en la misma línea, una posible fórmula más elaborada:

> el Tratado es aplicable a las actividades de todas las empresas, independientemente de su tamaño, modo de creación o control o propiedad. Su ámbito de aplicación se limita a las actividades empresariales que tienen carácter transnacional. Esto incluye la relación de las corporaciones con sus sucursales, filiales, o socios empresariales con los que tenga una relación de negocios continuada[54].

La reacción de las organizaciones respecto de esta aproximación ha sido positiva, pero no exenta de crítica. En su aporte escrito, la International Trade Union Con-

49 Vid. En este sentido el documento aportado en el periodo de consultas posterior al tercer grupo: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/CallforComments/Mexico.pdf

50 TREATY ALLIANCE GERMANY. *Toward global regulation on human rights and business. position paper of the Treaty Alliance Germany on the UN treaty process on transnational corporations and other business enterprises*. 2017. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx>. Consultado el: 10 jun. 2018.

51 AMNESTY INTERNATIONAL. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. 2017. Disponible en: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx.

52 FIAM. Written contribution by FIAN International for the 3rd session of the OEIGWG on transnational corporations and other business enterprises with respect to human rights: comments to the elements document presented by the Chairperson-Rapporteur. 2018. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

53 FIAM. *Written contribution by FIAN International for the 3rd session of the OEIGWG on transnational corporations and other business enterprises with respect to human rights: comments to the elements document presented by the Chairperson-Rapporteur*. 2018. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

54 SCHUTTER, Olivier de. *The elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*: a comment. 2017. Disponible en:<https://www.business-humanrights.org/sites/default/files/documents/ElementsTBHR-De%20Schuttercomments23.10.2017.pdf>.

federation (ITUC) y la International Transport Workers Federation (ITF)[55], manifestaron su acuerdo con la utilización del concepto de actividad transnacional, pero señalaron, con acierto, que debía desarrollarse el mismo para establecer con claridad los límites para la aplicación del Tratado, en este mismo sentido se han pronunciado otro conjunto de organizaciones como CIDSE et alt[56]. La FIDH[57] por su parte, encomiando el contenido del Documento de elementos por diversas razones, expresó su preocupación por la delimitación del ámbito subjetivo, al señalar que el futuro instrumento debe contener una definición flexible, de "actividad transnacional" que sea capaz de incluir de manera amplia las actividades de las empresas locales que tienen algún tipo de actividad transnacional.

Pese a los apoyos que ha generado esta tercera opción, las reticencias son importantes y parece necesario avanzar en una propuesta que evite los recelos derivados de la existencia de posibles vías de escape para actividades empresariales que pudieran ampararse bajo el velo de la actuación local. En este sentido, podría acogerse la propuesta de otras organizaciones como la que parece apuntar la International Network for Economic, Social and Cultural Rights[58], que se inclina por una fórmula híbrida aun más amplia, es decir, por incluir dentro del ámbito de aplicación a todas las empresas, estableciendo a la vez disposiciones específicas para las que realizan una actividad transnacional. Así, una posible propuesta sería la siguiente:

> Las disposiciones del presente Instrumento se aplicarán a todas las empresas, independientemente de su modo de creación, control, propiedad, tamaño o estructura, incluyendo el conjunto de sus cadenas de suministro. Cuando se trate de empresas con actividad transnacional serán de aplicación, además de las disposiciones generales, aquellas específicas que así se determinen.

Evidentemente, esta definición implica el establecimiento de una doble escala de responsabilidades para las empresas, las genéricas dirigidas a todas las empresas y las específicas, entre las que irían por ejemplo los mecanismos de diligencia debida, estructuradas respecto de las empresas transnacionales.

Por añadidura, tampoco cabe duda de que esta delimitación nos aboca a la necesidad de incluir una serie de definiciones, sin duda complejas, en el texto del Instrumento. Esta operación, que se evitó en el Documento de Elementos, deviene imprescindible, en particular respecto de conceptos como control, cadenas de suministro, o la misma "actividad transnacional".

3.3. La inclusión de definiciones en el texto del Instrumento Jurídicamente Vinculante

Una de las cuestiones más debatidas en los diferentes foros de discusión del Instrumento ha sido la oportunidad o necesidad de definir determinados conceptos, como el término "Empresa Transnacional", "cadena de suministro", "control empresarial", "empresa matriz", "empresa filial", etc.

Las opciones son múltiples. Si tomamos como ejemplo el primero de los conceptos, es interesante recordar que el texto de las Normas de la Subcomisión abordó la definición de "Empresa Transnacional", entendiendo la misma como la "entidad o grupo de entidades económicas que realizan actividades en dos o más países, cualquiera que sea la forma jurídica que adopte, tanto en su propio país como en el país de la actividad[59]. Sin embargo, es bien sabido que hay textos fundamentales en la materia que nos ocupa que evitan expresamente la definición, como las Líneas Directrices de la OCDE para Empresas Multinacionales (revisión de 2011) donde se reconoce que "no es necesaria a los efectos de las Directrices una definición precisa de empresas multina-

55 INTERNATIONAL TRADE UNION CONFEDERATION (ITUC). International Transport Workers Federation (ITF), Joint Written Submission to the Third Meeting of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. 2017. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx>.

56 CIDSE et al. *Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. 2018. Disponible en: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/CallforComments/CIDSE.pdf>.

57 FIDH. *Position paper on elements for a draft legally binding instrument on Transnational Corporations (TNCs) and Other Business Entreprises (OBEs) with respect to human rights*. 2017. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributionsDraftElements.aspx>.

58 SUBMISSION to the United Nations' Open-ended intergovernmental working group on Transnational Corporations and other business enterprises with respect to human rights: third session of the IGWG at the Human Rights Council. 2017. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx>.

59 Normas sobre las responsabilidades de las empresas transnacionales y otras empresas comerciales en la esfera de los derechos humanos, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

cionales". En una línea similar se pronuncia la Declaración tripartita de principios de la Organización Internacional del Trabajo sobre las empresas multinacionales y la política social. Entre ambas opciones, es también posible, tanto en este caso como en los subsiguientes conceptos, efectuar una definición indirecta incluyendo una remisión a la legislación nacional, lo que permite evitar problemas a la hora de la ratificación.

Pese a que la opción de remitir a la legislación nacional es sin duda tentadora, la complejidad de los conceptos señalados aconseja la inclusión de una serie de definiciones que permitan una adecuada seguridad jurídica respecto de las previsiones del Instrumento. Por añadidura, no puede olvidarse que los propios Principios Ruggie han necesitado de una serie de definiciones, contenidas en el documento denominado "La responsabilidad de las empresas de respetar los derechos humanos, Guía para la interpretación" publicado por la Oficina del Alto Comisionado Derechos Humanos, en 2012[60]. Las definiciones contenidas en este documento, en la línea de la necesaria y permanente relación de complementariedad y coherencia entre los Principios Rectores y el Instrumento Jurídicamente Vinculante, pueden ser particularmente útiles para ser incluidas en el futuro tratado.

Para definir el concepto de "actividad empresarial de carácter transnacional"[61], sería posible utilizar como ejemplo la Convención de las Naciones Unidas contra la corrupción de 2003[62], donde se concreta que una actividad será considerada transnacional si: se realiza en más de un Estado; se realiza dentro de un solo Estado, pero una parte sustancial de su preparación, planificación, dirección o control se realiza en otro Estado; se realiza dentro de un solo Estado, pero entraña la participación de un grupo económico organizado que realiza actividades económicas en más de un Estado; o si se comete en un solo Estado, pero tiene efectos sustanciales en otro Estado. De manera más sencilla, utilizando las nociones de Estado de origen y de acogida, podría definirse esta actividad como "aquella que se realiza o afecta a un territorio o jurisdicción distinto de aquél del Estado de origen de la empresa matriz, responsable de manera directa o indirecta de dicha actividad". Debería, en todo caso, indicarse claramente que el término "actividades" incluye tanto acciones como omisiones de los actores empresariales.

Más allá de la noción de actividad, sería igualmente aconsejable acoger una definición ampliar de "empresa", para explicitar que dentro de la misma se incluyen entidades de carácter público, privado o mixto, independientemente de su tamaño, de su sector de actividad, ubicación, propietarios y estructura y de que su actividad en el país de la persona/s o comunidades afectadas sea realizada por medios físicos o virtuales.

A partir de esta definición debe abordarse otra de crucial importancia, que es la de los conceptos de "cadena de suministro" y "control empresarial". Ambos son determinantes para establecer las responsabilidades de las empresas matrices respecto de las filiales y para fijar otras obligaciones como las derivadas del desarrollo de la noción de diligencia debida en materia de derechos humanos.

Ciñéndonos al primer término, utilizado en el Documento de elementos que acoge claramente la terminología de la Organización Internacional del Trabajo, encontramos distintas definiciones. La OIT ha definido "cadena mundial de suministro" como toda organización transfronteriza de las actividades necesarias para producir bienes o servicios y llevarlos hasta los consumidores, sirviéndose de distintos insumos en las diversas fases de desarrollo, producción y entrega o prestación de dichos bienes y servicio[63]. En la cadena de suministro se incluyen por tanto los contratistas, subcontratistas o proveedores con quien la empresa matriz o las empresas que controla haya establecido una relación comercial. Esta definición incluye las operaciones de inversión extranjera directa (IED) efectuadas por las empresas multinacionales, tanto en filiales que les pertenecen en su totalidad como en empresas mixtas en las que la multinacional tiene la responsabilidad directa de la relación de trabajo[64].

60 UNITED NATIONS. *La responsabilidad de las empresas de respetar los derechos humanos*. Disponible en: <https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_sp.pdf>.

61 Hay que recordar que la nota al pie de la Resolución 26/9 utiliza el término "actividades operacionales", sin embargo, en el Documento de elementos se utilizó, de manera acertada, el concepto de "actividad empresarial", entendiendo que la misma tiene un carácter más amplio.

62 UNITED NATIONS. *Convención de las Naciones Unidas Contra la Corrupción*. New York, 2003. Disponible en: <https://www.unodc.org/pdf/corruption/publications_unodc_convention-s.pdf>.

63 OIT. El trabajo decente en las cadenas mundiales de suministro, Conferencia Internacional del Trabajo. *Informe IV*, 2016.

64 OIT. El trabajo decente en las cadenas mundiales de suministro, Conferencia Internacional del Trabajo. *Informe IV*, 2016.

Por su parte, las Directrices de la OCDE, versión de 2011, utilizan el concepto de "cadena de suministro" y señalan en su párrafo 17 que

> las relaciones en la cadena de suministro pueden tener formas diversas; por ejemplo, franquicias, contratos de licencia o subcontratación. Las propias entidades de la cadena de suministro, a menudo, son empresas multinacionales que ejercen sus actividades en o desde un país adherente a la Declaración y, por ello, también están cubiertas por las Directrices.

Finalmente es posible importante tener en cuenta la definición de "cadena de suministro" contenida en la Guía de responsabilidad social, ISO 26000:2010, que define la misma como la "secuencia de actividades o partes que proporcionan productos o servicios a la organización".

Los Principios Rectores no utilizan el concepto de "cadena de suministro" sino el de "cadena de valor", más amplio que el primero. La definición del término la encontramos en la Guía para la interpretación mencionada, que señala que:

> la cadena de valor de una empresa está constituida por las actividades que convierten los insumos en productos mediante la adición de valor. Incluye a las entidades con las que mantiene una relación empresarial directa o indirecta y que bien: a) proporcionan productos o servicios que contribuyen a los propios productos o servicios de la empresa; o b) reciben productos o servicios de la empresa.

Más allá de estas definiciones encontramos otras, en sede sindical o doctrinal. Por ejemplo, la Confederación Sindical de las Américas (CSA) utiliza el término "cadena global de producción" de la siguiente manera:

> conjunto de actividades desarrolladas desde la concepción de un producto hasta su uso final, incluyendo también los servicios de post-venta. Dentro de este concepto está la caracterización usual de las diversas fases del proceso productivo, que típicamente incluyen: obtención de insumos; investigación y desarrollo; la propia producción; distribución; etapas de marketing y servicios de post-venta[65].

En un sentido similar en amplitud se ha utilizado el concepto de Cadena de Valor, aplicándolo al "conjunto de fases productivas y de servicios necesarios para la producción de valor".

En opinión de Albarracín, esto implica recorrer desde la fase de financiación, de diseño industrial, de extracción de materias primas, de obtención de bienes primarios, de construcción, de fabricación, de logística y transporte, hasta la distribución comercial final e incluso los servicios posteriores al mismo acto de venta (reparación, atención al cliente, etc.)[66].

Otro de los conceptos fundamentales y de elevada complejidad es el de "control empresarial". Como ha podido observarse, el concepto aparece en la definición de "cadena de suministro" utilizada por la OIT; otras normas estatales, muy en particular la *Loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre* francesa, adoptada en 2017, han incorporado la noción de control como elemento fundamental para establecer la responsabilidad de las empresas matrices respecto de las actividades cometidas por aquellas a las que controla.

La normativa europea respecto de la transparencia que se le exige a determinadas empresas sobre información financiera y no financiera, proporciona un buen marco para encuadrar estos conceptos. Como es bien sabido, la legislación de la UE establece la obligación para determinadas grandes empresas, empresas de interés público con más de 500 empleados, de revelar determinada información sobre su manera de funcionar y gestionar determinados riegos sociales y ambientales, con el objetivo de permitir a las partes interesadas y a la sociedad en su conjunto la evaluación de su desempeño.

En concreto, la Directiva 2014/95/UE del Parlamento Europeo y del Consejo de 22 de octubre de 2014 por la que se modifica la Directiva 2013/34/UE en lo que respecta a la divulgación de información no finan-

65 CSA. Cadenas globales de producción y acción sindical. *Cartilla formativa*. 2017. Disponible en: <http://csa-csi.org/Include/ElectosFileStreaming.asp?FileId=4477>. Consultado el 10 jun. 2018.

66 Es útil también apuntar la tipología básica en la que se encuadran estas cadenas, diferenciándose entre aquellas dirigidas por el comprador y las dirigidas por el productor. En las primeras la empresa líder se centra en las funciones de proyecto y de comercialización dejando a las subcontratas los procesos de manufactura, bajo las condiciones estrictas del comprador; en este modelo se insertan las industrias de textil o calzado, todas intensivas en el uso de la mano de obra. Las cadenas lideradas por el productor son aquellas dirigidas por la empresa que controla la tecnología, que es el elemento fundamental del producto, que coordina una red de subcontratas, subsidiarias, etc. Vid. ALBARRACÍN, Daniel. La acción sindical en «distritos laborales» y «cadenas de valor»: una reflexión estratégica sobre experiencias sindicales concretas, sociología del trabajo. *Nueva Época*, n. 84, 2015. AZARHOUSHANG, Behzad et alt. *Cadenas de valor, subdesarrollo y estrategia sindical, boletín internacional de investigación sindical, trabajo decente en las cadenas mundiales de suministro*. Ginebra: Oficina Internacional del Trabajo, 2015. Disponible en: <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_433861.pdf>.

ciera e información sobre diversidad por parte de determinadas grandes empresas y determinados grupos, establece que, a efectos de mejorar la coherencia y la comparabilidad de la información no financiera divulgada en la Unión, las empresas antes mencionadas (unas 6000 en la UE)

> deben preparar un estado no financiero que contenga información relativa por lo menos a cuestiones medioambientales y sociales, así como relativas al personal, al respeto de los derechos humanos y a la lucha contra la corrupción y el soborno. Ese estado debe incluir una descripción de las políticas, resultados y riesgos vinculados a esas cuestiones y debe incluirse en el informe de gestión de la empresa de que se trate. El estado no financiero debe asimismo incluir información sobre los procedimientos de diligencia debida aplicados por la empresa, también en relación con sus cadenas de suministro y subcontratación, cuando sea pertinente y proporcionado, con el fin de detectar, prevenir y atenuar los efectos adversos existentes y potenciales.

El artículo 2 de la Directiva de 2013, base de la regulación, incluye, a efectos de delimitar el ámbito de aplicación de la norma, definiciones básicas como las siguientes:

- sociedad matriz: una sociedad que controla una o varias empresas filiales;

- empresa filial, una empresa controlada por una sociedad matriz, incluidas las empresas filiales de una empresa matriz de mayor jerarquía

El término "control" no se define en su articulado, sino en su considerando 31, donde se señala que

> el control se basará en la titularidad de una mayoría de los derechos de voto, pero también podrá existir en los casos en que existan acuerdos con accionistas o socios. En ciertas circunstancias, podrá ejercerse un control efectivo cuando la sociedad matriz sea titular de una proporción minoritaria de acciones o no sea titular de ninguna acción de la filial.

El complejo término de "control empresarial" se haya presente en otras normas de la UE a las que merece la pena atender. En concreto, el art. 3 de la Directiva 2009/38/CE del Parlamento Europeo y del Consejo de 6 de mayo de 2009 sobre la constitución de un comité de empresa europeo o de un procedimiento de información y consulta a los trabajadores en las empresas y grupos de empresas de dimensión comunitaria, incluye una detallada definición cuyo interés radica además en la larga génesis de la Directiva (más de 20 años de búsqueda del consenso) en la que participaron tanto actores sociales como empresas y Estados y en su probado funcionamiento, que proporciona una base sólida y aceptada de la definición de control. En este sentido, la Directiva establece que:

> Se entenderá por «empresa que ejerce el control», la empresa que pueda ejercer una influencia dominante en otra empresa («empresa controlada»), por ejemplo, por motivos de propiedad, participación financiera o estatutos o dependencia económica. Se presumirá, salvo prueba en contrario, que una empresa puede ejercer una influencia dominante sobre otra cuando dicha empresa, directa o indirectamente: posea la mayoría del capital suscrito de la empresa; disponga de la mayoría de los votos correspondientes a las acciones emitidas por la empresa, o pueda nombrar a más de la mitad de los miembros del consejo de administración, de dirección o de control de la empresa.

En opinión de quien suscribe, en la definición que se contenga en el IJV, debería incluirse una cláusula de cierre al estilo de la incluida en la Declaración de Multinacionales de la OCDE, indicando que, en todo caso, "se presumirá que una empresa puede ejercer una influencia dominante sobre otra cuando puede modificar de manera determinante las prácticas negativas de la entidad causante de la violación o abuso del derecho protegido"[67].

Por último, cabe recordar que siempre queda como última opción la técnica aplicada en la citada *Loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre* aprobada en 2017, que remite el concepto de control a lo dispuesto en el Código de Comercio francés, evitando así una nueva definición[68].

67 ORGANIZACIÓN PARA LA COOPERACIÓN Y EL DESARROLLO ECONÓMICO. *Líneas directrices de la OCDE para empresas multinacionales*: revisión 2011. Paris, 2011. Disponible en: <https://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>. párrafo 19. Es útil igualmente atender a la definición contenida en la Guía de responsabilidad social, ISO 26000:2010, apartado 2.19, de esfera de influencia, que se define como "ámbito/alcance de una relación política, contractual, económica o de otra índole, a través de la cual una organización (2.12) tiene la capacidad de afectar las decisiones o actividades de individuos u organizaciones".

68 Por todos sobre esta ley se remite a: SACHS, Tatiana. La loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation. *Revue de droit du travail*, n. 6, 2017. MOREAU, Marie-Ange. L'originalité de la loi française du 27 mars 2017 relative au devoir de vigilance dans les chaînes d'approvisionnement mondiales. *Droit social*, N. 10, 2017. HANNOUN, Charly. Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017. Droit Social, n. 10, 2017. CUZACQ, Nicolas. Commentaire des propositions de loi relatives au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. *Revue de droit du travail*, n. 4, 2014.

3.4. El acceso a la justicia y la responsabilidad penal, civil y administrativa.

Como es bien sabido, el acceso a mecanismos de reparación constituye el tercer pilar de los Principios Rectores sobre las Empresas y los Derechos Humanos. El Principio Fundacional 25 contiene la obligación de los Estados de tomar medidas apropiadas para garantizar, por las vías judiciales, administrativas, legislativas o de otro tipo que correspondan, que cuando se produzcan ese tipo de abusos en su territorio y/o jurisdicción los afectados puedan acceder a mecanismos de reparación eficaces. A continuación el Principio Operativo 26 se dirige a los mecanismos judiciales estatales, para mandatar a los Estados que actúen a efectos de asegurar la eficacia de los mismos y limitar los obstáculos legales, prácticos y de otros tipos que puedan conducir a una denegación del acceso a los mecanismos de reparación.

El tercer pilar en general y estos dos principios en particular están recibiendo un desarrollo muy desigual; la necesidad de impulsar su aplicación efectiva ha sido señalada por diversos organismos regionales e internacionales.

A modo de ejemplo, puede citarse el Informe del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, titulado "Mejorar la rendición de cuentas y el acceso a las reparaciones para las víctimas de violaciones de los derechos humanos relacionadas con actividades empresariales", (A/HRC/32/19) de 16 de mayo de 2016, donde se afirmó con total claridad que la rendición de cuentas y reparación de daños son, todavía, difíciles de conseguir en los casos de violaciones cometidas por empresas. De manera textual el informe afirma que:

> Las consecuencias de las actividades de las empresas sobre los derechos humanos dan lugar a la apertura de causas en muchas jurisdicciones, pero las demandas privadas suelen finalizar sin que se llegue a juicio y, en los casos en que se obtiene una reparación, a menudo esta no satisface la norma internacional en materia de reparación adecuada, efectiva y rápida del daño sufrido" […] "las personas que buscan valerse de mecanismos judiciales para obtener reparación se enfrentan a numerosos desafíos. Si bien estos desafíos varían según la jurisdicción, existen problemas persistentes, que son comunes a muchas jurisdicciones. Entre dichos problemas, cabe citar unos regímenes jurídicos fragmentarios, mal diseñados o incompletos; la falta de innovación en el ámbito jurídico; el desconocimiento del alcance y el funcionamiento de los regímenes; las complejidades estructurales en el seno de las empresas; los problemas a la hora de acceder a una financiación adecuada para reclamaciones de derecho privado; y la falta de medidas de cumplimiento. Todos estos problemas han contribuido a crear un sistema de recursos de derecho interno "desigual, imprevisible, a menudo ineficaz y frágil.

No se trata de afirmaciones aisladas, al contrario, el informe del Grupo de Trabajo de expertos sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas del CDH (A/72/162) de abril de 2017, afirmaba con claridad que "parece que la mayoría de los planes (nacionales de actuación) existentes no contienen suficientes medidas concretas para eliminar los obstáculos perfectamente documentados que impiden acceder a la reparación" [69]. En el Informe también se señala la necesidad de avanzar de manera conjunta hacia la consecución de mecanismos eficaces de reparación para las personas perjudicadas por las actividades empresariales.

Es útil remarcar que, en el ámbito europeo, también se han destacado las carencias actuales que lastran la efectividad del acceso a la justicia en el marco de actividades empresariales, pudiéndose destacar dos textos fundamentales, el primero del Consejo de Europa y el segundo de la Agencia Europea de Derechos Fundamentales (UE). El Consejo de Europa aprobó en marzo de 2016 la recomendación CM/Rec(2016)3 sobre los derechos humanos y las empresas, que incluyó las medidas que deberían adoptar los Estados miembros para garantizar que todas las personas tengan acceso a una reparación efectiva. Por su parte, la Agencia de los Derechos Fundamentales de la Unión Europea, ha publicado el informe "*Improving Access to Remedy in the Area of Business and Human Rights at the EU Level: Opinion of the European Union Agency for Fundamental Rights"* (2017). El contenido de ambos textos puede ser particularmente útil para la elaboración del futuro IJV.

Al igual que sucede con el resto de disposiciones, la base de análisis debe ser el Documento de elementos. En este texto, de manera coherente con la necesidad de desarrollar este tercer pilar, cuestión que puede identificarse con uno de los objetivos fundamentales del Instrumento Vinculante, se enfoca la cuestión del acceso

69 CONSEJO DE DERECHOS HUMANOS. *Informe del grupo de trabajo sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas*. 2017. Presentado de conformidad con las resoluciones 17/4 y 35/7 del el 18 de julio de 2017 (A/72/162)

a la justicia en una curiosa división en tres apartados, separando la cuestión de la responsabilidad jurídica, del acceso a la justicia y de la jurisdicción. Dicha separación añade complejidad al texto y parece aconsejable reubicar su contenido en dos grandes grupos de artículos; el primero sobre el acceso a la justicia y el segundo sobre la responsabilidad penal, civil y administrativa de las empresas y los mecanismos que deben implementar los Estados.

Respeto del acceso a la justicia, el Documento de elementos debe ser desarrollado de manera amplia, a efectos de establecer obligaciones a los Estados (o a las Partes si en el ámbito subjetivo se añaden las organizaciones de integración económica) para reducir los obstáculos que impidan a las víctimas de violaciones o abusos de derechos humanos concernidos por este instrumento tener acceso a los recursos efectivos. Entre otras cuestiones y de manera específica, atendiendo a la realidad de las víctimas, podría incluirse el derecho a la información de los recursos existentes, en un idioma que puedan entender; la mención expresa a la garantía de la compensación, reparación, restitución, rehabilitación, medidas de satisfacción, y no repetición, así como la reparación ambiental de las áreas afectadas, incluyendo los gastos respectivos; la inclusión de mecanismos específicos para la protección de los derechos humanos de los defensores y defensoras de derechos y la específica referencia a la posibilidad de que las organizaciones sociales o sindicales puedan actuar en nombre de las víctimas ante los tribunales contra las empresas, entre otras cuestiones.

Dentro del acceso a la justicia tiene un lugar preferente, por el debate que existe sobre la cuestión a nivel político y doctrinal, la inclusión de mecanismos de responsabilidad extraterritorial, con el objeto de abordar el conjunto de las actividades de las empresas, incluidas las realizadas por sus cadenas de suministro cuando se demuestre la conexión, utilizando el concepto de control que antes mencionábamos[70].

Se trata de una cuestión que está sometida a un debate creciente y que ha levantado reticencias en cada grupo de trabajo. En la tercera sesión, la delegación de Ecuador puso como ejemplo a utilizar en la redacción del IJV la normativa de la Unión Europea y muy en particular el artículo 4 del Reglamento Bruselas I[71] así como la interpretación que, respecto de este precepto (en realidad de su versión anterior, es decir, del artículo 2 del Convenio de Bruselas de 27 de septiembre de 1968 sobre la competencia judicial y la ejecución de resoluciones judiciales en materia civil y mercantil) ha realizado el Tribunal de Justicia de la UE. En este sentido, se recordó que la sentencia de 1 de marzo de 2005 del TJUE (asunto 281/02) señala en sus considerandos 38 y siguientes que el respeto del principio de seguridad jurídica constituye uno de los objetivos del Convenio de Bruselas y que la aplicación de la teoría del *forum non conveniens* deja un amplio margen de apreciación al juez que conoce del asunto para decidir si un foro extranjero es más adecuado para resolver el fondo del litigio, lo cual puede afectar a la previsibilidad de las reglas de competencia establecidas en el Convenio de Bruselas y, por consiguiente, al principio de seguridad jurídica. Así, es posible afirmar que el art. 4 del Reglamento Bruselas I permite la persecución de responsabilidad extraterritorial, siempre y cuando ésta se pueda imputar fehacientemente a la empresa matriz.

Esta interpretación ha sido usada en la ya conocida sentencia de la *England Court of Appeal*, de 13 de octubre de 2017, (Caso Dominic Liswaniso y otros contra Vedanta Resources y Konkola Copper Mines)[72].

Tampoco puede olvidarse que el propio Tribunal Internacional de Justicia, en su opinión consultiva de 9 de julio de 2014[73], relativa a las "Consecuencias jurídicas de la construcción del muro en el territorio palesti-

70 Sobre la cuestión de la extraterritorialidad se remite CABOT, Francisco Javier Zamora. Extraterritoriality: outstanding aspects. In: ZAMORA, Francisco Javier et al. (Ed.). *Implementing the U.N. guiding principles on business and human rights*. Geneva / Zurich: Schulthess Éditions Romandes, 2017. para una comparación entre los mecanismos de Estados Unidos y la Unión Europea se remite a: LIVEIRA, Carina Costa de. The debate on companies liability for international environmental damages: a comparison between the jurisdictional rules of the European Union and the United States. *Revista de Direito Internacional*, Brasília, v. 11, n. 1, p. 82-99, 2014.

71 En concreto el art. 4 del Reglamento Bruselas I establece lo siguiente: "1. Salvo lo dispuesto en el presente Reglamento, las personas domiciliadas en un Estado miembro estarán sometidas, sea cual sea su nacionalidad, a los órganos jurisdiccionales de dicho Estado. 2. A las personas que no tengan la nacionalidad del Estado miembro en que estén domiciliadas les serán de aplicación las normas de competencia judicial que se apliquen a los nacionales de dicho Estado miembro".

72 La sentencia puede consultarse en: Firm logo for VOLTERRA FIETTA. *Court of Appeal upholds decision that Zambian villagers can claim in the UK against a London-based mining company. 2018. Disponible en:* <https://www.lexology.com/library/detail.aspx?g=b8ce048f-9093-4812-8023-641f717e3829>.

73 La información sobre el caso puede encontrarse en: http://www.icj-cij.org/en/case/131

no ocupado", reiterada posteriormente en la Sentencia de 19 de diciembre de 2005, "asunto de las actividades armadas en el territorio del Congo (República Democrática del Congo c. Uganda), concluyó que los instrumentos de derechos humanos son aplicables, respecto de los actos realizados por el Estado en el ejercicio de su jurisdicción fuera de su territorio[74]. En este sentido, el Tribunal Internacional de Justicia ha reiterado que los Estados tienen la obligación de no permitir que su territorio sea utilizado para actos contrarios a los derechos de otros Estados y que, en aplicación de este principio, los Estados deben velar porque las actividades realizadas dentro de su jurisdicción o bajo su control no causen daños al medio ambiente de otros Estados o zonas que estén fuera de su jurisdicción[75], así como que están obligados a usar todos los medios a su disposición para evitar que actividades que tienen lugar en su territorio, o en cualquier área bajo su jurisdicción, causen un daño significativo al medio ambiente de otro Estado[76].

El Documento de Elementos de la Presidencia no incluye la palabra "extraterritorialidad". Sin embargo, uno de los propósitos que se establecen está claramente vinculado a las obligaciones territoriales, puesto que el texto incluye la voluntad de "reafirmar que las obligaciones de los Estados Partes en relación a la protección de los derechos humanos no terminan en sus fronteras territoriales". Además, en el apartado séptimo, dedicado a la jurisdicción, se indica la voluntad de adoptar un concepto "amplio" que permita evitar las limitaciones actuales derivadas de las fronteras territoriales.

El futuro IJV debería ajustar la distribución de las materias estableciendo, como se indicó anteriormente, una doble división. Por un lado, un artículo dedicado al acceso a la justicia, donde podría incluirse una cláusula respecto de la obligación de las partes del Instrumento de establecer mecanismos que aseguren que las empresas establecidas en su territorio podrán ser demandadas ante los tribunales estatales por las actividades que causen violaciones a los derechos humanos, independientemente del lugar donde se cometan y de que sean cometidas directamente por la matriz o por las empresas de la cadena de suministro que controla la matriz.

Por otro lado, y a modo de cláusula de cierre, el IJV podría contener una previsión específica respecto de la comisión de violaciones graves de derechos humanos. Una propuesta puede ser la siguiente "Las Partes de este Instrumento establecerán los mecanismos necesarios para que, en los supuestos de violaciones graves de derechos humanos, las empresas responsables puedan ser demandadas ante sus órganos jurisdiccionales independientemente del lugar de la comisión del delito o del lugar de establecimiento de la empresa".

Tras estas previsiones, dentro de un amplio apartado dedicado al acceso a la justicia, sería necesario incluir de manera separada los mecanismos específicos que deberían ser implementados por los estados para asegurar la responsabilidad penal, civil y administrativa de las empresas.

3.5. La relación entre los Acuerdos Marco Internacionales y el Instrumento Jurídicamente Vinculante.

A efectos de tratar la cuestión de los Acuerdo Marco Internacionales y su relación con el proceso de la Resolución 26/9 es necesario partir de una definición básica de los mismos, como, por ejemplo, la siguiente:

> los acuerdos marco internacionales son suscritos por las organizaciones sindicales internacionales o europeas y la dirección de las empresas multinacionales para establecer de manera conjunta una serie de normas y principios mínimos de coordinación en materia de relaciones laborales, basados normalmente en los derechos sociales fundamentales tal y como los define la OIT[77].

Las cláusulas de estos acuerdos están llamadas a desplegar efectos en todas las etapas de la cadena mundial de suministro, incluidas las personas que trabajan para los proveedores y contratistas. Se trata por tanto de un fruto del diálogo social o de la negociación entre capital y trabajo a nivel supra nacional, cuyo objeto es regular las relaciones de trabajo en el conjunto de las actividades de la empresa en cuestión y promover el respeto de los derechos sociales fundamentales.

74 Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, pp. 178-181, paras. 107- 113; ICJ. International Court of Justice. Judgment. *Case concerning armed activities on the territory of the Congo*. San Francisco, 2005. p. 243.

75 CORTE INTERNACIONAL DE JUSTIÇA. *Legalidad de la amenaza o el uso de armas nucleares*. São Francisco: CIJ, 1996.

76 CORTE INTERNACIONAL DE JUSTIÇA. *Caso de las plantas de celulosa sobre el Río Uruguay (Argentina Vs. Uruguay)*. São Francisco: CIJ, 2010.

77 SCHÖMANN, Isabelle et al. *Códigos de conducta y acuerdos marco internacionales*: nuevas formas de gobernanza a nivel de empresa. Bruselas: ETUI-REHS, 2008.

Como remarca Hadwiger[78], en la actualidad podemos distinguir cuatro elementos que caracterizan a los AMI: alcance mundial y referencia a la cadena de suministro; participación de las federaciones sindicales internacionales; inclusión de referencias a textos de la OIT sobre la materia y reconocimiento como mínimo de los derechos recogidos en los Convenios fundamentales del trabajo, normalmente a través del reconocimiento de la Declaración de 1998.

El diálogo entre el contenido de los AMI y los Principios rectores es creciente pero no exento de contradicciones. Siguiendo el estudio cuantitativo de Hadwier, sabemos que un 18% de los AMI contiene en la actualidad una mención a los Principios. A su vez, los Principios Rectores mencionan a los AMI en su numeral 30, que indica que:

> Las corporaciones industriales, las colectividades de múltiples partes interesadas y otras iniciativas de colaboración basadas en el respeto de las normas relativas a los derechos humanos deben garantizar la disponibilidad de mecanismos de reclamación eficaces.

Sin duda, la integración de una referencia a los AMI en el texto de los Principios rectores fue un paso adelante. Sin embargo, la relación establecida entre ambos conjuntos (acuerdos colectivos y Principios) tiene una serie de fallos que pueden afectar negativamente a los AMI y que deben ser corregidas en una futura norma internacional vinculante.

- El reconocimiento del espacio de negociación en el numeral 30 incluye una serie de cuestiones a modo de "contenido mínimo" en los AMI. Esto podría entenderse como algo positivo sino fuera porque en la negociación y aprobación de los Principios Rectores el tripartismo ha estado ausente. En otras palabras, la regulación de los AMI, de su contenido o incluso de su "legitimidad" no puede realizarse a espaldas de las confederaciones sindicales internacionales, las organizaciones de empresarios y de la OIT.

- Los Principios sitúan en igual nivel a los Códigos de Conducta, donde como hemos visto no participan los actores sociales, y a los AMI, lo cual no parece acorde con la promoción de la libertad sindical que, evidentemente, es uno de los derechos humanos más afectado por la acción de las ETN y sus cadenas.

- Los Principios mencionan las cadenas de valor en dos ocasiones, en el numeral 13 y en el 17. En el primero se detalla lo siguiente:

> la responsabilidad de respetar los derechos humanos exige que las empresas: a) Eviten que sus propias actividades provoquen o contribuyan a provocar consecuencias negativas sobre los derechos humanos y hagan frente a esas consecuencias cuando se produzcan; b) Traten de prevenir o mitigar las consecuencias negativas sobre los derechos humanos *directamente relacionadas* con operaciones, productos o servicios prestados por sus relaciones comerciales, incluso cuando no hayan contribuido a generarlos[79].

El comentario a este numeral es de fundamental importancia, ya que señala que, desde la perspectiva de estos Principios Rectores, las "actividades de una empresa incluyen tanto sus acciones como sus omisiones; y sus "relaciones comerciales" abarcan las relaciones con socios comerciales, entidades de su cadena de valor y cualquier otra entidad no estatal o estatal directamente relacionada con sus operaciones comerciales, productos o servicios". Por su parte, en el numeral 17, dedicado a la diligencia debida, se incluye un comentario que indica que: "Para las empresas que cuenten con numerosas entidades en sus cadenas de valor puede resultar demasiado difícil proceder con la diligencia debida en materia de derechos humanos a nivel de cada entidad. En tal caso, las empresas deben identificar las áreas generales que presenten mayor riesgo de consecuencias negativas sobre los derechos humanos…".

Como puede observarse, por un lado, la noción de cadena, en concreto a través de la noción de relación comercial, es más restrictiva que la que se plantea en diversos AMI; por otro, incluso con esta noción más restrictiva, el cumplimiento del principio fundamental de diligencia debida respecto de las entidades *directamente relacionadas* podría obviarse cuando "resulte demasiado difícil" identificar a las partes de la cadena, es decir, en la mayor parte de los casos de grandes ETN.

Así, es posible afirmar, además, que las disposiciones de los Principios Rectores sobre de la actuación de las empresas respecto de las entidades de su cadena de valor se sitúan por detrás de las previstas en diversos AMI, lo cual puede acabar provocando un retroceso en el contenido protector de los mismos.

Todo lo anterior aconseja tratar con atención la relación entre los AMI y el contenido del futuro instru-

78 HADWIGER, Felix. Global framework agreements: achieving decent work in global supply chains?. *International Journal of Labour Research*, v. 7, n. 1/2, 2015.

79 La cursiva es de la autora.

mento vinculante. Esta interrelación podría contribuir a solucionar una de las principales carencias de los AMI, como es, evidentemente, las dificultades para exigir a las empresas su cumplimiento y para dirimir las responsabilidades que acarrea su incumplimiento ante las jurisdicciones nacionales[80]. Sería por tanto aconsejable convertir el IJV en un camino para apoyar esta eficacia de los AMI, con una cláusula tipo que podría señalar lo siguiente: "Las Partes de este Instrumento deben alentar el diálogo social y la elaboración de Acuerdos Marco Globales entre organizaciones de trabajadores y empresarios, reconociendo el valor contractual recíprocamente vinculante de estos acuerdos y dispondrán en la medida de lo posible mecanismos e instrumentos para compeler mutuamente su eficacia".

3.6. Los "olvidos" del documento de elementos.

En último lugar, como tema transversal al Documento, es necesario destacar dos ausencias que deben solucionarse en el texto del Draft 0. La primera es una específica mención a las actividades empresariales en territorios en conflicto, la segunda es la integración del enfoque de género en el conjunto del Instrumento, tanto de manera transversal como con propuestas concretas.

Respecto de la primera de las cuestiones y a modo de ejemplo paradigmático, puede retomarse el contenido del Informe de la misión internacional independiente de investigación de las repercusiones de los asentamientos israelíes en los derechos civiles, políticos, económicos, sociales y culturales del pueblo palestino en todo el territorio palestino ocupado, incluida Jerusalén Oriental (A/HRC/22/63) de 2013. En concreto, su apartado 96 señaló que la información recabada por la misión evidenciaba que las empresas comerciales han permitido, facilitado y aprovechado, directa e indirectamente, la construcción y el crecimiento de los asentamientos. La información no sólo demostraba la vulneración de los derechos de los trabajadores palestinos sino la existencia de una serie de actividades que plantean especial preocupación en materia de derechos humanos[81]. Ante esta situación el Informe contiene una serie de recomendaciones directas para las empresas y los Estados[82], que se conjugan con el Principio 7 de los Principios Rectores, donde se establecen medidas para fomentar el respeto de los derechos humanos por las empresas en zonas afectadas por conflictos. Ambos conjuntos de medidas podrían incorporarse al texto del IJV.

La otra carencia, señalada por distintas organizaciones en el debate y las contribuciones en la tercera sesión de 2017, es la falta de un concreto desarrollo del enfoque de género. Como marco general es importante tener en cuenta la advertencia realizada por Meyersfeld[83], en su excelente contribución acerca de cómo incluir el enfoque género en el debate respecto de las actividades empresariales y derechos humanos. La autora afirma, de manera acertada, que el hecho de que los Principios

80 Sobre esta cuestión, vid. NIETO ROJAS, Patricia. Los acuerdos marco internacionales como una manifestación de la negociación colectiva en red. *Trabajo y Derecho*, n. 26, 1 feb. 2017.

81 El informe cita expresamente las siguientes actividades: el suministro de equipos y materiales que facilitan la construcción y expansión de los asentamientos y el muro, así como de las infraestructuras asociadas; el suministro de equipos de vigilancia e identificación para los asentamientos, el muro y los puestos de control directamente vinculados a los asentamientos; el suministro de equipos para la demolición de viviendas y propiedades y la destrucción de explotaciones agrícolas, invernaderos, olivares y cultivos; el suministro de servicios de seguridad, equipos y materiales a las empresas que operan en los asentamientos; la prestación de servicios de apoyo al mantenimiento y existencia de los asentamientos, como el transporte; las operaciones bancarias y financieras que ayudan a desarrollar, expandir o mantener los asentamientos y sus actividades, incluidos los créditos a la vivienda y el desarrollo de empresas; la utilización de recursos naturales, en particular agua y tierras, para fines empresariales; la contaminación y el vertido o la transferencia de desechos a aldeas palestinas; la limitación de los mercados financieros y económicos palestinos, así como las prácticas que colocan a las empresas palestinas en situación de desventaja, entre otras cosas mediante restricciones de la circulación y limitaciones administrativas y jurídicas; la utilización de los beneficios y reinversiones de las empresas de propiedad total o parcial de los colonos para el desarrollo, la expansión y el mantenimiento de los asentamientos

82 Las medidas son las siguientes:
- Las empresas privadas deben evaluar los efectos que tienen sus actividades en los derechos humanos y tomar todas las medidas necesarias, entre otras cosas poniendo fin a sus intereses comerciales en los asentamientos, para asegurarse de que no tengan un efecto perjudicial en los derechos humanos del pueblo palestino, de conformidad con el derecho internacional y con los Principios Rectores sobre las empresas y los derechos humanos.
- La misión exhorta a todos los Estados miembros a que adopten medidas apropiadas para velar por que las empresas comerciales domiciliadas en su territorio y/o bajo su jurisdicción, incluidas las que sean de su propiedad o estén bajo su control, que realicen actividades en los asentamientos o relacionadas con ellos respeten los derechos humanos en todas sus operaciones. La misión recomienda que el Grupo de Trabajo sobre las Empresas y los Derechos Humanos se ocupe de esta cuestión.

83 MEYERSFELD, Bonita. Business, human rights and gender: a legal approach to external and internal considerations. In: DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business*: beyond the corporate responsibility to respect?. Cambridge: Cambridge University Press, 2013.

Rectores incluyan determinadas referencias al género no implica que esta perspectiva esté integrada de manera real en el contenido de los mismos. En este sentido, Meyersfeld afirma que el análisis de género no descansa en la creación de un universo paralelo de consideración y políticas sino en un análisis real de cómo los roles y las expectativas diferenciadas según el género alimentan la discriminación y el daño, un daño que puede ser exacerbado por determinadas conductas empresariales, pero que también puede ser susceptible de mejoras derivadas de prácticas corporativas no sexistas[84]. En concreto, la autora propone que el enfoque de género respecto de las actividades empresariales en relación con los derechos humanos se plasme en tres esferas, incluyendo disposiciones específicas: la esfera de actuación *ad intra* de las empresas, es decir su papel como empleadoras y los derechos de las mujeres en el trabajo; la esfera de los impactos externos de las actividades de las empresas y la realidad del sector informal.

Si tomamos como punto de partida el enfoque de Meyersfeld, la crítica al Documento de elementos es evidente. Es cierto que el Documento establece entre sus principios el reconocimiento de "la protección especial de las víctimas y, en particular, de los pueblos indígenas; mujeres; mujeres jóvenes; niñas y niños; personas con discapacidad; refugiados o cualquier grupo considerado vulnerable de acuerdo con las normas nacionales, regionales o internacionales aplicables". Posteriormente, una previsión similar se contiene en el apartado relativo al acceso a la justicia. Sin embargo, no existen medidas concretas diferenciadas de las genéricas y orientadas específicamente a la solución de los problemas especiales que se derivan para las mujeres de las actividades empresariales.

Esta crítica se puso de manifiesto durante los debates del tercer grupo, en varias contribuciones escritas. Aunque de la lectura del Documento no se desprende una inclusión de las mujeres, per se, en la categoría de "grupo vulnerable"; organizaciones como el Asia Pacific Forum on Women, Land and Development[85] (APWLD, 2017) han afirmando que el Documento "incluye a las mujeres con otros grupos marginales como una categoría necesitada de una protección especial en lugar de situarse como un paso fundamental hacia la consecución de la igualdad sustantiva y el complete disfrute de los derechos humanos de las mujeres".

Más allá de esta crítica, diversas organizaciones han incluido entre sus recomendaciones medidas concretas para integrar una serie de previsiones específicas que den cuenta de la especial afectación que las actividades de las empresas transnacionales provocan en los derechos humanos de las mujeres y niñas y en particular cuando se trata de indígenas o pequeñas agricultoras y en concreto en relación con su rol como responsables de los cuidados. Como ejemplo de esta especial afectación cabe recurrir de nuevo al texto de Meyersfeld y en sentido similar a la contribución del Centre for International Environmental Law[86] que señalan como la atribución de las tareas de cuidados a las mujeres (como puede ser la provisión de agua, el cuidado de niños y adultos mayores, etc.) implica un impacto mayor en los casos de pérdida del acceso a la tierra o recursos naturales que puede derivarse de las actividades de una empresa extractiva que provoquen un desastre natural (el caso Chevron/Texaco es un ejemplo privilegiado de esto). Así las cosas, frente a esta situación, no cabe un reconocimiento genérico al derecho a la compensación, por ejemplo, porque un enfoque de género neutro aplicado sobre una situación de base discriminatoria no hace más que incrementar la discriminación. Por añadidura, en muchas ocasiones, la situación de particular vulnerabilidad se combina con situaciones de violencia sexual y física vinculadas al uso de fuerzas de seguridad por las empresas, que debe ser igualmente tratada de manera específica.

Como propone el documento del ESCR, el texto final del IJV debe reconocer el liderazgo y las experiencias vitales de las mujeres como un componente integral para la creación de instituciones de derechos humanos, mecanismos, legislaciones, políticas y prácticas relativas

84 Vid un análisis similar en el document: GRONOW, Jane. *Submission to the UN Working Group on Human Rights and Transnational Corporations and other Business Enterprises by the Gender, Business and Human Rights Reference Group*. 2018. Disponible en: <https://www.ohchr.org/Documents/Issues/TransCorporations/Submissions/MultiStakeholder/GenderBusinessAndHumanRightsReferenceGroup.pdf>. Consultado el: 10 jun. 2018.

85 APWLD submission on the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Thailand: Asia Pacific Forum On Women, Land and Development, 2017. Disponible en: <http://apwld.org/apwld-submission-on-the-elements-for-the-draft-legally-binding-instrument-on-transnational-corporations-and-other-business-enterprises-with-respect-to-human-rights/>.

86 CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW. *Written contribution, third session OEIGWG*. 2018. Disponible en: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

a las actividades corporativas[87].

Entre las medidas que diferentes organizaciones han recomendado para ser incluidas en el Instrumento podemos destacar las siguientes[88]:

Los Estados tienen la obligación de crear un ambiente que permita la completa, activa e igual participación y liderazgo de mujeres en el desarrollo de políticas y legislación relacionada con la responsabilidad de las corporaciones.

Adoptar normas vinculantes que exijan estudios de impacto de género previos al inicio de las actividades; estudios de impacto ambiental, igualmente previos, que incorporen un análisis de género; políticas de diligencia debida en derechos humanos que incluyan un análisis de género.

Asegurar el acceso de las mujeres a la justicia y en particular a la efectiva reparación en situaciones de violaciones cometidas por empresas, ya sea en su condición de trabajadoras o se derive de las actividades empresariales. Los estados deben identificar y solucionar los obstáculos específicos existentes vinculados con el género para acceder a mecanismos de acceso a la justicia y reparación, con especial atención a las mujeres víctimas de violencia de género.

Los Estados deben adoptar medidas legislativas que exijan una participación activa de las mujeres y una presencia equilibrada en relación con los hombres en toda consulta relevante respecto de las actividades empresariales.

Además de las medidas orientadas a los Estados, sería necesario que en las obligaciones directas a las empresas se incluyeran previsiones específicas tanto en relación con la discriminación en el lugar de trabajo como en la obligación de realizar un análisis del impacto de genero de las actividades allí donde se realicen, incluyendo las desarrolladas por las cadenas de suministro, cuya definición abordamos en los siguientes apartados.

87 CIDSE et al. *Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. 2018. Disponible en: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/CallforComments/CIDSE.pdf>.

88 Se han combinado las propuestas de las distintas organizaciones mencionadas en este apartado.

4. Conclusiones

Como ya se comentó al inicio del presente texto los temas elegidos para ser desarrollados en los siguientes epígrafes no agotan, evidentemente, la discusión y las propuestas en torno al contenido del Documento de Elementos y del futuro Instrumento Jurídicamente Vinculante (IJV). La finalidad, enunciada en la introducción, no era en absoluto tratar todas las aristas, algo sin duda imposible, sino aportar alternativas de cara a la discusión "sustantiva" que debe darse en la cuarta sesión de trabajo del OEIGWG.

Sin duda, como es evidente, la cuestión jurídica en este proceso es trascendida y traspasada en cada uno de los artículos del futuro tratado por un sinfín de aristas políticas que además varían de sesión en sesión. Así, el cambio en los ministerios que se ocupan del tema, como ha ocurrido tanto en Sudáfrica como en Ecuador en los últimos meses; el reposicionamiento de las alianzas geopolíticas regionales e internacionales, como puede suceder dentro del GRULAG; la presión creciente de Estados Unidos hacia países pequeños o, en sentido inverso, la actividad creciente de la sociedad civil y otros actores como el Parlamento Europeo sobre los estados que componen la Unión, incluso el más reciente cambio en el Gobierno español, pueden ser factores que marque desde el inicio el contenido de la cuarta sesión.

Desde la aprobación de la Resolución 26/9 los actores fundamentales del proceso y la sociedad civil sabían que el camino iba a estar plagado de dificultades, que no se trataba de la negociación de un tratado que fuera a generar consensos y que debían ganar tanto aliados como presionar para conseguir no-oponentes. El cambio en el panorama geopolítico de América Latina, que en un momento parecía favorable o neutro en su mayoría, podría afectar de lleno al proceso. Las posibilidades son múltiples, mantener la presidencia en Ecuador, si el nuevo gobierno así lo sostiene, o apostar por un cambio de batuta en la conducción del proceso, bien manteniéndolo en un país del Sur Global, como Sudáfrica bien haciendo una apuesta arriesgada y llamando a algún estado miembro de la UE que sea capaz de, con la ayuda de la presión del Parlamento Europeo y de la sociedad civil, provocar un cambio en la postura mantenida hasta el momento y avanzar, al menos, en una no-paralización del proceso.

Llegados a este punto, y ante la tesitura de, o bien

cerrar las negociaciones (opción que sin duda va a seguir intentando Estados Unidos en los próximos meses) o bien adelgazar el contenido del tratado para convertirlo en un mecanismo solo aplicable a las violaciones graves contra los derechos humanos, como han apuntado algunas de las figuras más relevantes de la negociación, tal vez sea el momento de hacer una apuesta arriesgada. En este sentido podría incluso interpelarse a estados que están dando un giro progresista en el seno de la UE, y a la propia UE, utilizando de nuevo el argumento de la necesidad de conseguir un "level playing field" que extienda las exigencias que ya se plasman respecto de las empresas europeas, y en particular de las francesas, al conjunto de los actores económicos.

El cómo se llegue a la cuarta sesión, el grado de consenso respecto del programa de trabajo, el respeto de los tiempos pactados para la publicación del instrumento, los mensajes políticos que se lancen desde la Presidencia del grupo y la presión de la sociedad civil, sindicatos y academia, respecto de la necesidad de continuar el debate, va a ser crucial para la continuidad de un proceso, el proceso del *Binding*, que sin duda ya ha marcado un antes y un después en el largo debate respecto de las empresas (transnacionales) y los derechos humanos.

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Access to remedies and the emerging ethical dilemmas: changing contours within the business-human rights debate

Acesso a remédios e os dilemas éticos emergentes: mudando os contornos dentro do debate sobre negócios e direitos humanos

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Acesso a remédios e os dilemas éticos emergentes: mudando os contornos dentro do debate sobre negócios e direitos humanos

Justin Jos**

Abstract

The objective of this paper is to contest the inclusion of human rights waivers in settlement agreements and argue that such agreements create barriers to access to justice especially in cases involving corporate human rights abuse. Human rights waivers force the survivors of corporate wrongdoings to waive their right to access judicial remedies and extinguish the legal liability of corporations in exchange for monetary compensation. Settlement agreements, which use human rights waivers, are widely touted as the desired remedial norm in cases of corporate wrongdoings and has been continuously employed by corporate actors. Firstly, to tackle this contentious issue the paper will explore settlement agreements from an ethical perspective. Secondly, it will argue that such human rights waivers create compulsive situations because of which survivors are denied their human rights. The article will take three different perspectives on how these compulsive situations can be counter-theorized namely through: asserting the right to life, challenging settlements through public policy clauses and securing ethical remedies within the Guiding Principles. The conclusion of the paper is that the nature of remedies needs to be embedded in a more ethical framework to address complex business-human rights issues. The originality of the research lies in the fact that the consequences of using waivers and its effect on the access to remedies remains unexplored within legal scholarship thereby meriting this research.

Keywords: Waivers. Human Rights. Guiding Principles. Business. Corporations.

Resumo

O objetivo deste artigo é contestar a inclusão de renúncias de direitos humanos em acordos de solução de controvérsias e argumentar que tais acordos criam barreiras ao acesso à justiça, especialmente em casos que envolvem abuso corporativo de direitos humanos. As renúncias aos direitos humanos forçam os sobreviventes de irregularidades corporativas a renunciarem ao seu direito de acesso a recursos judiciais e a extinguir a responsa-

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bilidade legal das empresas em troca de compensação monetária. Os acordos, que usam renúncias a direitos humanos, são amplamente considerados como a norma corretiva desejada em casos de irregularidades corporativas e têm sido continuamente empregados por atores corporativos. Em primeiro lugar, para lidar com essa questão contenciosa, o artigo explorará os acordos de solução de pagamento de uma perspectiva ética. Em segundo lugar, argumentará que tais renúncias aos direitos humanos criam situações compulsivas por causa das quais os sobreviventes são privados de seus direitos humanos. O artigo terá três perspectivas diferentes sobre como essas situações compulsivas podem ser contra-teorizadas, a saber: afirmando o direito à vida, desafiando acordos por meio de cláusulas de política pública e assegurando remédios éticos dentro dos Princípios Orientadores. A conclusão do artigo é que a natureza dos remédios precisa ser incorporada em uma estrutura mais ética para abordar questões complexas de direitos humanos de negócios. A originalidade da pesquisa reside no fato de que as conseqüências do uso de renúncias e seus efeitos sobre o acesso a remédios permanecem inexploradas no âmbito acadêmico legal merecendo, portanto, esta pesquisa.

Palavras-chave: Renúncias Direitos humanos. Princípios Orientadores. Negócios. Corporações.

1. Introduction

The recently concluded 2017 Business and Human Rights Forum was centred around the theme 'Realizing Access to Effective Remedy'. The Concept Note of the Forum clearly mentioned the need to examine 'systematic flaws' and 'shortcomings' within the current structure of access to remedies while revising 'emerging good practices and innovations'.[1] The imminent need to focus on access to remedies reflects the historicity of neglect in the development of the Third Pillar. Part of this neglect can *arguably* be blamed on the post-cold war world which resulted in the emergence of a neo-liberal economic order with globalization promoted as the elixir for under-industrialized countries to achieve 'prosperity'. This clearly has not worked out favourably for all the stakeholders involved in this 'prosperity' project. The rise of Transnational Corporations (TNCs) throughout this period generated much debate on how corporations can be held accountable for wrongdoings. Settlement agreements appeared to be one of the most common approaches used by corporations to avoid risking brand reputation and quickly settling survivors'[2] claims in a post-disaster situation. In the infamous Bhopal Gas Tragedy case, the State through passing of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 arrogated to itself the 'exclusive right to represent' the survivors and subsequently, arrived at a settlement agreement to the tune of $470 million.[3] Whenever corporations are involved in human rights violations, such settlement agreements raise serious ethical questions regarding how we perceive access to justice and more specifically, the evolving nature of remedies while providing an insight into the shifting idea of justice. Historically, the Universal Declaration of Human Rights (UDHR) seemed inadequate to establish norms regulating corporations and any obligation to bind TNCs emanating out of UDHR would seem to be placed on the most "uncertain grounds" and such duties, at best, would be called "ethical duties".[4]

The arrival of United Nations Guiding Principles on Business and Human Rights[5] seem to be a pyrrhic victory as it seems to have not done enough to sponsor ideas on an ethical code for settlement agreements. This compels us to investigate further on the ethics of settlement agreements which include waiving of rights in the context of corporate wrongdoings. A broader auxiliary food for thought which will emanate out of this paper will be 'how do we understand the social responsibility of businesses?'. Friedman discarded any conversation on social responsibilities of business for their "analytical looseness and lack of rigor".[6] On the other hand,

1 OHCHR | 2017 Forum on Business and Human Rights.

2 PAPENDICK, Michael; BOHNER, Gerd. Passive victim: strong survivor? Perceived meaning of labels applied to women who were raped. *PLoS ONE*, v. 12, n. 5, 2017. The research highlights how English-speaking participants deemed survivor as a more psychologically stable term than victim in cases of sexual assault.

3 CROSSETTE, Barbara. India Supreme Court Backs Carbide's Bhopal Settlement. *The New York Times*, 1989.; *See* The Bhopal Gas Leak Disaster (Processing Of Claims) Act.

4 KINLEY, David; TADAKI, Junko. From talk to walk: the emergence of human rights responsibilities for corporations at international law. *Virginia Journal of International Law*, v. 44, n. 4, p. 931, 2004.

5 UNITED NATIONS. *Guiding principles on business and human rights:* implementing the United Nations "Protect, Respect and Remedy" framework., [s.l.]: Human Rights Council, 2011.

6 FRIEDMAN, Milton. The social responsibility of business is to increase its profits. In: ZIMMERLI, Walther Ch; HOLZINGER, Markus; RICHTER, Klaus (Org.). Corporate ethics and corporate

Chomsky questions the presuppositions of the legitimacy of corporate power and forces us to rethink the role of corporations within society.[7] A purely economic analysis of corporate social responsibility norms suggests that it would work better in monopolistic markets and any deviation from the goal of profit maximization can lead to shrinking of firms.[8] The nature of corporations and the debate surrounding such issues, like one on social responsibility, has also prompted strong support for governmental regulation.[9] Therefore, the cause and reaction surrounding the emergence of the role of corporations remain hotly contested.

This paper broadly focuses on the ethical dimensions of settlement agreements. More specifically, it aims to critically investigate the ethics behind settlement agreements and re-read it as an attempt to stifle the right to access to remedies in cases of violation of human rights by TNCs. This paper will form the basis of a larger debate on the increasing role of private remedies. Part 2 of the paper will firstly try to establish the role of human rights waivers in legal theory which forms the essential part of settlement agreements. Two of the major theories on function of rights i.e., Will Theory and Interest Theory will be explored ostensibly to set the philosophical foundations of the debate. The tensions and contradictions of theorizing the philosophical debates within the contemporary situation involving corporations as stakeholders will be traversed. An example of the rights of Qatari construction workers and how the law promotes waiver of fundamental rights like right to sue will highlight the tensions within the ethical and positivist perspectives regarding operations of human rights. Part 3 will make a case against settlements involving waiver of human rights from three different perspectives namely, right to life, public policy clauses and the role of the Guiding Principles. These three perspectives will be wearing the lens of ethical and normative standards and contribute to the wider argument of ethical objections to settlement agreements as a mode of creating compulsions and limitations to the rights of the survivors.

2. Locating human rights waivers in legal theory

A need to locate human rights waivers within legal theory remains necessary to lay the groundwork within legal theory. This can be achieved through exploring the functionality of rights and how they interact in the context of human rights waivers. To understand the issue further a brief introduction of the theories regarding functionality of rights will be explained along with its critique. The tensions try to further expand on the issue of survivor autonomy considering the universality and inalienability of the nature of human rights. These debates, by no means exhaustive, will be further contextualized through examples of migrant workers in Qatar and how their rights under international law remain suppressed because of the use of waivers endorsed by the Qatari Constitution. To achieve more effective remedies, it is important that the remedies remain ethical in the first place by not allowing human rights waivers.

2.1. Will and Interest Theory

Not much has been written about human right waivers in general but there has always been contentious scholarly debate surrounding the nature and function of rights. This section will endeavour to understand settlement agreements through the prism of functional approach towards rights and briefly contextualize it in the realm of corporate wrongdoings. To reflect further on this, we first need to revisit the two major theories on the function of rights: Will theory and Interest theory. Will theorist assert that you have a right to X if and only if you can claim the right to X against others and have the power to waive or enforce others' duties regarding X. For example, if X owns a laptop, X becomes a "small-scale sovereign"[10] over the relevant duties of

governance. Berlin; Heidelberg: Springer Berlin Heidelberg, 2007. p. 173-178.

7 CHOMSKY, Noam. *U. S. Defense and Corporate Social Responsibility?* Noam Chomsky interviewed by an anonymous interviewer. Disponível em: <https://chomsky.info/19810408/>. Acesso em: 2 maio 2018.

8 POSNER, R. A. *Economic analysis of law*. 9. ed. New York: Wolters Kluwer Law & Business, 2014. p. 582.

9 STEPHENS, Beth. The amorality of profit: transnational corporations and human rights Stefan A. Riesenfeld Symposium 2001. *Berkeley Journal of International Law*, v. 20, n. 1, p. 45, 2002, p. 82. Stephens traces the origins of corporations and provides a detailed analysis of the rise of corporations starting from the fifteenth century and explores the nature of profit maximization of most corporations. While advocating for state regulation of corporations she finds that there is an "unwillingness to accept social obligations as part of the business ethics".

10 HART, H. L. A. *Legal rights:* essays on Bentham. Oxford: Ox-

others as X can either allow others to touch her laptop or not, at her own discretion. Interest theorists disagree with this position. They argue that the function of a right is to further the right-holder's interest. In plain terms, X has a right to something means that it is in X's interest or benefit to have that right which is a sufficient reason, other things being equal, for holding someone else to be under duty.[11] For example, Raz points out that a journalist's interest in maintaining confidentiality of their sources is valued because of its usefulness to the public at large.[12] These two theories are not exhaustive in itself but there are many variations. I am only providing a brief overview of the two theories as preliminary delineations to the reader to formulate a philosophical basis for further discussion.

2.1.1. Critiquing the theories: in brief

Since we have now established the two theories, we can move further with critiquing the theories and see how human rights waivers in settlement agreements fall within a grey area of these theories. The major criticism of the Will theory has been the implications of the theory on 'marginal cases'[13]; human beings who are momentarily or eternally indisposed of taking rational decisions in an independent manner. This includes schizophrenics, mentally challenged people or individuals in permanent comatose condition. MacCormick also argued that the will theory does not accommodate children's rights because children "lack the normative power to enforce or waiver their rights"[14] and proposes a "modified form of interest theory"[15] while rejecting will theory. Similarly, the interest theory is quite rooted in pure human self-interests which seems to be in contradiction to universal moral claims. For example, if freedom is understood as a basic universal moral claim then freedom cannot be constitutive to human interests as it would be contradiction.

The greater problem emerges when we try to locate human rights within these two theories. These two theories are normative human rights theories which have tried to define the philosophical underpinnings of the doctrine of human rights. I will now highlight the tension between human rights waiver clauses in settlement agreement and test it with these two theories.

2.2. Tensions

The survivors of human rights violations are generally not able to exercise their right to remedies and are curtailed from availing other remedies through settlement of cases which forms the core of the tension. The Preamble to the Universal Declaration of Human Rights declares Human Rights to be "equal and inalienable rights of all members of the human family".[16] The Vienna Declaration and Programme of Action, explicitly stated that "the universal nature of these rights and freedoms is beyond question".[17] Inalienable is defined as "Not able to be taken away or given up without consent of the possessor"[18] and more generally as "Not assignable or transferable".[19] Human rights are inalienable because you do not possess the power to waive others' duties with respect to your primary human rights. For example, the inalienable right to be free from slavery means that you cannot sell yourself into slavery or lack the power to waive the duty on someone else to not enslave you. Will theory cannot accommodate the inalienable character of human rights because under this theory unwaivable rights do not exist. There cannot be any right over which the right-holder has no control. Therefore, if a survivor's human rights were violated by corporations then she cannot, under will theory, waive her human rights, even in exchange of any monetary compensation. Any waiver will deny autonomy to the survivor regarding her authority over her rights. This theory reveals the connection between "rights and nor-

ford University Press, 1982. p. 183.

11 RAZ, Joseph. *The morality of freedom*. Oxford: Oxford University Press, 1988. Raz argues that "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well□ being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."

12 RAZ, Joseph. *The morality of freedom*. Oxford: Oxford University Press, 1988. p. 179.

13 IEP. *Human rights*. Internet Encyclopedia of Philosophy. Disponível em: <https://www.iep.utm.edu/hum-rts/#SH4c>. Acesso em: 27 abr. 2018.

14 MACCORMICK, Neil. Children's rights: a test-case for theories of right. *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, v. 62, n. 3, p. 305-317, 1976.

15 MACCORMICK, Neil. Children's rights: a test-case for theories of right. *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, v. 62, n. 3, p. 305-317, 1976.

16 Universal Declaration of Human Rights.

17 Vienna Declaration and Programme of Action.

18 BLACKWELL, Amy Hackney. *The essential law dictionary*. Naperville, Ill: Sourcebooks, 2008. v. 1.

19 GARNER, Bryan A.; BLACK, Henry Campbell. *Black's law dictionary*. [s.l.: s.n.], 2014.

mative control."[20] In case of corporate wrongdoings, the autonomy of the survivor is central to achieving justice because access to remedy posits that survivor cannot be extricated from her right to pursue all the available remedies without being pressurised into accepting a settlement agreement. The ethical framework is directly linked to the inalienability of human rights of the survivor of corporate wrongdoings.

For this difficulty, human rights are rooted and granted to be understood in the Interest model. Interest model would tackle the question of inalienability through asserting that human rights protect "sufficient interests" hence they remain inalienable. For example, if a slave labourer can get a higher standard of well-being by waiving away her right not to be enslaved and surrenders herself to the local lord then interest theory would allow one to waive her human right because it is in the labourer's interest.[21] The goal of promoting one's well-being is achieved through violation of human rights. Going by the interest theory or more specifically, the instrumentalist model of justification, the survivor of corporate wrongdoings would be better off accepting settlement agreements as it would advance some of the weighty interests. This also foments tensions with the "universality" of human rights. If human rights are considered as universal, then they cannot be violated at any cost and are available to all human being without any prejudice on the grounds of sex, creed, religion, colour, sexuality etc. Going back to the previous example of a slave labourer, if an individual waives away her right not to be enslaved then it only leads to the denial of the normative character of the "universality" of human rights.[22] It is also not possible to consider human rights as mere positive rights or deny human rights to be inalienable or universal. Both these do not seem very possible explanations for understanding the functional approaches towards human rights. The survivor of a corporate wrongdoing as a right-holder remains floating in an undefined territory within the sea of theoretical framework of functionality of rights. Zylberman argues that Kant's juridical idea of human rights having *a priori right* status offers adequate solution to the current dilemma. He argues that "human rights function as constitutive conditions of any claim of rights".[23] I shall not expand on the possible theoretical solutions, but this part establishes the existing theoretical dilemmas towards understanding the functionality of rights and how they challenge existing understanding of inalienability and universality. The following section will further apply the theoretical challenges in real life problems regarding business and human rights.

2.3. Contextualising the theories: curious case of qatari workers vis-à-vis commercial contracts

The human rights abuse of the construction workers in Qatar has been a major issue, especially in wake of Qatar's bid to host the FIFA World Cup 2022.[24] Rights violation of migrant workers, who constitute an overwhelming majority in the construction sector, by Qatari construction companies is no hidden issue. Settlement agreements remain the widely practised method of resolving disputes with aggrieved parties.[25] The Permanent Constitution of Qatar, which was ratified in 2004, has incorporated the right of litigation as "inviolable" under Article 135.[26] Article 403 of the Civil Code[27] mentions that any claim for personal rights is statutorily time barred to 15 years. Further, Article 418 of the Code prohibit variation in the statutory prescription periods.[28] Many settlement agreements include

20 WENAR, Leif. Rights. In: ZALTA, Edward N. (Org.). *The Stanford encyclopedia of philosophy*. Stanford: Metaphysics Research Lab, Stanford University, 2015.

21 ZYLBERMAN, Ariel. Kant's juridical idea of human rights. In: MALIKS, Reidar; FØLLESDAL, Andreas (Org.). *Kantian theory and human rights*. New York: Routledge, 2013. p. 31.

22 The normative characteristic of human rights as "Universal" has been contested and the changing positions of global political power and increasing sense of cultural relativism of established norms within the realpolitik reminds us of the same. See, DONNELLY, Jack. The relative universality of human rights. *Human Rights Quarterly*, v. 29, n. 2, p. 281-306, 2007.

23 ZYLBERMAN, Ariel. Kant's juridical idea of human rights. In: MALIKS, Reidar; FØLLESDAL, Andreas (Org.). *Kantian theory and human rights*. New York: Routledge, 2013. p. 28, 36 et. seq.

24 BOOTH, Robert. Qatar World Cup construction "will leave 4,000 migrant workers dead". *The Guardian*, 2013.

25 MCDONALD, Pamela. *How enforceable are settlement agreement waivers?*. ConstructionWeekOnline.com. Disponível em: <http://www.constructionweekonline.com/article-43316-how-enforceable-are-settlement-agreement-waivers/>. Acesso em: 30 abr. 2018.

26 The Permanent Constitution of the State of Qatar, 2004. Article 135 states that 'The right of litigation is inviolable, and it shall be guaranteed to all people. The law shall specify the procedures and manner of exercising this right.'

27 Regarding Promulgating the Civil Code. The Article states that, "The claim of any personal right shall prescribe after the lapse of a period of fifteen years, except where another period is provided for either by law or by the events described in the following Articles."

28 Regarding Promulgating the Civil Code. Article 418 of the Civil Code, which states that "Prescription may not be waived before the right thereto is established. The period for prescription shall

waiver of right to future litigation and are being used by companies to settle disputes. The Constitution and Article 418 of the Qatari Civil Code ensure the right to litigation, yet many infrastructure projects are settled through agreements with waiver clauses under Article 573 which is titled 'Reconciliation'.[29] The finality and effects of the reconciliation is also reflected in Article 577(2).[30] Therefore, agreements in which parties waive their rights to future litigation are enforceable in Qatar and perfectly within the bounds of law.

Extrapolating from the abovementioned example, if a construction worker before starting employment waives away her right to pursue future claims-litigation as a condition towards securing employment then it remains speculative as to how can human right be secured. If the law permits settlement of all claims, then how do we understand the limits of law vis-à-vis human rights. The positive law contradicts ethical as well as international obligations directly in this case. This case showcases the constant infighting between the different understandings of law and indicates the changing nature of access to justice. The Qatari Law is one of the many examples which reflect the broader ethical questions needed to be considered while contextualizing business and human rights debates. An ethical perspective on access to remedy can aid us in understanding reconciliation between the 'ought' and 'is' proposition in cases involving corporations using settlement agreements. The absence of an ethical framework in settlement agreements especially in cases of human rights waivers requires us to further investigate the ethical theories of human rights and observe the creation, re-creation and multiplication of compulsions which curtail access to remedies.

3. Human rights waivers and creating compulsions

To explore the ethical issues regarding usage of human rights waivers in settlement agreements by corporations this section will make a case against the attempt of limitation of survivor's rights in guise of settlement agreements through three different theoretical positions. These three different positions are (1) Right to Life, (2) Public Policy Clauses and, (3) Guiding Principles on Business and Human Rights. These three perspectives will provide a more coherent understanding of the individual, the contractual and the international dimensions involved in promoting a wider ethical framework in remedial structures. There could be many other positions like of the survivor community, the civil society etc. but to maintain a coherent argument I restrict myself to these positions which remain vital towards ensuring access to remedies. The usage of the word 'compulsion' is a deliberate effort to highlight the wider panoply of conditions in which human rights operate. In some cases, such as Trafigura's toxic waste dumping in Côte d'Ivoire the State's active involvement in dropping of all charges existing as well as those arising in future in exchange of settlement amount results in dissuading survivors from availing other remedies, especially judicial remedies. The creation of compulsions and unfavourable conditions might result in survivors giving up their right to remedies and willingly inhibit their own human rights. This dichotomy where the autonomous survivor remains free yet bound while seeking remedies reflect the need to align an ethical framework to these settlement agreements. The rise in settlement agreements also highlights the limits of 'development' as we understand it in the era of globalization. TNCs being the major players in the economy have altered the nature of remedies which is offered but are also posing major ethical challenges to the wider definition of justice. These challenges will be elaborated further in the following sections.

3.1. Right to life

The right to life is secured for all individuals and any infringement of the same is usually prohibited by various international laws as well as domestic laws. In Locke's famous work titled 'Second Treatise of Civil Government'[31] he wrote that "being all equal and independent, no one ought to harm another in her life, health, liberty, or possession." This classical liberal thought provided *inter alia* a solid moral foundation for the right

be established by law only."

29 Regarding Promulgating the Civil Code. The Article states that, "Reconciliation is a contract under which the parties settle a dispute between them, or avoid a contingent dispute by each party waiving the corresponding part of their claim."

30 Regarding Promulgating the Civil Code. The Article states that, "As a result of reconciliation, rights and claims finally waived by the parties shall lapse."

31 LOCKE, John. The second treatise of civil government and a letter concerning toleration. Oxford : B. Blackwell, 1948. Chapter 2 Section VI.

to life. But it has always faced challenges from ruling establishments throughout the centuries rendering the basis of human rights as uncertain. Scholars like Griffin argue that even Locke does not provide with the foundation of human rights and he asserts that the whole moral space would be filled by rights if rights were to be generated through moral viewpoints alone.[32] Despite the contrary opinions, right to life remains an overarching moral principle which ensures that no one is whimsically deprived of their life and it *prima facie* seems to be one of the foundation stones of human right theories. It is mentioned in several international instruments like International Covenant on Civil and Political Rights (Article 6), Charter on Human and Peoples' Rights (Article 4), African Charter on the Rights and Welfare of the Child (Article 5), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 4), Arab Charter on Human Rights (Article 5, 6), European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2), American Declaration of the Rights and Duties of Man (Article 1), American Convention on Human Rights (Article 4), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" (Article 4).[33] The preponderance of international instruments incorporating provisions respecting right to life reflects its conceptual relevance and importance. The argument made here is that right to life is directly linked to right to seek remedies (even when some forms of non-financial compensation for denial of the right to seek remedies can be asserted through other means).[34] A connection between these two rights is essential to develop a framework of moral-legal ethical position against deprivation of human rights. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[35] provides for the right to equal access to remedies. It categorically establishes the right of victims to seek remedies including private remedies even though the primary responsibility lies with the State. The gamut of remedies is not only limited to official remedies but are extended to private remedies as well. This indicates that any ethical framework will and must incorporate private remedies.

In the seminal caselaw of Marbury v. Madison[36] the Court held that "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." The enjoyment of life is directly linked to access to remedies and any right to seek remedies in cases of infringement of our enjoyment is impermissible even through employing arbitration claims.[37] Even within the constitutional sphere, the idea of surrender or waiver of constitutional rights which involves right to life has been disputed from the early twentieth century. In Insurance Company v. Morse[38] the Court while discussing the contractual surrender of constitutional rights as invalid and repugnant to the constitution of the United States and laws in pursuance thereof the Court held that, "any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit her rights at all times and on all occasions, whenever the case may be presented." Similarly, in Fox River Paper Co. v. Railroad Commis-

32 GRIFFIN, James. On human rights. Oxford: Oxford University Press, 2008. p. 214.

33 OHCHR. *International standards.* Disponível em: <http://www.ohchr.org/EN/Issues/Executions/Pages/InternationalStandards.aspx>. Acesso em: 1 maio 2018.

34 PALFIN, R. A.; DANNINGER, B. B. *Hedonic damages:* proving damages for lost enjoyment of living. [s.l.]: Michie, 1990.

35 UN GENERAL ASSEMBLY. *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law.*

36 Marbury v. Madison.

37 HYLTON, Keith N. Agreements to waive or to arbitrate legal claims: an economic analysis. *Supreme Court Economic Review*, v. 8, p. 209-263, 2000. Hylton offers an economic analysis of the role of arbitration claims to Title VII suits. He locates the history of arbitration claims regarding employment claims and writes "The most important statement on the scope of arbitration in the employment setting is the Supreme Court's decision in Alexander v. Gardner-Denver Co. which held that a union cannot waive an employee's right to litigate under Title VII of the 1964 Civil Rights Act. The opposing precedent, decided much later, is Gilmer v. Interstate/Johnson Lane Corporation, which enforced an arbitration agreement covering an age discrimination claim signed by an employee in the securities industry. Since Gilmer, lower court decisions have largely remained consistent with this distinction, enforcing arbitration agreements covering statutory rights in the individual-versus-employer context and refusing to enforce in the union context. The two exceptions are the Ninth Circuit in Duffield v. Robertson Stephens & Co., and the Fourth Circuit in Austin v. Owens-Brockway Glass Container Inc. Duffield held that the 1991 Civil Rights Act precludes mandatory arbitration with respect to Title VII claims. Austin seems to reject Alexander altogether, holding that unions can consign statutory employment claims to the arbitration process."

38 Insurance Company v. Morse.

sion of Wisconsin,[39] the Court held that a requirement which waives away the party's right to receive compensation, should the dam in question be appropriated after thirty years as valid in eyes of law.

More recently, in United States v. Oliver[40] the Court mentioned the "presumption against the waiver of constitutional rights" (relying on the Harcrow[41] case) and added that the waiver of rights is possible provided it is "clearly established that there was 'an intentional relinquishment or abandonment of a known right."[42] In Gonzalez v. United States,[43] Scalia J. while concurring clarified that, " certain 'fundamental' or 'basic' rights cannot be waived unless a defendant personally participates in the waiver." The Indian Supreme Court has been more cautious regarding allowing of waiver of fundamental rights. In the leading judgment of Basheshar Nath v. The Commissioner of Income-Tax, Delhi & Rajasthan & Another,[44] it was only Das J. (minority opinion), who observed that fundamental rights can be waived provided they are given for the individual and not for those rights which are available to the public. In the European legal realm, Schutter reminds us to be cautious of attaching too much weight to the idea that rights recognized within the European Convention on Human Rights may be hierarchized and that some rights being "more fundamental, or instituted, rather than for the sole benefit of the individual, for the benefit of the whole of society, and thus not waivable by the right-holder."[45] The varied limitations on waiver of fundamental rights also reproduce the nature of constitutional morality which prohibits allowing waivers of rights explicitly. Right to life being an inseparable part of the wider ambit of guaranteed human rights reflects the moral framework embedded in many constitutional texts. Therefore, an argument can be made that rights such as right to not have fundamental rights waived and right to seek remedies are important limbs of the right to life which opposes the conditions of compulsions and denial of entitled remedies. However, one of the other factors which might affect the operation of human rights in settlement agreements and help us frame the ethical dilemma in context is the consent of the survivors of corporate human rights violations. Consent of survivors to agree to settlement is an important part of the ethics of settlement agreements will be investigated in the following section in brief.

3.1.1. Consent

The requirement of consent of the survivor to agree to the terms of settlement is extremely crucial in understanding the ethical underpinnings of modern day settlement agreements and helps us navigate the unequal power dynamics between the two players involved. An uninformed consent towards settlement of agreement by survivors leads to an unconscious violation of rights. This was quite visible in the Barrick case where "business grants" were provided in exchange for waiving legal rights.[46] The European Court of Human Rights [ECtHR] has laid down that waiver must be free, unambiguous and "established in an unequivocal manner",[47] and this was extended even in the case of waiver of procedural rights.[48] Van Drooghenbroeck while equating waiver and consent argues that it impacts the existence of rights and the current conflicts between two rights.[49] In Sörensen and Rasmussen v. Denmark,[50] it was held that compelling a person to join a specific trade union as part of his condition of employment is in breach of the European Convention of Human Rights. The compulsion to join employment due to economic constraints may impact the 'free' nature of consent/waiver. In Albert and Le Compte v. Belgium,[51] the Court gave some indications on the inclusion and exercise of waiver of 'certain' rights as guaranteed wi-

39 Fox River Paper Co. v. Railroad Commission of Wisconsin.

40 United States v. Oliver.

41 United States v. Harcrow.

42 Brookhart v. Janis.

43 Gonzalez v. United States.

44 Basheshar Nath v The Commissioner of Income-Tax, Delhi & Rajasthan & Another, Indian Supreme Court 1959 AIR 149.

45 SCHUTTER, Olivier de. Waiver of rights and state paternalism under the European Convention on Human Rights. *Northern Ireland Legal Quarterly*, v. 51, n. 3, p. 481-508, 2000. See, n17.

46 Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights.

47 Oberschlick v Austria (No 1). Court held that, "According to the Court's case-law, waiver of a right guaranteed by the Convention — in so far as it is permissible — must be established in an unequivocal manner (see, inter alia, the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 176, p. 35, para. 82)."

48 Pfeifer and Plankl v Austria.

49 VAN DROOGHENBROECK, Sébastien. Conflict and consent: does the theory of waiver of fundamental rights offer solutions to settle their conflicts? In: SMET, Stijn; BREMS, Eva (Eds.). *When human rights clash at the European Court of Human Rights:* conflict or harmony? Oxford: Oxford University Press, 2017.

50 Sörensen and Rasmussen v. Denmark.

51 Albert and Le Compte v Belgium.

thin the Convention:

> Admittedly, the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them […] but the same cannot be said of certain other rights. Thus, neither the letter nor the spirit of Article 6 para. 1 (art. 6-1) would prevent a medical practitioner from waiving, of her own free will and in an unequivocal manner […] the entitlement to have her case heard in public; conducting disciplinary proceedings of this kind in private does not contravene Article 6 para. [citations omitted].

Similarly, there are other caselaw on the role of free consent involving employment contracts within ECtHR[52] which provide guidance on the polemical topic of consent. The impetus on securing the free will of the individual by the Court reflects that merely providing consent should not be a parameter for waiver of rights. This problem of redefining consent would be exacerbated with the involvement of corporations as they tend to be the more influential party in settlement agreements therefore blurring the lines between consent and informed consent. The dilemma is whether an individual will be better off by bargaining her rights in exchange of a benefit even if the consent for the trade-off was reached through an uninformed consent or on the other hand, is the requirement of a higher standard of consent merely paternalism by the State as it tries to enforce upon the right-holder a higher moral-legal standard? It is not necessary to view this dilemma only through the prism of the presented binaries and the whole issue remains indecisive. Some teleological ethicists would even call such a debate unnecessary. An alternative way to look at such issues is through understanding that rights are also marketable commodities and they do not require any further consent from any other entity beyond the right holder.[53] But that discussion shall be laid to rest here.

3.2. Public policy clauses

One of the foremost contributors in economics Prof. Amartya Sen, has argued that "human rights are best seen as articulations of social ethics, comparable to-but very different from utilitarian ethics."[54] He argues that if human rights can survive "open and informed scrutiny" then this scrutiny is what validates the general claim for human rights. Prof. Sen adds that the idea of human rights is essentially ethical and should not be confined to only narrow legal boxes and terminologies. However, human rights have been restricted within the textual boundaries of legislations and rules. One of the areas where human rights indirectly interacts beyond the text is within the traditional contract law principle of public policy. This section will argue that public policy acts not only as a legal but also as an ethical barrier to unjust settlement agreements by *arguably* rendering them unenforceable in the eyes of law. Public policy has often been called as "an unruly horse".[55] Nevertheless, public policy clauses under contract law can form a significant ethical core of settlement agreements as they can act as potential objection towards settling of disputes through unfair agreements. In terms of understanding the contract-based conception of human rights in private relationships, it is pertinent to note that ethical barriers within contract law have remained underexplored and therefore it warrants further research. This section will further amplify the ethical objections against settlements in cases of human rights violations by corporations. To clarify, it must be said that the aim is not to dismiss the proposition of awarding financial compensation received by the survivors of human rights violations but to make a case against settling of legal liabilities in lieu of financial compensation offered to survivors in a post-disaster situation.

The enormous litigation cost has led to a massive push within the corporate sector for seeking alternative remedies for settling legal cases. Even law schools have started courses on these subjects. This push for seeking alternative remedies has not left the human rights arena untouched. The settlement agreements arrived at between the corporations and survivors can be questioned on ethical as well as contract law jurisprudence. Within the domain of contract law, settlement agreements can *arguably* be against public policy which might render such agreements illegal.[56] Coleman and Silver argue that

52 Fernández Martínez v Spain, [2014] ECtHR App. no. 56030/07 (12 June 2014).; Eweida and Others v. United Kingdom.

53 RADIN, Margaret Jane. Market-inalienability. *Harvard Law Review*, v. 100, n. 8, p. 1849-1937, 1987.

54 SEN, Amartya. Human rights and the limits of law lecture. *Cardozo Law Review*, v. 27, n. 6, p. 2913, 2006.

55 Richardson v Mellish.

56 COLEMAN, Jules; SILVER, Charles. Justice in settlements. *Social Philosophy and Policy*, v. 4, n. 1, p. 102-144, 1986.; FEINBERG, Joel. Legal paternalism. *Canadian Journal of Philosophy,* v. 1, n. 1, p. 105-124, 1971. Feinberg also elaborates on the two different types of paternalisms which exist within the legal sphere, namely weak and strong legal paternalism.

there is a transference of right to sue to the class of plaintiffs in cases of human rights violations and this cannot be termed as forfeiture of the right to sue.[57] On the other hand, Kirby J. et. al opinion in Fitzgerald case[58] provides us caution before curtailing freedom to contract:

> Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.

The freedom to contract should, ideally, not be curtailed.[59] The dividing line between being against public policy and arbitrary curtailment of freedom to contract remains unclear. But it can be argued that any loss of access to remedies in exchange of gaining financial compensation is not a fruitful bargain as it might be an outcome of a paternalistic deal influenced by many other factors such as power dynamics between the corporation and the survivors etc. Intrinsic to such an agreement is the monetization of loss of human rights which is problematic. How do we arrive at the price of settlement agreement? How do we quantify the loss of rights? How much does each survivor of corporate human rights violation get and what is the basis for providing the amount? These difficult questions make the foundations of settlement agreement unethical and vague. Settlement agreements which are based on restriction of personal liberties[60] are against public policies and hence considered to be illegal. These agreements infringe upon the recognized public policies and the judicial enforcement of such agreements are injurious to the public at large as they tend to give a message that corporate wrongdoings can be reversed through financial means. When one can raise the public policy, clause depends on the jurisdiction, but this paper presumes that most jurisdictions would have public policy clauses or similar clauses. In Cf Vita Food Products Inc v. Unus Shipping Co Ltd (in liq)[61] the Privy Council held that "Public policy is not, as such, raised, unless it be the general public policy that the courts should uphold the law of the land." Similarly, in Materials Fabrication Pty Ltd v Baulderstone Pty Ltd,[62] the Court held that a clause which prevented the subcontractor from commencing and maintaining legal proceedings until depositing 10% of the amount claimed by the subcontractor in the proceedings was void. Any attempt to exclude the jurisdiction of the Court through imposing significant monetary barriers was held void as being against public policy. It has been well established that "claims for redress for breach of contract or for a remedy for tortious damage can be settled out of court."[63] Not all settlement agreements are invalid, but many settlement agreements based on uninformed consent and which restrict liberties can be classified as against public policy.

The society at large does not benefit from the settlement of such cases (absence of precedent creation) and the loss of rights shakes the conscience of the society through providing impunity to corporations involved in corporate wrongdoings. The expansive interpretation of the public policy objection can render such agreements illegal. Securing justice for the survivors cannot come at the altar of sacrifice of core fundamental rights and any restriction imposed through settlements can potentially brand such contracts as unethical, if not illegal.

3.3. United Nations Guiding Principles on Business and Human Rights

The Guiding Principles elaborates upon the role of different kinds of remedies which can be offered to the survivors of human rights violations by corporations. This includes operational level grievance mechanisms which are also more generally called as 'company level grievance mechanisms'. However, the principles do not offer much guidance on the issues surrounding ethical framework of settlement agreements. It is probable

57 CCOLEMAN, Jules; SILVER, Charles. Justice in settlements. *Social Philosophy and Policy*, v. 4, n. 1, p. 102-144, 1986. p. 131.

58 Fitzgerald v. FJ Leonhardt Pty Ltd. This case provides an insight into the operations of public policy within contract law jurisprudence.

59 Printing and Numerical Registering Co v Sampson, Court of Appeal, Eq 462 1875. Sir George Jessel MR stated in this case that "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."

60 See, CHEN-WISHART, Mindy. *Contract law*. Oxford: Oxford University Press, 2012. For further reading on what kind of contracts are against public policy.

61 Cf Vita Food Products Inc v Unus Shipping Co Ltd (in liq).

62 Materials Fabrication Pty Ltd v Baulderstone Pty Ltd.

63 Felton v. Mulligan. Windeyer J. elaborates that "Claims for redress for breach of contract or for a remedy for tortious damage can be settled out of court; and actions and suits of many kinds can be compromised by agreement, after they have been commenced, provided that each of the parties is sui juris.".

that the non-binding and specific point-based elaboration of the principles did not allow further explanation on ethical dimensions of the various kinds of remedies. This section will try to argue that the Guiding Principles by not insisting on ethical remedies has left the door open for further debate on what we mean by remedies.

Providing ethical remedies is equally important as providing remedies. Unethical efforts by corporations to silence survivors' claims through using opaque company mechanisms hinders rule of law and reinforces corporate impunity. The Interpretive Guide on Corporate Responsibility to Respect Human Rights mentions that operational level grievance mechanisms are "distinct from whistle-blower systems" and of "concern to enterprise as a whole."[64] It seems that such an endeavour is an attempt of moral righteousness and pursued in order to attach an ethical outline to the principles, but it is nevertheless important, at least in terms of access to remedy. Much debate revolves around access to remedy, but the larger question remains what kind of remedy are we willing to offer to survivors? Even if corporations provide private remedies, can they be held to be unaccountable to the extent of restricting freedom of the survivors? Bilchitz argues that corporations should not be excluded from positive obligations because both Kantian and Utilitarian ethical theories recognize that "individuals have some positive moral obligations on some fundamental ethical concerns" and if this is true then there is no reason to exclude corporations from the ambit of obligations as corporations are also, ultimately, a "conglomeration of individuals."[65] If this premise is correct then it must be assumed that the kind of remedies provided both post and pre-violation need to be ethical not only because of international obligations but because it is morally justified to do so in light of the wrong committed. The text of the principles even though not using ethical arguments has always insisted on the best available remedies and the subsequent reports by the United Nations insisted on providing the survivors with "*bouquet of remedies*".[66] Moving towards a binding treaty, this aberration could be remedied by ensuring that access includes adequate and ethical remedies being provided to survivors of human rights violations by corporations.

4. Conclusion

This paper argues settlement agreements, being private forms of remedies, need to be ethical. Locating waivers and the ethics of such agreements in legal theory, it tries to reveal the contradictions surrounding personal autonomy of survivors while also highlighting the many tensions posed by settlement agreements towards vulnerable populations like migrant workers. The paper forms a basis for redefining how private remedies can potentially do much damage if ethics of the same are not considered as a major part of the issue. Relying on different perspectives the paper tries to make the case for reading remedies as 'ethical remedies'. Attempt is made to recognize the basis for establishing the role of private remedies in understanding not only access to remedies but also the larger idea of justice. Our pretensions maybe misplaced when we see private remedies as replacing judicial remedies. What is more threatening is unethical remedies being considered as the future of rights-litigation in cases of corporate violation of human rights.

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64 UNITED NATIONS. The corporate responsibility to respect human rights: an interpretive guide, [s.l.]: United Nations, 2012, p. 69. It clearly mentions that "These mechanisms are distinct from whistle-blower systems, which enable employees to raise concerns about breaches of company codes and ethics, which may or may not harm those individuals, but are of concern to the enterprise as a whole."

65 DEVA, Surya; BILCHITZ, David (Org.). *Building a treaty on usiness and human rights:* context and contours. Cambridge: Cambridge University Press, 2017. p. 202.

66 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, [s.l.]: United Nations General Assembly, 2017.

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La responsabilidad penal de las empresas por graves violaciones de derechos humanos: práctica actual y desafíos futuros

Corporate criminal liability for gross human rights violations: current practice and future challenges

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La responsabilidad penal de las empresas por graves violaciones de derechos humanos: práctica actual y desafíos futuros*

Corporate criminal liability for gross human rights violations: current practice and future challenges

Daniel Iglesias Márquez**

Resumen

La vía penal, tanto en su vertiente internacional como nacional, constituye otro posible mecanismo judicial para responsabilizar a las empresas o, en su defecto, a los directivos o ejecutivos de las mismas por la vulneración de derechos humanos. La responsabilidad penal de las empresas es aún un tema controversial y adopta diversos enfoques en cada Estado. Por tanto, el Derecho penal ha recibido menos atención que otras vías y, en consecuencia, su potencial para responsabilizar a las empresas por sus impactos sociales y ambientales no ha sido suficientemente explorado. A partir del análisis descriptivo y comparativo de la práctica actual y de la bibliografía relacionada con el tema se examina el potencial y los obstáculos legales, políticos y prácticos a superarse para hacer efectiva la responsabilidad penal por los graves abusos de derechos humanos cometidos en el marco de las actividades globales de las empresas transnacionales.

Palabras clave: Derecho penal. Empresas y derechos humanos. Violaciones de derechos humanos. Tercer pilar de los Principios Rectores sobre empresas y derechos humanos.

Abstract

Criminal law, both internationally and nationally, is another judicial mechanism to hold corporations –or corporate agents- accountable for human rights violations. Corporate criminal liability is still contested and each State has adopted a different approach. Thus, criminal law has received less attention than other avenues, and hence its high potential to hold corporations accountable for their social and environmental impacts has not been sufficiently tested. Thus, taking into account the current practice and the bibliography related to the theme, this article examines through a comparative and descriptive analysis the potential and the legal, political and practical obstacles for holding transnational corporations criminally liable for gross human rights abuses committed in the framework of their global activities.

Keywords: Criminal Law. Business and Human Rights. Human rights violations. Third pillar of the Guiding Principles on Business and Human Rights.

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1. Introducción

Durante los casi cincuenta años de debate sobre el tema de empresas y derechos humanos, una de las cuestiones en la agenda internacional a la que se ha intentado dar solución es a la búsqueda de mecanismos efectivos para responsabilizar a las empresas por las graves violaciones de derechos humanos cometidas en el desarrollo de sus actividades. A día de hoy, la comunidad internacional no ha logrado alcanzar un consenso en la creación de un mecanismo que permita alcanzar de manera efectiva este objetivo. Existen propuestas desde la academia y de la sociedad civil para crear un tribunal internacional sobre empresas y derechos humanos que permita acceder a las personas afectadas a una instancia judicial internacional independiente. No obstante, aún quedan cuestiones pendientes sobre los recursos humanos y financieros que requiere para su funcionamiento.[1]

En este orden de ideas, le corresponde a los Estados la carga de garantizar el acceso a los recursos judiciales existentes para las víctimas de violaciones de derechos humanos cometidas por las empresas. A día de hoy, las víctimas pueden recurrir a diversos mecanismos para hacer efectiva la responsabilidad de las empresas y recibir una reparación justa por los daños sufridos, aunque cada mecanismo tiene resultados y alcances diferentes. Por tanto, el panorama actual deja entrever que, por lo general, las víctimas se adentran en un laberinto de mecanismos judiciales -y no judiciales- con diversos obstáculos a superar.

El Derecho penal constituye uno de los mecanismos judiciales a los que las víctimas pueden recurrir. Algunos progresos y casos recientes demuestran que la vía penal, tanto en su vertiente internacional como nacional, presenta importantes oportunidades para responsabilizar a las empresas por graves violaciones de derechos humanos. Así, el Derecho penal podría llevar el debate sobre empresas y derechos humanos a nuevos horizontes, no obstante, a diferencia de otros mecanismos, esta vía ha recibido menos atención, manteniendo de esta manera los obstáculos doctrinales y legales que hasta el momento parecían inamovibles.

El presente artículo, a través de un análisis comparativo y descriptivo de la práctica actual, examina las oportunidades y el potencial de la vía penal, tanto a nivel internacional como nacional, como mecanismo judicial para hacer efectiva la responsabilidad de las empresas por graves violaciones de derechos humanos. El objetivo principal del presente artículo es aportar elementos que permitan determinar la viabilidad del Derecho penal y la justicia penal como un mecanismo judicial a ser contemplado y reforzado en las disposiciones del futuro tratado sobre empresas y derechos humanos o, en su defecto, en la implementación del tercer pilar de los Principios Rectores de las Naciones Unidas sobre empresas y derechos humanos a nivel nacional. Para ello, se aportan, en primer lugar, algunas reflexiones preliminares sobre el alcance de la vía penal en el debate sobre empresas y derechos humanos. Posteriormente se analizan las oportunidades actuales y los avances para recurrir al Derecho penal internacional para hacer efectiva la responsabilidad de las empresas por graves violaciones de derechos humanos. Seguidamente, se profundiza en la experiencia y los obstáculos prácticos y políticos del enjuiciamiento penal a nivel nacional para luchar contra la impunidad de los delitos corporativos relacionados con abusos de derechos humanos. Finalmente, se concluye que la justicia penal es clave en el debate sobre empresas y derechos humanos y, sobre todo, que la actual coyuntura se presta para que los Estados avancen en el desarrollo de esta vía en aras de adoptar las medidas legislativas y políticas para paliar los obstáculos en el enjuiciamiento penal de las empresas, tanto a nivel internacional como nacional.

2. La vía penal como mecanismo judicial para responsabilizar a las empresas por la vulneración de derechos humanos

En la práctica y en la doctrina legal,[2] la vía civil ha

1 HERNÁNDEZ ZUBIZARRETA, Juan. El Tribunal Internacional para las empresas transnacionales y los derechos humanos. *América Latina en movimiento*, p. 14-15, 2016; Ramasastry, Anita; CASSELL, Douglass. White Paper: Options for a Treaty on Business and Human Rights. *Notre Dame Journal of International & Comparative Law,* v. 6, n. 1, p. 1-50, 2015.

2 Existe una abundante doctrina legal relacionada con la práctica del litigio civil en los Estados Unidos contra las empresas por la vulneración de derechos humanos. No obstante, queda fuera del análisis del presente artículo. Algunos autores que abordan el litigio civil transnacional en los Estados Unidos contra empresas por violaciones de derechos humanos en tercero Estados, véase, REQUEJO ISIDRO, Marta. Responsabilidad civil y derechos humanos en EEUU: ¿el fin del ATS? *InDret. Revista para el análisis del Derecho*, n. 3, p. 1-38, 2011; STEPHENS, Beth. Corporate Accountability: International Human Rights Litigation against Corporations in US Courts. En: KAMMINGA, Menno T.; ZIA-ZARIFI, Saman (Ed.). *Liability of Multinational Corporations under International Law*. La Haya-Londres-Boston: Kluwer Law International, 2000. p. 209-230.

sido el mecanismo judicial más explorado y recurrido hasta el momento para responsabilizar a las empresas por violaciones de derechos humanos. Sin embargo, las víctimas y las organizaciones de la sociedad civil (OSC) instan cada vez más a los Estados al ejercicio de la jurisdicción penal para investigar y enjuiciar a las empresas por las graves violaciones de las normas internacionales de derechos humanos, de Derecho humanitario y de Derecho penal internacional. Por ejemplo, a raíz de una investigación realizada por Amnistía Internacional sobre la campaña de la empresa *Shell* para silenciar las protestas en Ogoniland en la década de los noventa, la organización solicitó a los gobiernos de Nigeria, de los Países Bajos y del Reino Unido una investigación penal para determinar la complicidad de la empresa en delitos relacionados con violaciones de derechos humanos cometidas por las fuerzas de seguridad nigerianas.[3]

Tradicionalmente, la doctrina penal clásica se ha mostrado reacia al reconocimiento de la responsabilidad penal de las personas jurídicas debido a que estos entes, considerados ficticios, carecen por su propia naturaleza de las actitudes mentales (*mens rea*) - ya sean intencionales, imprudentes o negligentes- para la comisión de delitos, lo que se constituye como un elemento de la responsabilidad penal. Asimismo, la negativa a reconocer la responsabilidad penal de las personas jurídicas se debe también, entre otras cuestiones, a las diferencias en los modelos de atribución de responsabilidad, a la determinación del grado de culpabilidad colectiva o al tipo de sanciones aplicables a las personas jurídicas.

Sin embargo, la limitación histórica y clásica de los sistemas jurídicos penales en relación a las personas jurídicas presenta una evolución relevante encaminada a la lucha contra la delincuencia empresarial. Esto ha servido para superar los dogmas individualistas y personalistas característicos del esquema tradicional del Derecho penal. Y, a su vez, para la construcción de un sistema de responsabilidad penal de las personas jurídicas, dejando atrás el dogma de "*societas delinquere non potest*", pero sin llegar a ser este tipo de responsabilidad penal universalmente aceptada por todos los Estados.

En este punto, cabe advertir que la responsabilidad penal de las empresas no significa que los responsables individuales en el seno de las personas jurídicas no puedan ser enjuiciados y sancionados penalmente cuando se intente desplazar la responsabilidad a las entidades ficticias, salvo que diera lugar a castigos desproporcionados por un mismo delito. La responsabilidad penal de las empresas puede y debe existir junto a la responsabilidad de los agentes corporativos. No obstante, el presente artículo pone un mayor énfasis en la responsabilidad penal de las empresas, solo haciendo referencia a la responsabilidad de sus directivos y ejecutivos en la medida que se considere oportuno, ya que, como se analiza en los siguientes apartados, forma parte de la práctica actual para hacer efectiva la responsabilidad de los sujetos implicados en violaciones de derechos humanos cometidas en el desarrollo de las actividades empresariales.

Así, el Derecho penal juega un papel cada vez más importante para garantizar que las empresas respondan por sus actos ante la sociedad y para prevenir su impunidad, ya que se constituye como una vía disponible para responsabilizar a las empresas cuando cometan o participan en graves abusos de derechos humanos.

En 2011, el Consejo de Derechos Humanos de las Naciones Unidas adoptó por unanimidad los Principios Rectores sobre Empresas y Derechos Humanos (Principios Rectores), elaborados entre 2005 y 2011 por el Representante Especial del Secretario General para la cuestión de los derechos humanos y las empresas, John Ruggie. Los Principios Rectores rigen actualmente el vínculo entre empresas y derechos humanos. Este instrumento cuenta con un enfoque predominantemente de carácter *soft law* y desarrolla un sistema interrelacionado de medidas de prevención y reparación de violaciones de derechos humanos cometidas por empresas.

Los Principios Rectores advierten que a día de hoy existe un riesgo para las empresas de incurrir en una responsabilidad penal por violaciones de derechos humanos. En primer lugar, el Principio 7 aborda la obligación de los Estados de asegurar que las empresas que operan en zonas afectadas por conflictos no se vean implicadas en violaciones graves de derechos humanos, adoptando las medidas adecuadas que pueden explorar las responsabilidades civiles, administrativas o penales de las empresas domiciliadas u operativas en su territorio y/o jurisdicción que cometan o participen en este tipo de abusos.

Más adelante, el Comentario al Principio 17 señala que pueden generarse supuestos de complicidad cuando una empresa contribuye o parece contribuir a las conse-

3 Amnistía Internacional. *A Criminal Enterprise? Shell's Involvement in Human Rights Violations in Nigeria in the 1990s*. Londres: Amnesty International, 2017. p. 89.

cuencias negativas sobre los derechos humanos causadas por otras partes. La complicidad implica una responsabilidad penal en varias jurisdicciones nacionales.

Finalmente, el Comentario al Principio 23 destaca que varios Estados que reconocen la responsabilidad penal de las personas jurídicas han incorporado en sus ordenamientos internos las disposiciones del Estatuto de Roma de la Corte Penal Internacional (Estatuto de Roma). En este sentido, algunos Estados, como Italia o Dinamarca, proponen ya en sus Planes de Acción Nacional sobre empresas y derechos humanos medidas relacionadas con el Derecho penal que se alienan a lo señalado en los Principios Rectores.

Aún más específicos, algunos instrumentos internacionales e informes de expertos, como la Resolución del Parlamento Europeo sobre la responsabilidad de las empresas por violaciones graves de los derechos humanos en terceros países (2015/2315(INI)), la Recomendación CM/Rec (2016)3 del Comité de Ministros del Consejo de Europa sobre derechos humanos y empresas y el informe de los *Corporate Crimes Principles*, hacen un llamado a los Estados a recurrir al Derecho penal para hacer frente a los abusos corporativos y para abordar los obstáculos legales, procesales y prácticos que implica esta vía judicial.

La relevancia de la vía penal ha sido también parte del debate en los períodos de sesiones del Grupo de Trabajo Intergubernamental (GTI) encargado de elaborar el tratado vinculante sobre empresas y derechos humanos. Algunas delegaciones señalan que la máxima disuasión para que las empresas no cometan violaciones de derechos humanos se alcanzaría imponiendo la responsabilidad penal.[4] Así, este futuro instrumento debería, por un lado, sentar las bases para que los Estados incorporen en la legislación penal nacional las formas de conducta que afectan el disfrute de los derechos humanos, incluidas las que ya están reconocidas por el Derecho internacional.[5] Por otro lado, debería contribuir a aclarar la responsabilidad penal de las personas jurídicas con el fin de alentar a que más Estados reconozcan este tipo de responsabilidad, sin excluir la de los directores y ejecutivos, para así poder combatir la impunidad y proteger los derechos de las víctimas de violaciones de derechos humanos.[6]

En este sentido, algunas OSC, de manera más contundente, abogan por que los Estados estén obligados a aprobar legislaciones que definan adecuadamente la responsabilidad penal para sancionar a las empresas que vulneren derechos humanos o contribuyan a ello.[7] No obstante, este tipo de obligación puede ser contraproducente debido a que algunos Estados pueden hacer reservas a dicha disposición, ya que, como se observa más adelante, no todas las jurisdicciones reconocen la responsabilidad penal de las personas jurídicas. Por tanto, se afectaría la facultad discrecional de los Estados de decidir el tipo de responsabilidad según los principios jurídicos de sus ordenamientos internos. La solución más práctica, teniendo en cuenta el panorama actual, sería que el futuro instrumento alentara a los Estados a que adoptaran las medidas normativas y otras iniciativas para establecer la responsabilidad penal o, en su defecto, la responsabilidad equivalente (civil o administrativa), de acuerdo a los principios jurídicos de cada Estado.[8]

La vía penal cumple principalmente una función preventiva, pues la posibilidad de que las empresas incurran en una responsabilidad penal tiende a incentivarlas a adoptar las medidas necesarias para prevenir abusos de derechos humanos, pues la posibilidad de que sean identificadas como culpables de un delito las estigmatiza. Un posible enjuiciamiento penal podría afectar directamente la imagen y la reputación de las empresas, condicionando así su acceso a los mercados mundiales y la movilidad de sus activos. Asimismo, las sanciones

4 Consejo de Derechos Humanos, Informe del segundo período de sesiones del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, A/HRC/34/47 (4 de enero de 2017), párr. 29.

5 Consejo de Derechos Humanos, Informe del primer período de sesiones del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, con el mandato de elaborar un instrumento internacional jurídicamente vinculante, A/HRC/31/50 (5 de febrero de 2016), párr. 90.

6 Véase, "Elementos para el proyecto de instrumento internacional jurídicamente vinculante sobre empresas transnacionales y otras empresas con respecto a los derechos humanos." Disponible en: www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs_SP.pdf, p. 8-9.

7 Consejo de Derechos Humanos, Informe del primer período de sesiones del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, con el mandato de elaborar un instrumento internacional jurídicamente vinculante, A/HRC/31/50 (5 de febrero de 2016), párr. 88.

8 ICJ. *Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises*. Ginebra: ICJ, 2016. p. 19-22.

penales aplicables a la comisión de un delito pueden ser en ocasiones más onerosas.[9] Así, aunque carezca de una función reparadora, la vía penal permite exponer ciertas prácticas empresariales que deben ser perseguidas y sancionadas por los Estados y, en consecuencia, influir en el comportamiento de las empresas.

Por consiguiente, esta vía constituye otro de los recursos judiciales existentes para hacer efectiva la responsabilidad de las empresas por graves violaciones de derechos humanos. No obstante, presenta importantes obstáculos sustantivos y procesales que reducen las posibilidades de que las víctimas y las OSC recurran a esta vía, tanto a nivel internacional como nacional. Dichos obstáculos se analizan en los siguientes apartados.

3. El enjuiciamiento de las empresas por la vulneración de derechos humanos conforme al Derecho penal internacional

Las más graves violaciones de derechos humanos pueden dar lugar a crímenes internacionales reconocidos en el Derecho penal internacional. En este sentido, algunas conductas delictivas graves como asesinatos, explotación sexual, esclavitud, tortura o desplazamientos forzados pueden llegar constituirse como crímenes de lesa humanidad.[10] Por tanto, cabe plantearse en qué medida este tipo de conductas, cometidas en el marco de las actividades empresariales, activan la jurisdicción de los tribunales penales internacionales.

Cabe comenzar señalando que tras la Segunda Guerra Mundial la responsabilidad penal internacional se expandió a las personas físicas a través del Estatuto de Londres y de la jurisprudencia del Tribunal de Núremberg, con especial referencia a los casos contra los empresarios que participaron en la comisión de crímenes de genocidio y de guerra.

Es bien sabido que durante la Segunda Guerra Mundial las empresas alemanas cometieron graves atrocidades. Los juicios posteriores al conflicto, iniciados en virtud de la Ley del Consejo de Control Aliado núm. 10, exploraron y debatieron por primera vez la delincuencia empresarial, creando un precedente importante en la responsabilidad penal internacional de las empresas. El Estatuto del Tribunal Militar Internacional de Núremberg le concedía competencias para declarar que un grupo u organización era una organización criminal, no obstante, solo las personas físicas pertenecientes a dicha organización podían ser enjuiciadas y sentenciadas (artículo 9 y 10).

Los casos más conocidos son en los que se acusó a varios empresarios y banqueros de complicidad en los crímenes cometidos durante la guerra (*Flick*,[11] *I.G. Farben*[12] y *Krupp*[13]). Estos casos representan el primer precedente en el que se criminalizó a las empresas por la "complicidad empresarial" en crímenes internacionales,[14] es decir, los directores fueron responsabilizados por usar sus posiciones dentro de la entidad para proporcionar asistencia sustancial al autor del delito a sabiendas de que participaba en la comisión de un acto ilícito.[15]

Uno de los legados que dejaron los juicios de Núremberg y que a día de hoy se explora para superar algunas de las fronteras delineadas, son los límites del Derecho penal internacional. En este sentido, los juicios de Núremberg establecieron que los crímenes internacionales son cometidos por personas físicas, no por entidades abstractas sin voluntad. Este principio, ha sido adoptado en los estatutos de los tribunales penales internacionales *ad hoc*[16] y de la Corte Penal Internacional

9 SMITH, Susan L. Changing Corporate Environmental Behaviour: Criminal Prosecutions as a Tool of Environmental Policy. En: ECKERSLEY, Robyn (Ed.). *Markets, the State and the Environment towards Integration.* Melbourne: McMillan Education Australia, 1995. p. 261-274.

10 PÉREZ-LEÓN ACEVEDO, Juan Pablo. The Close Relationship between Serious Human Rights Violations and Crimes against Humanity: International Criminalization of Serious Abuses. *Anuario Mexicano de Derecho Internacional*, v. 17, p. 145-186, 2017.

11 Estados Unidos de América contra Friedrich Flick y otros. Tribunal Militar IV, 6 (1947).

12 Estados Unidos de América contra Carl Krauch y otros. Tribunal Militar VI, 7 y 8 (1948).

13 Estados Unidos de América contra Alfred Krupp y otros. Tribunal Militar IIIA, 9 (1948).

14 Ramasastry analiza la evolución histórica de la complicidad empresarial. Según la autora, los Tribunales de Núremberg proporcionan un importante punto de partida para desarrollar la concepción moderna de la complicidad empresarial sobre la base de cooperación entre agentes económicos y Estados para cometer crímenes internacionales. RAMASASTRY, Anita. Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations. *Berkeley Journal of International Law*, v. 20, n. 1, p. 91-159 2002.

15 KALECK, Wolfgang; SAAGE-MAAß, Miriam. Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and its Challenges. *Journal of international Criminal Justice*, v. 8, n. 3, p. 699-724, 2010.

16 Véase, artículo 5 del Estatuto del Tribunal Penal Internacional para Ruanda, artículo 6 del Estatuto del Tribunal especial para Sierra Leona, artículo 6 del Estatuto del Tribunal Penal Internacional ad

(CPI), por lo que las personas jurídicas no están contempladas dentro de las competencias de los tribunales penales internacionales.

Durante los trabajos preparatorios del Estatuto de Roma, se propuso la inclusión de la responsabilidad penal de las personas jurídicas dentro de las competencias de la CPI.[17] Los párrafos 5 y 6 del artículo 23 propuestos por Francia en el borrador establecían que la Corte también podía ejercer jurisdicción sobre las personas jurídicas, a excepción de los Estados, cuando los crímenes se hubieran cometido en nombre de ellas o por sus agentes o representantes; y continuaba diciendo que la responsabilidad penal de las personas jurídicas no excluiría la responsabilidad penal de las personas físicas que hubieran actuado en calidad de autores o cómplices.[18]

La propuesta de Francia se enfocaba únicamente en las personas jurídicas de carácter privado (organizaciones criminales y empresas) para contrarrestar los efectos de ciertos comportamientos empresariales y alentar a los Estados Parte a adoptar medidas legales más severas que fueran aplicables a este tipo de entidades. Asimismo, entre los objetivos de la propuesta se encontraba aumentar las posibilidades de las víctimas de obtener una indemnización a través del régimen de reparación de la CPI.

Por otra parte, la propuesta se trataba de un modelo de responsabilidad de carácter derivado, es decir, primero se determinaba la responsabilidad penal individual, específicamente de las personas físicas con capacidad de control y de dirección que actuaran en nombre y con el consentimiento explícito de la empresa en el curso de sus actividades.[19] Por tanto, al contrario de los juicios de Núremberg, la responsabilidad penal de la empresa dependía de la responsabilidad penal individual.

A pesar de que la responsabilidad penal de las personas jurídicas había experimentado cierta evolución desde su primera aproximación en los juicios de Núremberg y de que algunos Estados apoyaban la propuesta,[20] el Estatuto de Roma no incorporó dentro de sus disposiciones este tipo de responsabilidad en las competencias de la CPI, asegurando así una solución favorable que permitiera que los Estados que se oponen filosóficamente, constitucionalmente o doctrinariamente a la responsabilidad penal de las personas jurídicas firmaran y ratificaran el Estatuto.

3.1. La práctica actual en el Derecho penal internacional frente a los abusos cometidos en el marco de las actividades empresariales

Aunque en la práctica internacional actual no se pueda enjuiciar a las empresas por las graves violaciones de derechos humanos que constituyen crímenes internacionales, no significa que las atrocidades que se cometen en el marco de las actividades empresariales deben quedar impunes. Las personas físicas con capacidad de control y de dirección en el seno de las empresas son sujetos capaces de activar la jurisdicción de los tribunales penales internacionales.

En este sentido, de conformidad con el artículo 25 (responsabilidad penal individual) y artículo 28 (responsabilidad de los jefes y otros superiores) del Estatuto de Roma, la CPI podrá ejercer su jurisdicción complementaria sobre los directivos de una empresa cuando sus acciones, que constituyan o contribuyan a la comisión de crímenes internacionales, se remitan al Fiscal por parte de un Estado Parte o por el Consejo de Seguridad de Naciones Unidas (artículo 13 del Estatuto de Roma).

La Físcalia ha iniciado investigaciones y enjuiciamientos en contra de directivos y ejecutivos de algunas empresas.[21] Un ejemplo es el caso contra el antiguo jefe

hoc para la antigua Yugoslavia, artículo 1 del Estatuto del Alto Tribunal Penal Iraquí, artículo 2 del Estatuto del Tribunal Especial Para el Genocidio Camboyano.

17 Véase, "Proposal Submitted by France", A/CONF.183/C.1/L.3(16 de junio de 1998).

18 Informe del Comité Preparatorio sobre el Establecimiento de una Corte Penal Internacional, ONU A/CONF.183/2/Add.1. (14 de abril de 1998).

19 ICJ. *Corporate Complicity and Legal Accountability*; Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Criminal Law and International Crimes. Ginebra: ICJ, 2008. p. 56.

20 CHIOMENTI, Cristina. Corporations and the International Criminal Court. En: DE SCHUTTER, Olivier (Ed.). *Transnational Corporations and Human Rights*. Oxford-Portland: Hart Publishing, 2006. p. 287-312.

21 Los dos fiscales que ha tenido la CPI hasta la fecha han manifestado su compromiso de investigar entidades empresariales responsables de contribuir a la comisión de crímenes internacionales. Por su parte, el fiscal Luis Moreno Ocampo en su momento hizo referencia al conflicto en la República Democrática del Congo y al papel de las empresas dedicadas a la comercialización de recursos naturales que financiaban las actividades de las fuerzas rebeldes o gubernamentales, lo que les permitirá mantener el conflicto. Mientras tanto, la fiscal Fatou Bensouda ha puesto énfasis en que las investigaciones a fondo de las finanzas que hay detrás de un conflicto ayudan a identificar posibles empresas implicadas. BATESMITH, Alex. Corporate Criminal Responsibility for War Crimes and Other Violations of International Humanitarian Law: the Impact of the

de operaciones y periodista de la cadena de radio *Kass FM*, Joshua Arap Sang, acusado de crímenes de lesa humanidad por la transmisión de mensajes codificados en sus emisiones de radio que contribuyeron a la comisión de asesinatos, traslados forzosos y persecuciones ilegales en el Valle del Rift durante los sucesos violentos postelectorales que tuvieron lugar en Kenia en 2007 y 2008. Este caso fue cerrado en 2016 por falta de pruebas y testigos para mantener los cargos.[22]

Un caso más reciente en el que se invoca el artículo 25 del Estatuto de Roma para que la CPI investigue la participación de empresarios en crímenes internacionales es de la empresa estadounidense *Chiquita Brands International*, acusada de contribuir a la comisión de crímenes de lesa humanidad en Colombia mediante el pago de paramilitares y guerrilleros para proteger sus operaciones.

En mayo de 2017, de conformidad al artículo 15 del Estatuto de Roma, una coalición de OSC solicitó al Fiscal de la Corte investigar a catorce ejecutivos de la empresa. Según las OSC, los altos cargos de la empresa tenían conocimiento de las actividades criminales (homicidios, desplazamiento forzado, desaparición forzada, violencia sexual, torturas y persecuciones de civiles) del grupo paramilitar las Autodefensas Unidas de Colombia (AUC) y, a pesar de ello, supervisaron y autorizaron el pago a los bloques de las AUC. Los pagos al grupo paramilitar sirvieron para la compra de armas y municiones utilizadas en crímenes atroces cometidos en las regiones bananeras colombianas de Antioquia y Chocó.[23] Al momento de escribir el presente artículo la Corte no se ha pronunciado sobre el caso todavía, pero si respondiera de manera positiva a la petición de las organizaciones, lanzaría un fuerte mensaje para incidir en la conducta de los agentes corporativos.

La responsabilidad de los jefes y otros superiores también ha sido experimentada en los tribunales penales internacionales *ad hoc* por omisiones en los deberes de supervisión y de adoptar medidas razonables para prevenir la comisión de crímenes por parte de sus subordinados. El Tribunal Penal Internacional para Ruanda responsabilizó a Alfred Musema, director de una fábrica de té, por la participación de sus empleados en el genocidio de Ruanda.[24] Los empleados utilizaron vehículos de la fábrica y la propiedad para la comisión de actos ilícitos. En este caso se clarificó la obligación de los directores y ejecutivos de adoptar las medidas necesarias para prevenir que sus subordinados cometan delitos en el desarrollo de sus actividades, especialmente cuando operan en zonas de conflicto o de inestabilidad.

A pesar de que existe la posibilidad de responsabilizar penalmente a los directivos y ejecutivos de las empresas ante una instancia intencional, se trata de una cuestión difícil de llevar a la práctica, especialmente en casos de empresas de gran tamaño debido a la dificultad de probar que las decisiones o conductas (acciones u omisiones) de los directivos y ejecutivos dieron lugar a la comisión de los crímenes. Las complejas estructuras y cadenas de suministro de las grandes empresas permiten encubrir fácilmente a los responsables individuales, difuminando cualquier conexión entre los hechos cometidos y las actuaciones de los directivos y ejecutivos de las empresas. Por lo tanto, la responsabilidad se suele trasladar al operario que realiza la acción y no a quienes la ordenan. Estas dificultades ya se veían reflejadas en los juicios de Núremberg, pues en algunos casos fue difícil probar que el acusado conocía personalmente las atrocidades cometidas en el seno de la empresa, por lo que muchos de los acusados fueron absueltos o condenados a penas leves.[25]

En definitiva, la responsabilidad penal de los agentes corporativos no resuelve de manera satisfactoria el problema de la participación de las empresas en crímenes internacionales que constituyen graves violaciones de los derechos humanos. Esto plantea la necesidad de establecer métodos alternativos para responsabilizar a las empresas por la falta de una organización y estructura adecuada para prevenir graves conductas ilegales en el

Business and Human Rights Movement. En: HARVEY, Caroline; SUMMERS, James; WHITE, Nigel D. (Ed.). *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*. Cambridge: CUP, 2014. p. 285-312.

22 Asunto Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation [ICC-01/09-01/11-1274-Corr2], Corte Penal Internacional, 30 de abril de 2014.

23 IHCR; FIDH; COLECTIVO DE ABOGADOS JOSÉ ALVEAR RESTREPO. *La contribución de ejecutivos de Chiquita en la comisión de crímenes de lesa humanidad en Colombia*: Comunicación bajo el artículo 15 del Estatuto de Roma de la Corte Penal internacional. Disponible en: www.verdadabierta.com/especiales-v/2017/chiquita/InformeChiquitaBrandsCPI.pdf.

24 *Prosecutor v. Musema*, ICTR-96-13-T, Judgment, 16 November 2001, paras. 889-926 and 942-951.

25 FERENCZ, Benjamin B. An International Jurisdiction for Corporate Atrocities: Observations of a Former Nuremberg War Crimes Prosecutor. *Harvard International Law Journal*, v. 57, p. 15-19, 2016.

marco de sus actividades.

En la actualidad, parte de la doctrina asume que una de las mejores vías para asegurar que los directivos y ejecutivos de las empresas se impliquen en el respeto de las normas internacionales es a través de la responsabilidad penal directa de las personas jurídicas, ya que aunque se logre identificar y sancionar a los responsables, la empresa podría continuar realizando una conducta ilícita. Por consiguiente, el enjuiciamiento directo de las empresas podría crear el elemento disuasorio necesario más allá del que supone enjuiciar a los actores individuales. En este sentido, se puede considerar la responsabilidad de las empresas mediante el modelo de imputación basado en el modelo de organización que atribuye la responsabilidad por fallas o defectos en la estructura organizacional de la persona jurídica. Este modelo ya es empleado en algunas jurisdicciones nacionales como en Australia.[26]

Se plantea, por tanto, la posibilidad de enmendar el Estatuto de Roma[27] o de adoptar un protocolo adicional para introducir la responsabilidad penal internacional directa de las personas jurídicas dentro de las competencias *ratione personae* de la CPI, independientemente de la responsabilidad penal de los individuos que cometieron la conducta delictiva.[28] Autores como CLAPHAM[29] y JÄGERS[30] presagiaban que tras la primera Conferencia de Revisión del Estatuto de Roma, que se llevó a cabo en Kampala (Uganda) en 2010, los Estados Parte incluirían la responsabilidad penal de las personas jurídicas dentro de las competencias de la CPI. Sin embargo, no se adoptó ninguna disposición relacionada con el tema, ni siquiera fue retomada la propuesta de Francia. Por otra parte, también se propone reformar únicamente la Parte VII del Estatuto de Roma para determinar sanciones subsidiarias aplicables a las empresas una vez que sus órganos hayan sido declarados responsables de cometer un crimen internacional.[31]

La posibilidad de enmendar el Estatuto de Roma ha sido planteada por algunas delegaciones y OSC durante los períodos de sesiones del GTI, señalando que el futuro instrumento vinculante sobre empresas y derechos humanos podría corregir una omisión histórica del Derecho penal internacional.[32] La propuesta de ampliación de las competencias de la CPI se basa en dos premisas: I) que las empresas se benefician de la comisión o participación en crímenes internacionales y II) que la responsabilidad penal individual, por sí sola, ha sido insuficiente hasta el día de hoy para abordar de manera adecuada una nueva realidad en la que estas entidades tienen una mayor participación en distintos ámbitos.

Entre los posibles beneficios de la extensión de las competencias de la CPI se encontrarían: el efecto disuasorio necesario para que las empresas lleven a cabo reformas en sus estructuras y operaciones por la función preventiva del Derecho penal, la garantía de una vía legal para hacer efectiva la responsabilidad de las empresas en caso de inacción por parte de los tribunales nacionales competentes y, finalmente, el fortalecimiento de la capacidad de los Estados para controlar las acciones de los actores corporativos.[33]

En suma, la falta de consenso sobre el reconocimiento de la responsabilidad penal internacional de las personas jurídicas no se debe a una limitante conceptual, sino más bien al resultado de las complejas negociaciones entre los Estados. Como señala BERNAZ, "[*i*]*n truth, there is no conceptual reason why corporations should be immune from liability under international criminal law, and*

26 IVORY, Radha; JOHN, Anna. Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations. *University of New South Wales Law Journal*, v. 40, n. 3, p. 1175-119, 2017.

27 KYRIAKAKIS, Joanna. Corporations before International Criminal Courts: Implications for the International Criminal Justice Project. *Leiden Journal of International Law*, v. 30, n. 1, p. 221-240, 2017. La extensión de la competencia de la CPI vía enmienda requerirá una mayoría de dos tercios en la reunión de la Asamblea de los Estados Parte o en una Conferencia de Revisión (artículo 121 del Estatuto de Roma).

28 Scheffer, David. Corporate Liability under the Rome Statute. *Harvard International Law Journal*, v. 57, p. 36-39, 2016.

29 CLAPHAM, Andrew. The Question of Jurisdiction under International Criminal Lawover Legal Persons: Lessons from the Rome Conference on an International Criminal Court. En: KAMMINGA, Menno T. y ZIA-ZARIFI, Saman (Ed.). *Liability of Multinational Corporations under International Law*. La Haya-Londres-Boston: Kluwer Law International, 2000. p. 139-195.

30 JÄGERS, Nicola. *Corporate Human Rights Obligations:* In Search of Accountability. Amberes: Intersentia, 2002. p. 220-222.

31 WATTAD, Mohammed Said-Alden. Natural Persons, Legal Entities, and Corporate Criminal Liability under the Rome Statute. *UCLA Journal of International Law and Foreign Affairs*, v. 20, n. 2, p. 391-424, 2016.

32 Consejo de Derechos Humanos, *Informe del segundo período de sesiones del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos*, A/HRC/34/47 (4 de enero de 2017), párr. 85.

33 KYRIAKAKIS, Joanna. Corporations before International Criminal Courts: Implications for the International Criminal Justice Project. *Leiden Journal of International Law*, v. 30, n. 1, p. 221-240, 2017.

the idea has never been clearly rejected."[34] En otras palabras, la responsabilidad penal de las personas jurídicas no es una noción que no exista o no pueda ser concebida en el Derecho internacional, pero se requiere de un consenso político para que pueda ser incorporada expresamente en el régimen jurídico internacional.

4. Los avances en el Derecho penal internacional para la responsabilidad penal de las empresas por la vulneración de derechos humanos

Algunos de los avances más destacables que han tenido lugar a nivel internacional favorecen la práctica de poner fin a la impunidad de graves abusos corporativos a través del Derecho penal internacional. Entre ellos destacan: a) el *Policy Paper* de la Oficina del Fiscal de la CPI sobre Priorización y Selección de Casos a ser Investigados, b) las sentencias de los casos *New TV S.A.L.* y *Akhbar Beirut S.A.L.* del Tribunal Especial para Líbano y c) el Protocolo de Malabo sobre las enmiendas al Protocolo sobre el Estatuto de la Corte Africana de Derechos Humanos y de los Pueblos. El primero de ellos mantiene el *statu quo* del Derecho penal internacional, enfocándose en la responsabilidad penal individual de los directivos y ejecutivos de las empresas por la comisión o complicidad en crímenes internacionales. Mientras que el segundo y el tercero ponen a prueba las fronteras del Derecho penal internacional y avanzan hacia el reconocimiento de la competencia de los tribunales internacionales para hacer efectiva la responsabilidad de las empresas por crímenes internacionales.

4.1. El *Policy Paper* de la Oficina del Fiscal de la Corte Penal Internacional sobre Priorización y Selección de Casos a ser Investigados

En septiembre de 2016, la Oficina del Fiscal de la CPI publicó, con base en el marco legal aplicable y la jurisprudencia de la Corte, un documento sobre priorización y selección de casos a ser investigados.[35] El *Policy Paper* de priorización presenta un gran potencial para que se preste mayor atención a los crímenes cometidos en el marco de las actividades empresariales.

El *Policy Paper* de priorización atrajo la atención de los medios internacionales y de las OSC dado que puso de manifiesto el compromiso de la Oficina del Fiscal de prestar especial consideración a la persecución de los crímenes del Estatuto de Roma que se cometan o que tengan como resultado la destrucción del medio ambiente, la explotación ilegal de los recursos naturales o el despojo ilegal de las tierras.

De acuerdo con lo señalado en el documento, estos nuevos criterios cumplen con el requisito de gravedad (escala, características, modo de comisión e impacto) para la selección de casos a ser investigados y procesados por el Fiscal, aunque no se lleva a cabo una extensión formal de los crímenes competencia de la CPI, es decir, la Oficina solo puede atender estos delitos accesorios indirectamente o, lo que es lo mismo, en la medida en que concurran elementos contextuales o materiales de crímenes que sean competencia de la Corte. No obstante, implica cierto reconocimiento de que estas situaciones de degradación ambiental son motivo de preocupación para la comunidad internacional y que en ocasiones dan pie a crímenes internacionales.

La importancia del documento no solo recae en que abre el debate sobre la posible incorporación de los atentados graves contra el medio ambiente en entornos de paz dentro de la competencia *ratione materiae* de la CPI,[36] sino que genera un cambio en el panorama del Derecho penal internacional.[37] El documento eleva las expectativas de someter a un mayor escrutinio las actividades de las empresas que afectan el disfrute de los derechos humanos. Muchos de los conflictos bélicos contemporáneos tienen sus raíces en la competencia por la apropiación de los recursos naturales,[38] por tanto,

34 BERNAZ, Nadia. Corporate Criminal Liability under International Law. The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon. *Journal of International Criminal Justice,* v. 13, n. 2, p. 313-330, 2015.

35 Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (15 September 2016).

36 LAMBERT, Caitlin. Environmental Destruction in Ecuador: Crimes against Humanity under the Rome Statute? *Leiden Journal of International Law*, v. 30, n. 3, p. 707-729, 2017.

37 GLOBAL WITNESS PRESS RELEASE. *Company Executives Could Now Be Tried for Land Grabs and Environmental Destruction* (15 de septiembre de 2016). Disponible en: www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environmentaldestruction-historic-move-international-criminal-court-prosecutor/.

38 VAN DEN HERIK, Larissa; DAM-DE JONG, Daniëlla. Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict. *Criminal Law Forum*, v. 22, n. 3, p. 237, 2011.

dado los beneficios económicos y financieros en juego, la destrucción del medio ambiente, la explotación ilegal de los recursos naturales y el despojo ilegal de las tierras son acciones en las que suelen estar implicadas las empresas, especialmente las del sector extractivo o agroindustrial.[39]

En 2014, se solicitó a la Oficina del Fiscal la investigación de crímenes de lesa humanidad en Camboya cometidos a raíz del generalizado y sistemático acaparamiento de tierras llevado a cabo por la élite gobernante del país,[40] incluidos los líderes empresariales. Las personas que viven de la tierra se oponen al acaparamiento, convirtiéndose en blancos de asesinatos, detenciones ilegales, criminalización y otros actos inhumanos. A la luz del *Policy Paper*, este tipo de situaciones consiguen una mayor atención del Fiscal de la CPI, que adquiere un papel más activo para hacer frente a los impactos negativos de las actividades empresariales sobre los derechos humanos.

En consecuencia, el *Policy Paper* puede alentar la investigación y enjuiciamiento de los directivos y ejecutivos de las empresas que sí están contemplados dentro de la jurisdicción de la CPI, lo que supone un importante avance teniendo en cuenta las limitaciones del Estatuto de Roma para hacer efectiva la responsabilidad directa de las empresas por la comisión o complicidad en crímenes internacionales.

Asimismo, como en el caso de Camboya o en el de *Chiquita Brands International*, el *Policy Paper* incita a que las OSC comuniquen de manera estratégica al Fiscal, aunque no se produzcan las investigaciones o el enjuiciamiento, potenciales casos de crímenes internacionales que se cometan o que tengan como resultado la destrucción del medio ambiente, la explotación ilegal de los recursos naturales o el despojo ilegal de las tierras a causa del desarrollo de actividades empresariales.[41] Esto puede atraer la atención de los medios internacionales y generar presión sobre las empresas por los posibles impactos en su imagen y reputación.

39 BERNAZ, Nadia. An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights. *Journal of International Criminal Justice*, v. 15, n. 3, p. 527-542, 2017.

40 Global Diligence. *Communication under Article 15 of the Rome Statute of the International Criminal Court* (julio de 2002). Disponible en: https://www.fidh.org/IMG/pdf/executive_summary-2.pdf.

41 FAIRLIE, Megan A. The Hidden Costs of Strategic Communications for the International Criminal Court. *Texas International Law Journal*, v. 51, n. 3, p. 281-319, 2016.

4.2. Las sentencias de los casos *New TV S.A.L.* y *Akhbar Beirut S.A.L.* del Tribunal Especial para Líbano

Uno de los avances, modestos pero destacables, en relación a la responsabilidad penal internacional de las empresas tuvo lugar en el Tribunal Especial para el Líbano (STL, por sus siglas en inglés), constituido para enjuiciar a los presuntos responsables de llevar a cabo el ataque del 14 de febrero de 2005 que mató a 22 personas, incluido el ex primer ministro de Líbano, Rafik Hariri, e hirió a muchos otras. Por primera vez, de manera inesperada, se determinó que un tribunal penal internacional *ad hoc* tenía competencia *ratione personae* sobre personas jurídicas por delitos contra la administración de justicia. A pesar de que se determinó en apelación la competencia del STL sobre dos casos contra empresas por desacato y obstrucción a la justicia, este precedente constituye un progreso importante en la responsabilidad penal internacional de las empresas porque pone de manifiesto dos cuestiones relevantes:

I) Que las empresas, como cualquier persona física, son susceptibles de responder por sus conductas ilícitas ante tribunales internacionales. En este sentido, era cuestión de tiempo que una conducta realizada por una empresa llamara la atención de un tribunal internacional, teniendo en cuenta que hoy en día es difícil que pasen desapercibidas en cualquier instancia legal, especialmente considerando el aumento del número de empresas y su implicación cada vez mayor en diversos ámbitos sociales, políticos, económicos, etc.

II) Que un reconocimiento expreso de la responsabilidad de las empresas facilita y agiliza los procesos penales en instancias supranacionales. La competencia del STL se determinó en apelación, lo que significa que hubo un examen y análisis previo a la cuestión. Esta cuestión puede dilatar los procesos. El reconocimiento expreso evita retrasos en el proceso y centraliza la atención, los esfuerzos y los recursos en determinar la responsabilidad de la empresa.

Debido a que la cuestión de los casos no versa sobre violaciones de derechos humanos, a continuación se analizan brevemente los antecedentes y las cuestiones más destacables de las conclusiones del Panel de Apelaciones respecto a la responsabilidad de las empresas, particularmente en el caso contra *New TV S.A.L.*

En 2014, el Juez David Baragwanath del STL emitió

órdenes contra personas físicas y empresas de comunicación. Los cargos se referían a la publicación en un programa de televisión y en un periódico de los nombres de los supuestos testigos confidenciales en el proceso ante el STL. Según el Juez Baragwanath, la publicación de los nombres de los testigos constituía una injerencia deliberada en la administración de justicia. El Juez Nicola Lettieri fue designado para resolver los casos contra Karma Mohamed Tahsin al-Khayat de *Al-Jadeed TV* y la empresa matriz de la emisora *New TV S.A.L.*,[42] y contra Ibrahim Mohamed Al-Amin de *Al-Akhbar* y la empresa matriz del periódico *Akhbar Beirut S.A.L.*, acusados de desacato y obstrucción a la justicia de acuerdo a la Regla 60 bis de las Reglas de Procedimiento y Prueba del Tribunal.[43]

En julio de 2014, el Juez Lettieri falló a favor de la defensa de *New TV S.A.L.* y Karma Khayat, que impugnaron la competencia del STL debido a que no existía una base legal en el Estatuto del Tribunal, en las Reglas de Procedimiento y Prueba o en el Derecho penal internacional para iniciar un proceso contra una persona jurídica.[44] El Juez, por tanto, determinó que la Regla 60 bis se aplicaba solamente a las personas físicas.[45] No obstante, en ese mismo año el Panel de Apelación revirtió la decisión del Juez Lettieri, determinando que es parte del interés de la justicia interpretar que la competencia personal del Tribunal engloba a las personas jurídicas de conformidad con la Regla 60 bis.[46] Pocos meses después el Panel de Apelación resolvió en el mismo sentido en el caso *Akhbar Beirut S.A.L.*

Estos casos constituyen un precedente de gran relevancia hacia la responsabilidad penal internacional de las empresas pues, por primera vez, aunque de manera simbólica y con un alcance limitado, un tribunal penal internacional responsabilizó a dos empresas, desafiando así el enfoque individualista del Derecho penal internacional. Esta decisión, sin duda, podría utilizarse en el futuro para un caso sobre empresas y derechos humanos. Asimismo, podría servir de referencia en otras instancias internacionales como prueba de que las empresas pueden cometer delitos con incidencia en el ámbito internacional y pueden ser procesadas por ello. Algunos autores, como BERNAZ, esperan que estos precedentes no queden aislados y que otros tribunales penales internacionales, incluidos los tribunales nacionales, comiencen a considerar la responsabilidad penal de las empresas en virtud del Derecho internacional.[47]

4.3. El Protocolo de Malabo sobre las enmiendas al Protocolo sobre el Estatuto de la Corte Africana de Derechos Humanos y de los Pueblos

La Unión Africana adoptó en 2014 el Protocolo de Malabo sobre las enmiendas al Protocolo sobre el Estatuto de la Corte Africana de Derechos Humanos y de los Pueblos, que entrará en vigor una vez sea ratificado por 17 Estados miembros de la Unión Africana (artículo 11). El Protocolo crea una nueva sección de Derecho penal internacional que atribuye a la Corte Africana la competencia para conocer de casos de crímenes internacionales cometidos por empresas operando en África.[48]

42 Asunto Ms Karma Mohamed Tahsin Al Khayat and Al Jadeed (STL-14-05), Tribunal Especial para el Líbano, 31 de enero de 2014.

43 Asunto Mr Ibrahim Mohamed Ali Al Amin and Akhbar Beirut S.A.L. (STL-14-06), Tribunal Especial para el Líbano, 31 de enero de 2014.

44 En el caso contra la empresa *Akhbar Beirut S.A.L.* se impugnó la competencia del STL del mismo modo que en el caso contra *New TV S.A.L.* A pesar de que el Panel de Apelación ya había resuelto en el caso *New TV S.A.L.* que el STL era competente sobre las personas jurídicas en los casos de desacato y obstrucción de la justicia, el Juez Lettieri rechazó una vez más el caso debido a la falta de competencia sobre personas jurídicas. De acuerdo con la opinión del Juez, la decisión en *New TV S.A.L.* era un caso único y no se apoya en la jurisprudencia internacional, por lo que la decisión del Panel de Apelación era solo aplicable a ese caso. Asimismo, se apoyó en que uno de los jueces del Panel discrepó por lo que la decisión no fue unánime, y por lo tanto lleva menos autoridad que una decisión unánime. Véase, Asunto Decision on Motion challenging jurisdiction Mr Ibrahim Mohamed Ali Al Amin and Akhbar Beirut S.A.L. (STL-14-06/PT/CJ), Tribunal Especial para el Líbano, 6 de noviembre de 2014.

45 Decision on Motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment, New TV S.A.L. and Khayat (STL-14-05/PT/CJ), Tribunal Especial para el Líbano, 24 de Julio de 2014.

46 Del mismo modo, el Panel de Apelación, por razones de seguridad jurídica y para evitar la fragmentación de la ley, resolvió la impugnación de competencia en el caso *Akhbar Beirut S.A.L.*, señalando que el STL sí era competente para conocer de los casos contra las personas jurídicas por desacato y obstrucción de la justicia. Véase, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin (STL-14-06/PT/AP/AR126.1), Tribunal Especial para el Líbano, 23 de enero de 2015.

47 BERNAZ, Nadia. Corporate Criminal Liability under International Law. The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon. *Journal of International Criminal Justice,* v. 13, n. 2, p. 313-330, 2015.

48 El artículo 46C sobre responsabilidad penal empresarial del Protocolo de Malabo se lee de la siguiente manera: "*1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with*

El Protocolo de Malabo es el primer instrumento estatutario que incorpora la responsabilidad penal directa de las personas jurídicas mediante el modelo de imputación basado en el modelo de organización. En lugar de centrarse en el comportamiento de determinados individuos en el seno de la empresa, la responsabilidad se deriva de la implementación de sus políticas formales e informales y del conocimiento de la comisión del delito (artículo 46C.2-5).

Esto demuestra que está a la vanguardia de los modelos de imputación de responsabilidad penal de las personas jurídicas, pues mediante este modelo se busca incentivar cambios en las prácticas y en las políticas de las empresas. Por otra parte, la responsabilidad penal de las personas jurídicas no excluye la responsabilidad de las personas físicas que cometieron o fueron cómplices del crimen (artículo 46C.6), lo que evita que los miembros individuales se escuden en la estructura de las empresas para evadir su responsabilidad.

Se pueden destacar tres cuestiones relevantes en relación al Protocolo de Malabo. En primer lugar, si se adoptaran las enmiendas, se constituiría el primer tribunal internacional que reconocería expresamente su competencia sobre las empresas. En segundo lugar, se trata de una propuesta que surge de los Estados del Sur Global para poner fin a la impunidad corporativa. Esto reafirma el hecho de que las actividades de las empresas tienen un mayor impacto negativo en el Sur Global, como en el continente africano, donde se documentan múltiples conflictos relacionados con la extracción de los recursos naturales por parte de grandes empresas del sector minero en países como Angola, Sierra Leona, Liberia y la República Democrática del Congo (RDC).[49] Esta propuesta supone una respuesta a las demandas de la sociedad civil para establecer vías legales que creen un contrapeso a las actuaciones de las empresas transnacionales en los Estados africanos incapaces o indispuestos a responsabilizar a las empresas que operan en sus territorios.

Finalmente, el Protocolo de Malabo no solo concedería a la Corte Africana competencia sobre los crímenes internacionales contemplados en el Estatuto de Roma, sino también sobre otro tipo de conductas como corrupción, tráfico de personas, tráfico de drogas, tráfico de residuos peligrosos y explotación ilícita de recursos naturales, entre otros (artículo 28A.1). Tras probarse el alcance y la viabilidad del enjuiciamiento de las empresas en esta instancia internacional, se podría implementar en la CPI y en otros tribunales penales internacionales *ad hoc*.

5. La responsabilidad penal de las empresas a nivel nacional por la vulneración de derechos humanos

A la luz de lo señalado anteriormente y de los obstáculos y límites descritos en el Derecho penal internacional para hacer efectiva la responsabilidad de las empresas, en este apartado se examina la viabilidad de responsabilizar penalmente a las empresas ante los tribunales penales a nivel nacional por las vulneraciones de derechos humanos cometidas en el marco de sus actividades.

El vacío jurídico del Derecho penal internacional en relación a las empresas se ve subsanado parcialmente a nivel nacional, ya que, como se ha indicado, si bien la responsabilidad penal de las empresas aún no es aceptada universalmente en todas las jurisdicciones, es cierto que cada vez son más los Estados que reconocen la responsabilidad penal de las personas jurídicas, como responsables directos o como cómplices de actos ilícitos.

No obstante, existen diferentes posturas en los ordenamientos jurídicos internos respecto a esta cuestión. Por ejemplo, de acuerdo con un estudio comparativo

the exception of States. 2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence. 3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation. 4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation. 5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel. 6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes." Sobre el Protocolo de Malabo, véase AMNISTÍA INTERNACIONAL. *Malabo Protocol:* Legal and Institutional Implications of the Merged and Expanded African Court. Londres: Amnesty International, 2016.

49 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, ONU S/2002/1146 (16 de octubre de 2002); Final report of the Monitoring Mechanism on Angola Sanctions, S/AC.31/2000/CRP.1 (21 de diciembre de 2000); Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, S/2000/1195 (20 de diciembre de 2000).

encargado por la Unión Europea (UE) en relación con la responsabilidad penal de las personas jurídicas, el 50 por ciento de los Estados miembros de la UE han introducido la responsabilidad penal general en sus sistemas jurídicos, de los cuales, el 41 por ciento reconoce la responsabilidad penal de las personas jurídicas solo para delitos específicos. El resto reconoce la responsabilidad administrativa de las empresas por la comisión de delitos.[50]

A su vez, un gran número de Estados han incorporado dentro de sus ordenamientos penales los crímenes internacionales contemplados en el Estatuto de Roma.[51] No solo los Estados Parte del Estatuto de Roma, sino también algunos que no lo son, como Japón, India o los Estados Unidos, que han incorporado uno o más crímenes dentro de su legislación nacional.[52]

Asimismo, los Estados, en cumplimiento con sus obligaciones y compromisos internacionales, incorporan y definen sanciones penales en sus ordenamientos internos derivados de tratados internacionales de derechos humanos y de derecho humanitario, muchos de los cuales también fomentan la responsabilidad penal de las empresas a nivel nacional.[53] Es decir, algunos instrumentos internacionales contienen disposiciones para que los Estados Parte adopten las medidas legales aplicables a las personas jurídicas que cometan los hechos ilícitos en determinados ámbitos expuestos a la delincuencia empresarial. Por ejemplo, el Protocolo facultativo de la Convención sobre los Derechos del Niño relativo a la Venta de Niños, la Prostitución Infantil y la utilización de Niños en la Pornografía de 2000 señala que los Estados Parte adoptarán, cuando proceda, las disposiciones que permitan hacer efectiva la responsabilidad de las personas jurídicas, que podrá ser penal, civil o administrativa (artículo 3.4).[54] Esta fórmula discrecional de dejar elegir a los Estados el tipo de responsabilidad se replica en la mayoría de los tratados. De hecho, esta disposición se contempla en el Proyecto de artículos sobre crímenes contra la humanidad de la Comisión de Derecho Internacional que establece la responsabilidad de las personas jurídicas está sujeta a los principios jurídicos de cada Estado.

Lo anterior indica que en varias jurisdicciones existe un riesgo latente para las empresas de ser responsables penalmente por graves violaciones de derechos humanos. En Europa se registran un número considerable, pero limitado, de procesos penales por violaciones de derechos humanos cometidas en el marco de las actividades de las empresas en terceros Estados.[55] La mayoría de estos casos están relacionados con un comportamiento negligente de las empresas matrices por no prevenir dichos abusos. Sin embargo, la práctica de responsabilizar directamente a las empresas es limitada, por lo que en la mayoría de casos que se han llevado por la vía penal se intenta responsabilizar a los directivos o ejecutivos como vía alternativa para modificar el comportamiento de las empresas.

En Alemania, por ejemplo, se presentó una denuncia en la oficina del fiscal de Frankfurt am Main contra dos ejecutivos de la empresa *Lahmeyer International GmbH*, responsable de la construcción de la represa de Merowe en el norte de Sudán. Se les acusó de provocar la inundación de más de 30 aldeas, el desplazamiento de la población y la destrucción de sus medios de subsistencia.[56] Asimismo, varias OSC denunciaron en Tübingen al director de la empresa *Danzer Group* por su complicidad en delitos de abusos sexuales, detenciones ilegales, incendios provocados y graves daños cometidos por las fuerzas de seguridad congolesas durante un

50 VERMEULEN, Gert; DE BONDT, Wendy; RYCKMAN, Charlotte. *Liability of legal persons for offences in the EU*. Amberes: Maklu, 2012. p. 79.

51 RAMASASTRY, Anita; THOMPSON, Robert C. *Commerce, Crime and Conflict Legal Remedies for Private Sector Liability for Grave Breaches of International Law*. A Survey of Sixteen Countries New Security Programme Economic Agendas and Civil Wars. *Executive Summary*. Oslo: FAFO, 2006. p. 16-17.

52 DE JONGE, Alice. *Transnational corporations and international law*. Accountability in the global business environment. Cheltenham-Northampton: Edward Elgar, 2001. p. 139.

53 MONGELARD, Éric. Responsabilidad civil de las empresas por violaciones del derecho internacional humanitario. *International Review of the Red Cross*, n. 863, p. 1-30, 2006.

54 Otros instrumentos internacionales que contemplan la responsabilidad penal de las personas son: la Convención Internacional sobre la Represión y el Castigo del Crimen de Apartheid, de 30 de noviembre de 1973 (artículo 2.f); el Convenio Internacional para la Represión de la Financiación del Terrorismo, de 9 de diciembre de 1999 (artículo 5); y, la Convención de las Naciones Unidas contra la Delincuencia Organizada Transnacional, de 15 de noviembre de 2000 (artículo 10).

55 ENNEKING, Liesbeth et al. *Zorgplichten van nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen*. Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles. Ámsterdam: WODC, 2015.

56 ECCHR. *Reckless development:* forced displacement due to Lahmeyer dam construction (mayo, 2016). Disponible en: www.ecchr.eu/en/our_work/business-and-human-rights/lahmeyer-case.html.

ataque a la población de Bongulu.[57] En los Países Bajos han tenido lugar los conocidos casos contra los empresarios holandeses, Guus Kouwenhoven y Frans van Anraat, que fueron condenados por facilitar la comisión de crímenes internacionales al exportar armas y productos químicos a Liberia e Iraq, respectivamente.[58]

Si bien los casos anteriores son importantes en el ámbito de empresas y derechos humanos, su contenido es escaso en relación a la responsabilidad de las empresas *per se* como personas jurídicas. No obstante, existen otros casos que constituyen un referente importante que apuntan en la dirección correcta para fomentar el uso de la vía penal como un mecanismo judicial para hacer efectiva la responsabilidad de las empresas por la comisión o complicidad en graves violaciones de derechos humanos. Especialmente, representan una evidencia de que algunos conceptos del derecho interno de los Estados se pueden trasladar de manera cautelosa al ámbito internacional para hacer frente a la impunidad corporativa.

Por ejemplo, en Suiza, en 2013, se abrió una investigación penal en contra de la empresa minera *Argor-Heraeus SA*, acusada de blanqueo de capitales y pillaje de oro saqueado por un grupo armado ("*Front nationaliste et intégrationniste*") del noreste de la RDC. Los beneficios obtenidos de la venta de oro por los grupos armados sirven para financiar sus operaciones y para la compra de armas. Se alegaba la responsabilidad penal de la empresa por un delito contemplado en la legislación suiza que se deriva de los instrumentos internacionales aplicables a los conflictos armados no internacionales.[59]

En el mismo año, en los Países Bajos, la empresa *Lima Holding B.V.* fue acusada por varias OSC de complicidad en violaciones del Derecho internacional humanitario cometidas en los territorios palestinos ocupados por Israel, mediante el suministro de grúas y otros servicios para la construcción del muro. En 2017, se presentó una denuncia penal ante el fiscal holandés en contra del banco *Rabobank* por el blanqueó de las ganancias de los cárteles de droga mexicanos y por facilitar la comisión de crímenes de lesa humanidad y la tortura de civiles mexicanos a manos de estos cárteles.[60]

En Francia, las empresas *Amesys*[61] y *Qosmos*[62] están bajo investigación por suministrar respectivamente equipos de vigilancia al gobierno de Libia y Siria, que fueron utilizados para llevar a cabo detenciones arbitrarias, torturas y tratos inhumanos y degradantes a los opositores de dichos gobiernos. En 2016, antiguos empleados de la cementera *Lafarge* junto con organizaciones de la sociedad civil interpusieron una denuncia penal contra la empresa por la complicidad de crímenes de guerra y de lesa humanidad cometidas a través de las actividades de su filial en Siria entre 2013 y 2014. Según las organizaciones de la sociedad civil, la empresa pagaba a grupos armados en Siria, incluido al Estado Islámico (ISIS), para proteger sus actividades, violando así las sanciones impuestas por organismos internacionales y contribuyendo financieramente al conflicto armado en la región. En 2018, meses después de que los directivos de la empresa estuvieran bajo investigación formal por el financiamiento del terrorismo, la empresa *Lafarge* fue imputada por los jueces de instrucción por complicidad en crímenes de lesa humanidad, financiamiento de una empresa terrorista y por poner en peligro la vida de las personas. Además, se le ordenó un depósito de seguridad antes del juicio.[63]

En vista de los casos referidos en este apartado, se puede afirmar que la vía penal a nivel nacional presenta importantes posibilidades para responsabilizar a las

57 GLOBAL WITNESS. *Criminal Complaint against Senior Manager of Danzer Accountability for Human Rights Violations in the Democratic Republic of Congo*. Disponible en: www.globalwitness.org/en/archive/criminal-complaint-accuses-senior-manager-danzer-group-responsibility-over-human-rights/.

58 Public Prosecutor v. Guus Kouwenhoven, Tribunal Supremo de los Países Bajos [ECLI:NL:HR:2010:BK8132], 20 de abril 2010; Public Prosecutor v. van Anraat, Tribunal de Distrito de La Haya [LJN AU8685], 23 de diciembre de 2005.

59 BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. *Argor-Heraeus investigation (re Dem. Rep. of Congo)*. Disponible en: https://business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo.

60 D'OLIVEIRA, Prakken. *Aangifte tegen Rabobank Groep vanwege witwassen van winsten van Mexicaanse drugskartels*. Disponible en: http://www.prakkendoliveira.nl/nl/nieuws/aangifte-tegen-rabobank-groep-vanwege-witwassen-van-winsten-van-mexicaanse-drugskartels/.

61 SHERPA. *2006 Annual Report* (2 de mayo de 2007). Disponible en: www.asso-sherpa.org/wp-content/uploads/2013/09/Annual-report-2006.pdf.

62 BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. *Qosmos investigation (re Syria)*. Disponible en: https://business-humanrights.org/en/qosmos-investigation-re-syria.

63 ECCHR. *French Judiciary indicts former directors of Lafarge in Syria case*. Disponible en: www.ecchr.eu/en/business-and-human-rights/lafarge-syria.html; ECHHR. Landmark Decision: Company Lafarge Indicted - Complicity in Crimes Against Humanity Included. Disponible en: https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_Lafarge_Syria_Indictment_CrimesHumanity_Sherpa_ECCHR_20180628.pdf.

empresas, o bien a sus directivos y ejecutivos, por la comisión o complicidad en graves violaciones de derechos humanos. No obstante, la investigación y enjuiciamiento penal de estos casos están ligados a una serie de obstáculos prácticos, legales e incluso políticos que reducen el potencial de esta vía, entre ellos: a) la competencia internacional en materia penal, b) el inicio de la investigación y del proceso penal y c) la falta de cooperación judicial en la investigación, que se analizan con mayor detalle a continuación.

5.1. La competencia internacional en materia penal

Las empresas transnacionales realizan sus actividades en varios países, lo que equivale a una pluralidad de escenarios donde pueden cometer actos ilícitos. Por tanto, las cuestiones competenciales también juegan un papel importante en la investigación y enjuiciamiento penal de las empresas ya que, por lo general, se trata de casos de carácter extraterritorial que se cometen en el marco de sus operaciones globales o de sus cadenas de suministro. Así surge la cuestión de qué tribunal es competente cuando se sospecha o se denuncia que un directivo o una empresa registrada o domiciliada en una jurisdicción (*home State*) comete o contribuye a la comisión de un delito en otra (*host State*).

La jurisdicción penal tiene primordialmente un carácter territorial y, por tanto, se suele ejercer sobre los hechos y empresas locales donde tuvieron lugar los actos delictivos (*host State*). Esto, junto con las doctrinas de personalidad jurídica separada y de responsabilidad limitada de las entidades que conforman un grupo corporativo, escudan a las empresas matrices domiciliadas en los *home States* de cualquier riesgo de responsabilidad asociado a sus actividades globales.

No obstante, casi todos los Estados de conformidad a los principios reconocidos por el Derecho internacional ejercen y reconocen de forma unilateral la jurisdicción penal extraterritorial para el enjuiciamiento y sanción de los delitos más graves cometidos más allá de sus fronteras nacionales. En este sentido, la Corte Internacional de Justicia en el caso *Lotus* señaló que "*in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State*."[64]

Por lo general, para investigar y enjuiciar los delitos con elementos de extranjería sin afectar la soberanía y los intereses legítimos de otros Estados se basan en los principios de territorialidad, de personalidad y de jurisdicción universal.[65] La mayoría de los casos de empresas y derechos humanos llevados por la vía penal se basan en el principio de personalidad ya que la responsabilidad penal de los nacionales de un Estado por actos cometidos en terceros Estados no plantea, en principio, problemas competenciales. Por ejemplo, el caso de *Lima Holding B.V.* y los de *Amesys* y *Qosmos* se apoyaron en dicho principio ya que las empresas estaban constituidas en la jurisdicción de los Estados, respectivamente.

Por su parte, el principio de territorialidad también permite a los tribunales penales de un Estado conocer los actos delictivos en terceros Estados cuando una empresa no adopta las medidas necesarias para prevenir los delitos o, en su defecto, participa mediante órdenes, ejerciendo una influencia o facilitando la comisión. Sin embargo, la jurisdicción universal no presenta las mismas oportunidades a pesar de que no requiere vínculos territoriales o nacionales, ya que solo se activa con un número limitado de crímenes contemplados en el Derecho internacional y, por lo general, requiere la presencia del acusado dentro de la jurisdicción del Estado.

5.2. El inicio de la investigación y del proceso penal

A pesar de que los tribunales puedan ser competentes para conocer de actos delictivos en terceros Estados, pocas veces comienzan las acciones legales necesarias para investigar o enjuiciar a sus empresas o a sus filiales por delitos cometidos en el extranjero, incluso si su ordenamiento jurídico cuenta con los recursos y las bases legales para ejercer la jurisdicción penal extraterritorial o se tienen los conocimientos y las pruebas necesarias.[66]

64 Sentencia del Caso Lotus Francia v. Turquía [CPJI, serie A, núm. 10], Corte Internacional de Justicia, 7 de septiembre de 1927, párr. 50.

65 ZERK, Jennifer A. *Towards a fairer and more effective system of domestic law remedies*. A report prepared for the Office of the UN High Commissioner for Human Rights. Disponible en: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf. p. 42-43.

66 SKINNER, Gwynne; MCCORQUODALE, Robert; DE SCHUTTER, Olivier. *The Third Pillar*. Access to Judicial Remedies for Human Rights Violations by Transnational Business. Bruselas-

Los tribunales penales han demostrado ser extremadamente selectivos en los casos que se abren a proceso. Así, en la mayoría de las jurisdicciones existe una autoridad judicial con la facultad discrecional u obligatoria de ejercer la acción pública en todos los procesos penales no reservados a denuncias privadas. En algunas ocasiones las decisiones de estas autoridades son inapelables. En otros casos también los afectados pueden interponer querellas, sin embargo, le corresponde a la autoridad competente decidir si se abre una investigación o el proceso.

Las razones más comunes por las que no suele abrirse la investigación y el proceso se deben a la prioridad que un tribunal le da a los casos con hechos o víctimas que se encuentran en un tercer Estado en relación a las situaciones que tienen lugar dentro de su jurisdicción territorial. Es razonable (de cierto modo) que la prioridad recaiga en los casos dentro de su competencia territorial por el acceso directo a las víctimas y a la evidencia para obtener una posible condena. Por el contrario, los casos extraterritoriales, sin tener la certeza de ejecutar una posible sentencia, requieren de conocimientos especializados y recursos adicionales para llevar a cabo la investigación o el proceso. Por tanto, los Estados no suelen priorizar los delitos corporativos que tienen lugar en terceros Estados ya que las empresas implicadas se ubican en múltiples jurisdicciones y, por tanto, las investigaciones para determinar la responsabilidad de una empresa por delitos cometidos en el extranjero pueden parecer particularmente desalentadoras.

Por otra parte, los casos contra las empresas a menudo atraen presiones externas que limitan las actuaciones de los órganos judiciales por los costes políticos y económicos, es decir, por los posibles conflictos de intereses, lo que puede crear interferencias políticas que lleven a que la autoridad competente decida no dar inicio a la investigación o al proceso penal por motivos políticos en lugar de razones de justicia. A pesar del carácter independiente de las autoridades judiciales, existe una gran presión externa del poder ejecutivo cuando están en juego intereses políticos y económicos, lo que afecta la decisión de ejercer o no la acción penal o, luego de ejercitarla, no mantenerla. Esto se debe a los efectos negativos en las relaciones existentes con el sector privado o, incluso, entre el Estado en el que se han cometido los delitos y el Estado que pretende ejercer su jurisdicción penal extraterritorial.

Londres: ICAR-CORE-ECCJ, 2013. p. 32-33.

En el caso de *Lima Holding B.V*. el fiscal holandés se negó a seguir el caso argumentando que la contribución de la empresa en la construcción del muro fue menor y que la complejidad del caso requería una importante cantidad de recursos para llevar a cabo la investigación. En la misma línea, el caso contra la empresa *Argor-Heraeus* en Suiza se cerró en 2015 por falta de acceso a las pruebas.

5.3. La cooperación y la asistencia judicial en la investigación

Dada la complejidad y el carácter extraterritorial de los casos, se requiere que los Estados empleen recursos humanos y económicos para acceder a las víctimas, a los testigos y a las evidencias que prueben los elementos constitutivos del delito. En este sentido, algunas jurisdicciones como Alemania, Bélgica, Dinamarca, Noruega, los Países Bajos, el Reino Unido y Suecia cuentan con unidades especiales dedicadas a la investigación de crímenes de guerra, de lesa humanidad y crímenes internacionales, incluyendo los cometidos en el extranjero.[67]

El Grupo de Trabajo de las Naciones Unidas sobre empresas y derechos humanos ha recomendado la creación de unidades especializadas en la investigación y el enjuiciamiento que cuenten con expertos en las causas transfronterizas de empresas y derechos humanos. Si ya existen unidades dedicadas a los crímenes de guerra o de otro tipo, los Estados deben alentar a que estas también aborden las causas de derechos humanos relacionadas con actividades empresariales y las causas en las que intervengan infractores individuales. De hecho, la Dependencia Especializada en Crímenes Internacionales de los Países Bajos se hizo cargo del caso van Anraat y recabó pruebas procedentes de diversos países, entre otros, Bélgica y los Estados Unidos.[68] Asimismo, la Unidad Especializada en Crímenes de Guerra y Crímenes de Lesa Humanidad del *Tribunal de Grande Instance* de Pa-

67 ZERK, Jennifer A. *Towards a fairer and more effective system of domestic law remedies*. A report prepared for the Office of the UN High Commissioner for Human Rights. Disponible en: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

68 Consejo de Derechos Humanos, Mejores prácticas y forma de aumentar la eficacia de la cooperación transfronteriza entre los Estados en lo que respecta a la aplicación de la legislación en la cuestión de las empresas y los derechos humanos: Estudio del Grupo de Trabajo sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, A/HRC/35/33 (25 de abril de 2017), párr. 24 y 94.

rís está a cargo de las investigaciones en los casos contra las empresas *Amesys*, *Qosmos* y *Lafarge*.

En los casos que tratan delitos cometidos en el seno de grupos corporativos, no solo se requiere de unidades especializadas o recursos necesarios para investigar este tipo de ilícitos extraterritoriales, sino que es imprescindible la cooperación y la asistencia judicial entre los Estados, especialmente para que las autoridades del *home State* tengan acceso a la información y a las evidencias localizadas en el *host State*. La investigación en los casos de empresas y derechos humanos, por tanto, debe superar las diferencias culturales, las distancias geográficas y temporales y las circunstancias sociales en el lugar de los hechos para reunir las evidencias suficientes para llevar a juicio a la presunta empresa responsable.[69]

Por consiguiente, se requiere del permiso de otros Estados para realizar las diligencias judiciales del proceso penal (notificación, una diligencia de prueba, un acto jurídico o una medida cautelar). Es decir, las autoridades encargadas de la investigación no pueden realizarla en un tercer Estado sin la autorización o el consentimiento de sus homólogos pues se consideraría una violación de la integridad territorial y a su soberanía. No obstante, la cooperación y asistencia judicial no siempre garantizan de manera ágil y eficiente las diligencias judiciales del proceso penal, ya que las autoridades locales del lugar donde se cometieron los actos ilícitos no siempre están dispuestas a cooperar, a pesar de haber un tratado de cooperación vigente. En el caso de *Lima Holding B.V.* el fiscal holandés observó también que, en términos prácticos, sería difícil seguir adelante con el caso debido a la posible falta de cooperación de las autoridades israelíes en la cuestión en concreto.

En el ámbito de la cooperación y la asistencia judicial recíproca entre Estados, existen varios instrumentos de alcance regional e internacional, que constituyen, en el mejor de los casos, un sistema irregular de normas que hasta ahora no han permitido la cooperación eficiente en todos los ámbitos.[70] En las sesiones del GTI se resaltó que la cooperación entre los Estados y los órganos judiciales era fundamental ya que con frecuencia el *home State* y el *host State* no cooperan en las investigaciones ni el reconocimiento mutuo de las sentencias de los tribunales nacionales.

Así, el instrumento vinculante se presta como una herramienta para fortalecer y mejorar la cooperación en los casos extraterritoriales, por lo que se ha sugerido que se reafirmen las obligaciones de los Estados de concertar acuerdos bilaterales y multilaterales para facilitar las solicitudes de asistencia letrada y la realización de investigaciones transfronterizas; el establecimiento de mecanismos de intercambio de información; y, finalmente, llevar a cabo actividades adecuadas de capacitación, información y apoyo en materia de cumplimiento de la ley.[71]

6. Conclusiones

El Derecho penal y la justicia penal se constituyen como una de las vías judiciales para hacer efectiva la responsabilidad de las empresas por graves violaciones de derechos humanos. Este mecanismo judicial se alinea a los objetivos del primer y tercer pilar de los Principios Rectores, por lo que merece un espacio en los Planes de Acción Nacional sobre empresas y derechos humanos como un mecanismo a ser reforzado para garantizar a las víctimas de abusos corporativos el acceso a la justicia.

Los casos llevados por la vía penal no solo alertan a las empresas de que sus acciones están sujetas a un mayor escrutinio, sino que también proporcionan formas innovadoras de garantizar justicia a las víctimas de abusos corporativos. En algunas jurisdicciones de Derecho continental, las víctimas incluso pueden obtener una indemnización civil del proceso penal. Asimismo, a diferencia de la vía civil y de la administrativa, la responsabilidad penal implica una mayor condena moral.

A pesar del potencial del Derecho penal como me-

69 El informe del ACNUDH sobre el acceso a los recursos judiciales contiene una serie de recomendaciones (objetivos 9-10) para mejorar la cooperación judicial entre Estados para garantizar el acceso a la justicia a las víctimas de abusos de derechos humanos por empresas. Los objetivos de estas recomendaciones son facilitar y agilizar la detección, investigación, persecución y la represión para este tipo de casos específicos. Véase, Mejorar la rendición de cuentas y el acceso a las reparaciones para las víctimas de violaciones de los derechos humanos relacionadas con actividades empresariales, 10 de mayo de 2016, Doc. ONU. A/HRC/32/19.

70 ICJ. *Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises*. Ginebra: ICJ, 2016. p. 32.

71 Consejo de Derechos Humanos, Informe del segundo período de sesiones del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, A/HRC/34/47 (4 de enero de 2017), párr. 110.

canismo para garantizar justicia a los afectados, son (relativamente) pocos los casos de empresas y derechos humanos que se han llevado a través de esta vía. Aún existen diversos obstáculos tanto doctrinales como procesales, políticos y prácticos que merecen especial atención para explotar el potencial de esta vía judicial.

La inclusión de las personas legales dentro de la competencia de la CPI es un tema pendiente en la agenda internacional. Los avances descritos en el presente artículo en el Derecho penal internacional no solo representan un avance en la dirección correcta para hacer frente a la impunidad de los graves abusos cometidos en el marco de las actividades de las empresas, sino que son una muestra de la falta de voluntad política de los Estados para reconocer la responsabilidad penal internacional de las personas jurídicas. La experiencia de los Estados respecto a esta cuestión sirve de base para seguir avanzando cautelosamente en la búsqueda de modelos contemporáneos de imputación y de sanciones adecuadas para las empresas que permitan frenar la generalización de una cultura corporativa que alienta a la violación de derechos humanos. Asimismo, el reconocimiento de la responsabilidad internacional penal de las empresas supone un esfuerzo para paliar los efectos socioeconómicos que se generan desproporcionalmente en el Sur Global a raíz del actual modelo económico global.

A nivel nacional, dado que muchos Estados han superado los obstáculos doctrinales de conformidad con los principios de sus ordenamientos internos, la práctica de recurrir a la vía penal para hacer efectiva la responsabilidad de las empresas por violaciones de derechos humanos o, en su defecto, a los directivos o ejecutivos de las mismas, se consolida cada vez más. Sin embargo, en esta práctica surgen obstáculos relacionados con cuestiones competenciales, procesales y sobre la responsabilidad penal de las empresas matrices por delitos cometidos por filiales o socios comerciales en terceros Estados.

Entre los objetivos del tratado internacional sobre empresas y derechos humanos se encuentran mejorar y reforzar los mecanismos de responsabilidad de las empresas. En este sentido, se presenta como una oportunidad para dar un mayor impulso de la responsabilidad penal de las empresas por violaciones de derechos humanos, tanto a nivel internacional como nacional. El futuro tratado internacional no solo se constituye como una oportunidad para subsanar los errores del pasado respecto a la responsabilidad penal internacional de las empresas, sino también para estructurar el Derecho penal de los Estados hacia una posición mínima respecto a esta cuestión. El tratado debería definir los posibles actos y omisiones atribuibles a las empresas por la comisión o contribución a violaciones graves de derechos humanos, así como las sanciones a las que estarían sujetas. Asimismo, con base en la experiencia, podría definir medidas para reducir los obstáculos que implica la práctica de enjuiciar penalmente a las empresas a nivel nacional por actos ilícitos cometidos en sus operaciones globales.

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The environmental law dimensions of an international binding treaty on business and human rights

As dimensões do direito ambiental de um tratado internacional vinculante sobre empresas e direitos humanos

Juan Gabriel Auz Vaca

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The environmental law dimensions of an international binding treaty on business and human rights*

As dimensões do direito ambiental de um tratado internacional vinculante sobre empresas e direitos humanos

Juan Gabriel Auz Vaca**

Abstract

Multinational Corporations are present in virtually every corner of the world, generating not only economic growth but foremost human rights abuses linked to environmental degradation. In view of this, the United Nations Human Rights Council mandated an intergovernmental working group to draft a binding instrument on business and human rights, potentially drawing obligations for private commercial entities with a transnational character. In that context, an analysis of the on-going negotiations will be conducted to identify and discuss the environmental law dimensions embedded therein. A dialogue between the content of the *travaux préparatoires* of the treaty's drafting process - including the official reports of the three sessions and other relevant documents - and the evolution of international corporate environmental accountability, will yield some possible pathways for environmental protection linked to human rights. Furthermore, special importance will be given to discussions with respect to the obligations of corporations and its implications for the protection of the environment. Some findings will show that the current state of negotiations falls short in reflecting environmental dimensions from a legal perspective, although the tools that might be developed in the process could be moulded as to integrate them in forthcoming negotiations.

Keywords: International environmental law. Business and human rights. Binding treaty. Environmental rights. International human rights law.

Resumo

As corporações multinacionais estão presentes em praticamente todos os cantos do mundo, gerando não só o crescimento econômico, mas principalmente os abusos dos direitos humanos ligados à degradação ambiental. Em vista disso, o Conselho de Direitos Humanos das Nações Unidas determinou que um grupo de trabalho intergovernamental redigisse um instrumento vinculante sobre as empresas e os direitos humanos, potencialmente estabelecendo obrigações para entidades comerciais privadas com caráter transnacional. Nesse contexto, uma análise das negociações em andamento

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será conduzida para identificar e discutir as dimensões do direito ambiental nele incorporado. Um diálogo entre o conteúdo dos travaux préparatoires do processo de elaboração do tratado - incluindo os relatórios oficiais das três sessões e outros documentos relevantes - e a evolução da responsabilidade ambiental corporativa internacional, trará alguns caminhos possíveis para a proteção ambiental ligada aos direitos humanos. Além disso, especial importância será dada às discussões sobre as obrigações das empresas e suas implicações para a proteção do meio ambiente. Algumas descobertas mostrarão que o estado atual das negociações é insuficiente para refletir as dimensões ambientais do ponto de vista jurídico, embora as ferramentas que possam ser desenvolvidas no processo possam ser moldadas de modo a integrá-las nas próximas negociações.

Palavras-chave: Direito ambiental internacional. Empresas e direitos humanos. Tratado vinculante. Direitos ambientais. Direito internacional dos direitos humanos.

1. Introduction

Globalization has contributed to the proliferation of manifold markets around the world, giving rise to numerous Multinational Corporations (MNCs),[1] whose operations transcend regulatory frameworks and jurisdictions of any given state,[2] concurrently moulding the values to which our society adheres.[3] MNCs accrued larger revenues than the figures shown in the top economies' GDPs,[4] suggesting an important extent of influence in the design and implementation of international norms.[5]

Moreover, while it is unmistakable that MNCs have stimulated global economic growth, the negative impacts on human rights and the environment generated directly or indirectly by them should not be overlooked, especially in a context where their operations are being outsourced to developing countries, giving rise to a 'disproportionate impact of lawful pollution' linked to their 'operational policies, decisions, practices and production activities',[6] being carried out in practically de-regularized jurisdictions. A quotidian dramatic reality particularly for local communities highly dependent upon natural resources.[7]

Corporate Social Responsibility (CSR), a concept coined in the 50s, intends to contribute to the 'well-being and progress of individuals and society'[8]. However, it has not fully embraced a human rights perspective.[9] This has led human rights victims to find ways to hold MNCs liable in host[10] countries' jurisdictions; disentangling sophisticated contracts between parent companies with multiple suppliers in de-localized jurisdictions,[11] and attempting to lift corporate veils[12] to prevent impunity of MNCs domiciled in their home countries.

These legal challenges are the consequence of a vacuum in international law, mainly due to few eviden-

1 UNITED NATIONS. *Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*. UN Doc E/CN4/Sub2/2003/38/Rev2, 2003., para. 20. For the purposes of this document, the term MNC corresponds to that of Transnational Corporations (TNCs), generically defined in the Norms as 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form'.

2 MCBETH, Adam. Human rights in economic globalisation. In: JOSEPH, Sarah; MCBETH, Adam (Ed.). *Research handbook on international human rights law*. Edward Elgar, 2010. p. 139-141.

3 WETTSTEIN, Florian. *Multinational corporations and global justice*: human rights obligations of a quasi-governmental institution. Stanford Business Books, 2009. p. 167.

4 TRIVETT, Vincent et al. *25 US mega corporations: where they rank if they were countries*. Available in: Business Insider at: <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6>.

5 WETTSTEIN, Florian. *Multinational corporations and global justice*: human rights obligations of a quasi-governmental institution. Stanford Business Books, 2009. p.168.

6 SCHWARTZ, Priscilla. Corporate activities and environmental justice: perspectives on Sierra Leone's mining. In: EBBESSON, Jonas; OKOWA, Phoebe (Ed.). *Environmental law and justice in context*. Cambridge University Press, 2009. p. 432.

7 K. ANTON, Donald; SHELTON, Dinah. *Environmental protection and human rights*. Cambridge University Press, 2011. p. 132.

8 RAMASASTRY, Anita. Corporate social responsibility versus business and human rights: bridging the gap between responsibility and accountability. *Journal of Human Rights*, v. 14, n. 2, p. 237-259, jun. 2015.

9 RAMASASTRY, Anita. Corporate social responsibility versus business and human rights: bridging the gap between responsibility and accountability. *Journal of Human Rights*, v. 14, n. 2, p. 237-259, jun. 2015.

10 All along this text, 'home country' will be defined as the territory or jurisdiction where the parent company is registered or incorporated, whereas 'host country' is where the company, or a subsidiary, operates outside the jurisdiction or territory of its home country.

11 MORGERA, Elisa. Multinational corporations and international environmental law. In: ALAM, Shawkat et al. (Ed.). *Routledge handbook of international environmental law*. Routledge, 2015. p. 190.

12 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 28.

ce of 'direct liability of corporations when [breaching] obligations with regard to human rights'[13] or international environmental law (IEL),[14] ratifying that said duties are consigned exclusively upon states.

In view of this, the first attempt to regulate MNCs through international legislation in a universal and more stringent fashion was first initiated in the 70s by the United Nations Economic and Social Council, which created a UN Commission on Transnational Corporations in order to draft a Code of Conduct for Transnational Corporations (UNCCTC);[15] an attempt that was stalled by negotiations collapse in 1992,[16] partially due to the widespread perception that the paradigm surrounding regulation might encumbering businesses' development. Subsequently, 'partnership approaches' and soft-law guidelines[17] gave rise to some voluntary initiatives endorsed by intergovernmental organizations, such as the UN Global Compact (GC) in 2000, an initiative still in progress aiming to implement ten universal sustainability principles that derive from main international human rights instruments, with more than 10,000 companies as participants.[18]

In 1997, the UN Sub-Commission on the Promotion and Protection of Human Rights prepared the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the Norms),[19] an initiative focused in human rights and environmental direct responsibilities for companies, differing in that aspect with the GC.[20] However, its anti-hortatory content subtracted political recognition,[21] leading to a decline of endorsement by the former UN Commission on Human Rights (UNCHR) in 2003.[22]

In order to overcome past political stalemates, in 2005 the UNCHR requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises (SRSG) to submit recommendations and clarifications on the issue.[23] Professor John Ruggie assumed this position, who later developed the UN Framework on Business and Human Rights (UNFBHR) in 2008[24] and operationalized it through a set of 'Guiding Principles' on business and human rights (UNGP) in 2011.[25] Both initiatives were endorsed unanimously by the Human Rights Council (HRC)[26] and rest upon three pillars: 'Protect, Respect and Remedy' human rights.[27]

Despite a diverse range of opinions, it could be said that today, the UNGP and the OECD Guidelines for Multinational Enterprises,[28] are the most prominent soft-law instruments that bring corporations and governments together to respect human rights,[29] howe-

13 KHAN, Wasima. Corporate power and the protection of human rights in equilibrium. *Security and Human Rights*, v. 24, n. 1, p. 29-42, 2013.

14 BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International law and the environment*. 3. ed. United Kingdom: Oxford University Press, 2009. p. 328.

15 BUHMANN, Karin. The development of the "UN framework": a pragmatic process towards a pragmatic output. In: MARES, Radu (Ed.). *The UN guiding principles on business and human rights:* foundations and implementation. Martinus Nijhoff, 2012. p. 87.

16 MORGERA, Elisa. Multinational corporations and international environmental law. In: ALAM, Shawkat et al. (Ed.). *Routledge handbook of international environmental law*. Routledge, 2015. p. 193.

17 MORGERA, Elisa. The UN and corporate environmental responsibility: between international regulation and partnerships. *Review of European Community and International Environmental Law*, v. 15, n. 1, p. 93-109, 2006.

18 WEISSBRODT, David. Human rights standards concerning transnational corporations and other business entities. *Minnesota Journal of International Law*, v. 23, n. 2, p. 135-171, 2014.

19 LÓPEZ, Carlos. The "ruggie process": from legal obligations to corporate social responsibility? In: DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business*. Cambridge University Press, 2013. p. 62.

20 WEISSBRODT, David. Human rights standards concerning transnational corporations and other business entities. *Minnesota Journal of International Law*, v. 23, n. 2, p. 135-171, 2014.

21 MORGERA, Elisa. Multinational corporations and international environmental law. In: ALAM, Shawkat et al. (Ed.). *Routledge handbook of international environmental law*. Routledge, 2015. p. 201.

22 LÓPEZ, Carlos. The "ruggie process": from legal obligations to corporate social responsibility? In: DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business*. Cambridge University Press, 2013. p. 62.

23 UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Human rights and transnational corporations and other business enterprises*. E/CN.4/RES/2005/69, para. 1, 2005.

24 RUGGIE, John. *Protect, respect and remedy*: a framework for business and human rights: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 2008.

25 RUGGIE, John. *Guiding principles on business and human rights*: implementing the United Nations "protect, respect and remedy" Framework. A/HRC/17/31, 2011.

26 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Human rights and transnational corporations and other business enterprises.* A/HRC/RES/17/4, para. 1, 2011.

27 RUGGIE, John. *Just business*: multinational corporations and human rights. W. W Norton & Company, 2013. p. 6.

28 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *OECD guidelines for multinational enterprises*, 2011.

29 RUGGIE, John. *Just business*: multinational corporations and human rights. W. W Norton & Company, 2013. p. 84.

ver, since their adoption and further implementation, several governments and NGOs have been pushing the HRC's agenda[30] in order to resit discussions on a legally binding business and human rights treaty (BHRT).

This led to a resolution on 26 June 2014 to establish an open-ended intergovernmental working group (OEIGWG) to elaborate a BHRT,[31] which had its first round of negotiations in 2015, and two yearly consecutive sessions in 2016 and 2017, providing a new forum where countries could raise concerns about the inclusion of environmental issues therein.[32]

This process could entail multiple outcomes, such as contributing at 'redressing gaps and imbalances in the international legal order that undermine […] victims of corporate human right abuses',[33] or on the contrary, it could be an attempt to repeat history by emulating the unsuccessful destiny of the Norms or the UNCCTC.

Moreover, the environmental dimensions within the discussions of an instrument that might regulate the behaviour of businesses certainly will be taken into consideration, as humanity is facing multi-faceted challenges where ecological considerations are ubiquitous in the Anthropocene epoch,[34] which could be explain why in nearly a third of cases involving corporations around the world, alleged environmental harms had corresponding impacts on human rights.[35]

Despite the inextricably link between environmental harm and human rights violations, law has not entirely echoed its importance nor made a substantial effort to understand its underpinnings, since in 'general academic treatments of human rights law, […] there is almost no debate on the relationship between human rights and the environment',[36] nor an important exploration of 'the usefulness of [IEL] in addressing human rights--related concerns about corporate conduct'.[37] This spurs a problematic scenario, given that 'unlike the field of human rights, where most violations are committed by state agents, environmental harm largely stems from actions of the private sector'[38] in general, and MNCs in particular.[39]

Overall, the objective of this writing is to examine the environmental dimensions subtly entrenched within the prospective BHRT, currently being developed under the auspices of the HRC. Firstly, a brief contextual introduction on the practical and theoretical inter linkages between international human rights law (IHRL) and IEL in the context of corporate accountability will be explored. Secondly, the shortcomings and opportunities of past initiatives aimed at rendering MNCs accountable – emphasizing on UN initiatives, will be examined. Thirdly, some light will be shed on different issues involving the protection of the environment embedded in the negotiations of the BHRT. By comparing the evolution of the discussions around corporate accountability undertaken in the past and simultaneously relying on IEL instruments, possible pathways for environmental protection linked to human rights will be spelled out. Furthermore, special importance will be given to discussions with respect to duties directly assumed by corporations and its implications for the protection of the environment.

30 RUGGIE, John. *The past as prologue?*: a moment of truth for UN business and human rights treaty. Available in: <https://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf>.

31 LAGOUTTE, Stéphanie. New challenges facing states within the field of human rights and business. *Nordic Journal of Human Rights*, v. 33, n. 2, p. 158-180, 2015.

32 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>.

33 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 4.

34 STEFFEN, Will; CRUTZEN, Paul; MCNEILL, John. The anthropocene: are humans now overwhelming the great forces of nature? *Ambio*, v. 36, n. 8, p. 614-621, 2007.

35 RUGGIE, John. *Report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises.* Addendum: corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse. A/HRC/8/5/Add.2, 2008. para. 7.

36 BOYLE, Alan. Human rights and the environment: where next?. *European Journal of International Law*, v. 23, n. 3, p. 613-642, 2012.

37 MORGERA, Elisa. Benefit-sharing as a bridge between the environmental and human rights accountability of multinational corporations. In: Ben Boer (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 45.

38 K. ANTON, Donald; SHELTON, Dinah. *Environmental protection and human rights*. Cambridge University Press, 2011. p. 131.

39 NOLLKAEMPER, André. Responsibility of transnational corporations in international environmental law: three perspectives. In: WINTER, Gerd (Ed.). *Multilevel governance of global environmental change*. United Kingdom: Cambridge University Press, 2006. p. 180.

2. Human rights, the environment and international law in the context of corporate accountability

Principle 1 of the Rio Declaration placed human species at the centre of concerns for sustainable development [40], giving rise to the concept of having a healthy life in harmony with nature;[41] as a result, a convergence of three dimensions emerged: human rights, environmental protection and sustainable development. This conjunction is reflected in several international instruments designed by the interplay of socio-economic dynamics and diplomatic efforts, under the overarching paradigm of globalization,[42] where tensions between economic interests – predominantly identified with MNCs – and environmental protection are prevalent.[43]

With that said, this chapter will attempt to briefly explore the interactions of corporations with international law related to both: human rights and the environment.

2.1. MNCs under international law: an overview

A 'corporation' may be defined as a legal fictional abstraction, separated from the personality of its constituents and shareholders, of 'limited liability and licensed by the state for the purpose of conducting profit-seeking business activity'.[44] Contrariwise, behind the definition of a MNC lies an intrinsic elusive character, indicating its highly mutable nature. Although, irrespective of this fact, MNCs do share several common features, like their presence in more than one country through coordinated subsidiaries motivated by profit earning.[45] Part of their diversity lies on their size and 'multinational spread';[46] paving their way through unrestricted markets, and sometimes attracted by new frontiers with less regulated jurisdictions.[47]

Considering that MNCs are fundamental global actors, capable of prominently influencing international law due to their transnational powers – subduing even the role of several nations, discussions on whether MNCs are subjects or objects, or have rights and duties under international law, have not been exhausted; mainly because the state, as the exclusive duty-bearer, is a paradigm posited as inadequate under current socio-economic contexts.[48]

MNCs outsource their operations onto developing countries – where most of the times standards are less stringent, yielding profit not only from the low costs that those operations involve, but also from the guarantees provided by Bilateral Investment Treaties (BITs), which in some cases consider human rights and the environmental domestic law as a risk for foreign investments.[49]

International law has not been able to provide homogenous definitions and categories linked to corporations' nature, a lacuna cautiously addressed by the ICJ in the *Barcelona Traction* case, stating that municipal law should supplement any absence of definition in international law[50].

However, municipal law cannot decide if MNCs have personhood or not under international law. For instance, if corporations become new subjects of international law, they would freely amend bilateral treaties,

40 FRANCIONE, Francesco. *Principle 1*: human beings and the environment. In: VIÑUALES, Jorge (Ed.). The Rio declaration on environment and development: a commentary. United Kingdom: Oxford University Press, 2015. p. 94.

41 UNITED NATIONS. Conventions and agreements international developments. *Commonwealth Law Bulletin*, v.19, n. 1, p. 247-316, 1993.

42 BOYLE, Alan; CHINKIN, Christine. *The making of international law*. United Kingdom: Oxford University Press, 2007. p. 21.

43 DUPUY, Pierre-Marie. International environmental law: looking at the past to shape the future. In: DUPUY, Pierre-Marie; VIÑUALES, Jorge (Ed.). *Harnessing foreign investment to promote environmental protection*: incentives and safeguards. United Kingdom: Cambridge University Press, 2013. p. 19.

44 KRAVIAS, Markos. *Corporate obligations under international law*. United Kingdom: Oxford University Press, 2013. p. 4.

45 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 59.

46 SHAW, Malcolm. *International law*. 6. ed. United Kingdom: Cambridge University Press, 2008. p. 250.

47 SADELEER Nicolas de. Environmental justice and international trade law. In: EBBESSON, Jonas; OKOWA, Phoebe (Ed.). *Environmental law and justice in context*. United Kingdom: Cambridge University Press, 2009. p. 448.

48 ZAHARAI, Constantin et al. Transnational corporations, international law and human rights. *Economics, Management & Financial Markets*, v. 6, n. 4, p. 138-143, 2011.

49 MACLEAY, Fiona. Corporate codes of conduct and the human rights accountability of transnational corporations: a small piece of a larger puzzle. In: SCHUTTER, Olivier De (Ed.). *Transnational corporations and human rights*. Hart Pub, 2006. p. 220.

50 INTERNATIONAL COURT OF JUSTICE. International Court of Justice Reports of Judgments, Advisory Opinions and Orders. *Barcelona traction, light and power company, limited, judgment Belgium v Spain*, 1970. p. 3.

a task classically restricted to interstate relations,[51] but also home states would no longer 'retain the right to waive the right of their investors to file a claim'.[52]

Hence, handing over personhood to corporations – an scenario not yet crystallized under international law,[53] might 'threaten to remove the element of state control from such important questions and may threaten the credibility of international law itself',[54] thus potentially broadening historic power imbalances.

For the time being, corporations' identity under international law is not carved in stone; and while they can be referred as key 'participants' in the continuous international law-making process, or defined as subjects in the sense of its *locus standi* before specific international tribunals,[55] the need for improving the design of corporate accountability measures should not be restrained by this on-going debate.

Unquestionably, corporations are subjects of law under domestic law, and some treaties ratified by their home states may bestow them human rights,[56] or other category of rights embedded in thousands of BITs,[57] conferring them a 'fair treatment, contract enforcement, protection against expropriation, and compensation for violations of their rights'.[58]

Moreover, the idea of corporate duties or obligations under IHRL which would allow to render MNCs directly liable, contradicts the classic doctrine where states are the legitimate bearers of said obligation, and not private entities.[59] This notion is currently widely supported by the international human rights legal corpus,[60] and partly by literature.[61]

A similar phenomenon is reflected in IEL, where private actors do not have direct duties;[62] and while some liability regimes regarding pollution do take note of direct liability on private actors,[63] its application is only effective via the will of contracting states,[64] resorting the matter in national jurisdictions. Therefore, currently there are not international environmental norms[65] nor customary international law[66] directly binding upon private companies in general and MNCs in particular.

Overall, international law is currently not well-equipped to hold MNCs liable in a direct manner, and even if these entities could be deemed as subjects of international law under certain circumstances, its fluid personality allows them to circumvent obligations under international law. However, given that the legal architecture of the corporation is similar to that of recogni-

51 ALVAREZ, Jose. Are corporations "subjects" of international law? *Santa Clara Journal of International Law*, v. 9, n. 1, 2011.

52 ALVAREZ, Jose. Are corporations "subjects" of international law? *Santa Clara Journal of International Law*, v. 9, n. 1, 2011.

53 SHAW, Malcolm. *International law*. 6. ed. United Kingdom: Cambridge University Press, 2008. p. 250.

54 ALVAREZ, Jose. Are corporations "subjects" of international law? *Santa Clara Journal of International Law*, v. 9, n. 1, p. 25, 2011.

55 MUCHLINSKI, Peter. Corporations in international law. In: WOLFRUM, Rudiger (Ed.). *Max Planck encyclopaedia of public international law*. United Kingdom: Oxford University Press, 2014. para. 7.

56 SCHRÖDER, Meinhard. Precautionary approach/principle. In: WOLFRUM, Rudiger (Ed.). *Max Planck encyclopaedia of public international law*. United Kingdom: Oxford University Press, 2014.

57 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Global value chains: investment and trade for development*. 2013. p. 101. In 2013, around 339 International Investment Agreements and 2857 BITs were concluded.

58 STEPHENS, Beth. Are corporations people?: corporate personhood under the constitution and international law: an Essay in honor of professor Roger S. Clark. *Rutgers Law Journal*, v. 44, n. 1, p. 1-31, 2013.

59 NOLAN, Justine. The corporate responsibility to respect human rights: soft law or not law? In: DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business*. United Kingdom: Cambridge University Press, 2013. p. 146.

60 KATUOKA, Saulius; DAILIDAITE, Monika. Responsibility of transnational corporations for human rights violations: deficiencies of international legal background and solutions offered by national and regional legal tools. *Jurisprudencija*, v. 19, n. 4, p. 1301-1316, 2012.

61 SCHRÖDER, Meinhard. Precautionary approach/principle. In: WOLFRUM, Rudiger (Ed.). *Max Planck encyclopaedia of public international law*. United Kingdom: Oxford University Press, 2014. p. 30.

62 MALJEAN-DUBOIS, Sandrine; RICHARD, Vanessa. The applicability of international environmental law to private enterprises. In: DUPUY, Pierre-Marie; VIÑUALES, Jorge (Ed.). *Harnessing foreign investment to promote environmental protection*. United Kingdom: Cambridge University Press, 2013. p. 94.

63 INTERNATIONAL MARITIME ORGANIZATION. International convention on civil liability for oil pollution damage. *The American Journal of International Law*, v. 64, n. 2, p. 481, 1970; INTERNATIONAL MARITIME ORGANIZATION. International convention on the establishment of an international fund for compensation for oil pollution damage: 1971. *Environmental Policy and Law*, v. 13, n. 2, p. 61-65, 1984. p. 61-65; COUNCIL OF EUROPE. Convention on civil liability for damage resulting from activities dangerous to the environment. *International Legal Materials*, v. 32, n. 5, p. 1228-1246, 1993.

64 JONGE, Alice de. *Transnational corporations and international law*: accountability in the global business environment. Edward Elgar Pub, 2011. p. 146.

65 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 72.

66 BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International law and the environment*. 3. ed. United Kingdom: Oxford University Press, 2009. p. 326.

zed subjects of international law, such as states, in the sense that they both share the status of juristic person, establishing international legal obligations upon them, should not be considered as an impossible conceptual legal challenge.[67]

Thus, it could be said that the state-centred paradigm of international law has widened a legal chasm that a new binding treaty might be looking to sew up in tandem with soft-law initiatives, where direct obligations for companies could be outlined.

2.2. Human rights violations in relation to environmental degradation: Corporations under the spotlight

In 2010, global Foreign Direct Investment (FDI) exceeded $21,288.5 billion, and the number of MNCs was estimated at over 100,000.[68] Furthermore, the share of global FDI from MNCs registered in emerging markets has grown from 10 per cent in 2000 to 40 per cent in 2013,[69] denoting a likely impact in new frontiers where the pressure on the extraction of natural resources has not yet been consolidated, hence, not only increasing the chances of FDI opportunities, but most importantly, heightening the risks of human rights violations.[70]

Thus, the traditional narrative of western MNCs involved in breaches of human rights and environmental regulations in developing host states is now shifting to include local companies registered in those very same developing countries with inchoate institutions and an incipient rule of law – like MNCs originated from BRICS.[71]

Either way, regardless of jurisdiction, a breach of law by a private actor, amounting to human rights and environmental malfeasance, is usually generated by the tension between the right to pursue an economic endeavour on the one hand, and the rights of the people affected by those endeavours on the other.[72] This conflict of values can theoretically explain the interplay between human rights and the environment in its various forms,[73] and also be illustrated in several renowned cases around the world.

The harm on human rights and the environment caused by MNCs is often determined by the negligence of the parent company's supplier or a franchise thereof at some stage of the supply chain, normally operating in a developing country that seeks to attract FDI through lax environmental regulations, weak labour conditions, an ineffective judiciary system and an unstructured rule of law.[74]

Bhopal disaster in India, generated by the MNC Union Carbide, resulted in a death toll of 2.100 people and 200.000 people injured, let alone livestock and agricultural loss.[75] In this case, even if plaintiffs sought recourse in the US – the jurisdiction of the parent company, the case was dismissed.[76] Moreover, cases like Bhopal are just a symptom of a pervasive phenomenon, underlining that the vast majority of victims are poor communities, highly vulnerable to the practices of MNCs and their suppliers.[77]

67 KRAVIAS, Markos. *Corporate obligations under international law*. United Kingdom: Oxford University Press, 2013. p. 7.

68 JAWOREK, Malgorzata; KUZEL, Marcin. Transnational corporations in the world economy: formation, development and present position. *Copernican Journal of Finance & Accounting*, v. 4, n. 1, p. 55-77, 2015.

69 CHEN, Victor; JOHNSON, Lise. Emerging market MNEs and social responsibility: an institutional pressure perspective. *Transnational Corporations*, v. 22, n. 3, p. 1-4, 2013.

70 COTULA, Lorenzo. Property in a shrinking planet: fault lines in international human rights and investment law. *International Journal of Law in Context*, v. 11, n. 2, p. 113-134, 2015.

71 HOBBES, Michael. The untouchables. *Foreign Policy*, 2016. Available in: <https://foreignpolicy.com/2016/04/11/the-untouchables-zimbabwe-green-fuel-multinational-corporations/>.; GRADL, Christina et al. Fast growth and big impacts: how emerging market multinationals are advancing sustainable development. *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)*, 2011. p. 11. Although several MNCs from emerging market countries have demonstrated good examples of positive impacts on local populations, indicating that corporate behaviour is not monolithic.

72 AFFOLDER, Natasha. Square pegs and round holes?. In: BOER, Ben (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 35.

73 BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International law and the environment*. 3. ed. United Kingdom: Oxford University Press, 2009. p. 271. Three perspectives on environmental rights are developed: first, procedural human rights can serve environmental related purposes; the self-standing right to a healthy environment as an economic, social and cultural right; and a collective right to the environment.

74 BAUMANN-PAULY, Dorothée; POSNER, Michael. Making the business case for human rights: an assessment. In: BAUMANN-PAULY, Dorothée; NOLAN, Justine (Ed.). *Business and human rights*: from principles to practice, Routledge, 2016. p. 12.

75 UNITED STATES OF AMERICA. United States District Court for the Southern District of New York. In: *Re union carbide corp gas plant disaster at bhopal*. 634 f., supp. 842, 2, 1986.

76 UNITED STATES OF AMERICA. United States District Court for the Southern District of New York. In: *Re union carbide corp gas plant disaster at bhopal*. 634 f., supp. 842, 2, 1986.

77 RUGGIE, John. *Report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other*

In addition, emblematic cases around the world, which share analogous factual features as Bhopal,[78] may entail additional intricacies that reveal the complexity of the problem: from the violation of environmental defenders' right in the context of MNCs' operations in collusion with state actors,[79] to the potential transboundary human rights violations[80] linked to CO2 emissions from MNCs of fossil fuel industries.[81]

Clearly, finding a coherent convergence between IHRL and IEL to tackle corporations' misconducts is not a facile task, especially considering that the connections between human rights and the environment via IHRL instruments has been surprisingly recent. The evidence is that seminal human rights treaties, such as the UDHR and the two core human rights covenants[82] do not mention a self-standing right to a healthy environment, narrowing the environmental protection as a 'green' extension of the rights already recognized therein, [83] even though the right to a healthy environment is already present in regional treaties around the world,[84] and in more than 100 countries' constitutions.[85]

The fact is that 'greening' human rights has been successful in connecting environmental degradation and impairments of substantive (right to life, health, housing, access to water and private family life), and procedural rights (access to justice, public participation, transparency and access to information),[86] including collective rights of indigenous peoples such as the right to a free, prior and informed consent (FPIC).[87] This is evinced by UN human rights treaty bodies,[88] the HRC,[89] and even regional human rights bodies, who have established the prominence of environmental considerations as essential conditions to the full realization of human rights. [90]

business enterprises. Addendum: corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse. A/HRC/8/5/Add.2, 2008. para. 67.

78 UNITED STATES OF AMERICA. United States District Court for the Northern District of California. *Bowoto v Chevron Corp*. ND Cal 481 f., supp. 2d, 1010, 2007.; UNITED STATES OF AMERICA. United States District Court for the Central district of California. *Doe v Unocal Corp*. CD California 963 f., supp. 880, 1997.; UNITED STATES OF AMERICA. United States District Court for the Southern District of New York. *Flores v Southern Peru Copper*. 253 f., supp. 2d, 510, 2002.; UNITED STATES OF AMERICA. United States Supreme Court. *Kiobel et al v Royal Dutch Petroleum Co et al*. n. 10-1491, 2013.; UNITED KINGDOM. House of Lords. *Lubbe v Cape PLC*. UKHL 41, 2000.; UNITED STATES OF AMERICA. United States District Court for the Southern District of New York. *Aguinda v Texaco, Inc*. 142 f., supp. 2d, 534, 2001.; AUSTRALIA. Supreme Court of Victoria at Melbourne. *Gagarimabu v Broken Hill proprietary co Ltd*, VSC 517, 2001.; CANADA. British Columbia Supreme Court. *Garcia v Tahoe resources inc*. BCSC 2045, 2015.; CANADA. Québec Canadian Court of Appeal. *Bil'in village council v Park*. QCCA 2470, 2008.

79 FORST, Michel. *Situation of human rights defenders*: report of the special rapporteur on the situation of human rights defenders. A/70/217, 2015.

80 KNOX, John. *Report of the special rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*. A/HRC/31/52, 2016. para. 9; UNITED NATIONS HUMAN RIGHTS COUNCIL. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. UN. Doc. A/HRC/RES/26/9, 2014.; OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS. Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights. Annual Report A/HRC/10/61, 2009, para. 78. It is noteworthy to clarify that such contributions do not constitute a violation of rights in strict rigour.

81 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Ed.). *Climate Change 2014*: synthesis report, 2015. p. 5. Fossil fuel industry contributed with nearly 78% of the total level of emissions between 1970 and 2010.

82 UNITED NATIONS. Official documents United Nations human rights covenants: international covenant on economic, social and cultural rights, international covenant on civil and political rights, optional protocol to the international covenant on civil and political Rrights. *American Journal of International Law*, v. 61, n. 3, p. 861-890, 1967.

83 KNOX, John. *Greening human rights*. OpenDemocracy, 14 Jul 2015. Available in: <https://www.opendemocracy.net/openglobalrights/john-knox/greening-human-rights>.

84 ORGANIZATION OF AFRICAN UNITY. *African charter on human and peoples' rights*. OAU Doc. CAB/LEG/67/3 rev, 1981. art. 24; ORGANISATION OF AMERICAN STATES. *Additional protocol to the american convention on human rights in the area of economic, social and cultural rights*, 1988. art. 11; LEAGUE OF ARAB STATES. *Arab charter on human rights*, 2004. art. 38; ASSOCIATION OF SOUTH-EAST ASIAN NATIONS, *ASEAN Human Rights Declaration*, 2012, art.28(f); UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN. *Regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean*. 2018.

85 BOYD, David. Constitutional right to a healthy environment, the feature: environmental causes and the Law. *Law Now*, v. 37, n. 4, p. 9-13, 2012.

86 KNOX, John. *Report of the independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, compilation of good practices*. UN Doc. A/HRC/28/61, 2015. para. 25.

87 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 142.

88 UNITED NATIONS. *Review of the composition, organization and administrative arrangements of the sessional working group on the implementation of the international covenant on economic, social and cultural rights*. E/1982/L.35/Rev.1, 1985.

89 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Human rights and the environment*. UN Doc. A/HRC/RES/25/21, 2014.

90 ORELLANA, Marcos; KOTHARI, Miloon; CHAUDHRY, Shivani. *Climate change in the work of the committee on economic, social and cultural rights*. Geneva: Friedrich Ebert Stiftung, 2010. p. 20.

Therefore, dialogic interactions between IEL and IHRL have had both their drawbacks[91] and opportunities;[92] however, it must be noted that both 'regimes' formally converge into the state-centred paradigm as obligations to respect, protect and fulfil human rights and the environment are borne by the state, despite the fact that both conceive – predominantly in academic literature – non-state actors in general and business enterprises in particular, as fundamental elements for understanding the reasons behind environmental degradation and human rights violations. Which begs the burning question of the necessity, if any, of the paradigm's formal contestation under international law.

Perhaps, acknowledging the commonalities linked to modulating the freedom of action of subjects based on elements of power exertion, amounting to social and ecological distortions, might contribute to reshape the so-called 'fragmentation of international law', namely the 'loss of an overall perspective on the law'.[93]

After all, IHRL and IEL are regimes that appeal to alleged universal values or 'global concerns' upon which humanity is besought to respond. Thus, harnessing their 'hegemonic structure' vis-à-vis correcting power imbalances struck by MNCs through international legal obligations, might be an opportunity to solve a legal impasse by way of interaction and integration,[94] which may be crystallized in a new BHRT.

3. Some strategies for corporate accountability

3.1. Civil, criminal and human rights law versus MNCs: effective tools for environmental protection?

Whenever a human right abuse linked to an environmental harm occurs between a private actor (a MNC) against another private actor (a victim or group of victims), the forum on which the case will be resolved depends on the jurisdictional rules of a specific legal system.[95] This stems the possibility that proceedings can be filed either in a host or a home country.[96]

This apparent simplicity is superseded by the convoluted issue of 'fragmentation of jurisdiction', which is intimately linked to the nature of holding accountable a MNC. For instance, the headquarters, the legal incorporation, the shareholders, the operations, the workers and those affected by the operations, can all come from a different jurisdiction.[97]

This diversity obliges plaintiffs to be meticulous about selecting the type of recourse they should engage with. The options range from administrative, tort or criminal litigation against MNCs or their subsidiaries. However, finding proper redress in host states may entail several legal and procedural shortcomings. For instance, domestic legislation may not enshrine criminal or civil liability for legal persons; or the domestic judiciary might not be well-equipped for a highly complex task such as piercing a corporate veil; or it may be prone to hamper an independent trial;[98] or even if victims were favoured with a positive domestic judgement, the defendant may not have assets or personnel in the host country to actually materialize the redress, as exemplified by *Aguinda v. Chevron* in Ecuador.[99] These types of

91 DONALD, Kate. Human rights practice: a means to environmental ends? *Oñati Journal of Emergent Socio-Legal Studies*, v. 3, n. 5, p. 908-930, 2013. It is argued that human rights fall short in contributing to the extensive development of environmental law compliance mechanisms; in addition, human rights focus more on the remedy rather than preventive measures, as environmental law does.

92 KNOX, John. Human rights, environmental protection, and the sustainable development goals. *Washington International Law Journal*, v. 24, n. 4, p. 517-536, 2015. p. 517. He argues that human rights law provides effective procedural obligations for states, more elements to balance diverse societal interests and more protection to vulnerable groups from environmental harms.

93 UNITED NATIONS INTERNATIONAL LAW COMMISSION. *Fragmentation of international law*: difficulties arising from the diversification and expansion of international law. Erik Castrén Institute of International Law and Human Rights, 2007. para. 8.

94 KOSKENNIEMI, Martti. Hegemonic regimes. In: YOUNG, Margaret (Ed.). *Regime interaction in international law*. United Kingdom: Cambridge University Press, 2011. p. 324.

95 BOYLE, Alan. Globalising environmental liability: the interplay of national and international law. *Journal of Environmental Law*, v. 17, n. 1, p. 3–26, 2005.

96 BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International law and the environment*. 3. ed. United Kingdom: Oxford University Press, 2009. p. 312.

97 CLAPHAM, Andrew. *Human rights obligations of non-state actors*. United Kingdom: Oxford University Press, 2006. p. 200.

98 LAGOUTTE, Stéphanie. New challenges facing states within the field of human rights and business. *Nordic Journal of Human Rights*, v. 33, n. 2, p. 158-180, 2015. p. 172.

99 KIMERLING, Judith. Remarks by Judith Kimerling. *Proceedings of the Annual Meeting:* american Society of International Law, v.

shortcomings are constantly capitalized by big private companies, who are in a position to pay top law firms to effectively make use of substantive and procedural rules in their favour, thus sidestepping liability.[100]

These obstacles lead victims to pursue justice in MNCs' home states, like in the US, home of thousands of MNCs.[101] There, victims are able to sue US companies under several statutes, including the most renowned, the Alien Tort Claim Statute (ATCA), an 18th century statute that confers upon the Federal District Courts original jurisdiction over 'any civil action by an alien for a tort only committed in violation of the law of nations'.[102]

US jurisdiction provides victims a sense of due process, while giving them the chance of publicizing their case,[103] which explains the urge of Burmese victims to use the ATCA against the oil giant Unocal, allegedly involved in human rights violations in the context of the construction of an oil pipeline.[104] However, the Federal Court ruled that the corporations could not be held liable under international law,[105] although the Ninth District Court of Appeals subsequently overturned that previous view.[106] In the aftermath, this case along with others, like *Wiwa v. Royal Dutch Petroleum,*[107] agreed to settle the lawsuit out of court.[108]

In a related case, *Kiobel v. Royal Dutch Petroleum* have set precedents regarding dismissals based on the impossibility of extra-jurisdictional reach of US courts concerning alleged unlawful acts.[109] Likewise, US Courts have repeatedly afforded the doctrine of *forum non conveniens*, which gives a court discretion to dismiss the case on the basis of having a better court to vent the action.[110] According to several studies, dismissal on the grounds of this doctrine 'is typically outcome determinative – if the victims are unable to sue in U.S. courts, they are unable to recover for the violations of their rights'.[111]

In some European jurisdictions, however, the argument of *forum non conveniens* might be less substantial for national courts, who have jurisdiction over those corporate defendants domiciled in the territory of EU Member States in light of the rules of jurisdiction under the so called 'Brussels system', composed by some provisions under the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.[112] This is the case of England, where claimants of environmental nuisance, prompted by English parent companies or their subsidiaries, have been able to establish the English jurisdiction as the adequate one.[113] However, cases that discuss the extent of the alleged damages and a proper redress therein are quite scarce, as the customary practice is to resort to

106, p. 416-419, 2012.

100 MCCONNELL, Lee. Establishing liability for multinational oil companies in parent/subsidiary relationships case note. *Environmental Law Review*, v. 16, n. 1, p. 50-59, 2014.

101 COCKBURN, Iain; SLAUGHTER, Matthew. The global location of biopharmaceutical knowledge activity: new findings, new questions. *Innovation Policy and the Economy*, v. 10, p. 129-157, 2010. In 2006, there were more that 2000 MNCs registered in the US alone.

102 CLAPHAM, Andrew. *Human rights obligations of non-state actors*. United Kingdom: Oxford University Press, 2006. p. 252.

103 KATUOKA, Saulius; DAILIDAITE, Monika. Responsibility of transnational corporations for human rights violations: deficiencies of international legal background and solutions offered by national and regional legal tools. *Jurisprudencija*, v. 19, n. 4, p. 1301-1316, 2012. p. 1309.

104 RAMASASTRY, Anita. Corporate complicity: from Nuremberg to Rangoon: an examination of forced labor cases and their impact on the liability of multinational corporations Stefan A. Riesenfeld symposium 2001. *Berkeley Journal of International Law*, v. 20, n. 1, p. 91-159, 2002.

105 RAMASASTRY, Anita. Corporate complicity: from Nuremberg to Rangoon: an examination of forced labor cases and their impact on the liability of multinational corporations Stefan A. Riesenfeld symposium 2001. *Berkeley Journal of International Law*, v. 20, n. 1, p. 91-159, 2002. p. 137.

106 CLAPHAM, Andrew. *Human rights obligations of non-state actors*. United Kingdom: Oxford University Press, 2006. p. 256.

107 CENTER FOR CONSTITUTIONAL RIGHTS. *Wiwa et al. v. royal dutch petroleum et al.* Available in: <https://ccrjustice.org/node/1505>.

108 IROGBE, Kema. Global political economy and the power of multinational corporations. *Journal of Third World Studies,* v. 30, n. 2, p. 241, 2013.

109 SCHUTTER, Olivier De; SKINNER, Gwynne; MCCORQUODALE, Robert. *The third pillar*: access to judicial remedies for human rights violations by transnational business. International Corporate Accountability Roundtable, 2013. p. 5.

110 FOLEY SMITH, Erin. Right to remedies and the inconvenience of forum non conveniens: opening U.S. courts to victims of corporate human rights abuses. *Columbia Journal of Law and Social Problems*, v. 44, n. 2, p. 145-192, 2010.

111 FOLEY SMITH, Erin. Right to remedies and the inconvenience of forum non conveniens: opening U.S. courts to victims of corporate human rights abuses. *Columbia Journal of Law and Social Problems*, v. 44, n. 2, p. 145-192, 2010. p. 165.

112 MERINO BLANCO, Elena; PONTIN, Ben. Litigating extraterritorial nuisances under english common law and UK statute. *Transnational Environmental Law*, v. 6, n. 2, p. 285-308, 2017.

113 UNITED KINGDOM. England and Wales High Court. *The bodo community and others v shell petroleum development company of Nigeria Ltd*. EWHC 1973, 2014.; UNITED KINGDOM. United Kingdom House of Lords. *Connelly v. RTZ Plc*. AC 854, 1998.; UNITED KINGDOM. United Kingdom House of Lords. *Lubbe and Ors v. Cape Plc*. WLR 1545, 2000.

an out-of-court settlement.[114] Furthermore, in what might be the worst case scenario from the perspective of claimants when pursuing remedies in the home state's jurisdiction, a judge might award the defendants indemnity costs borne by plaintiffs soon after not having been convinced in ascertaining responsibility, as it was the case in the *Pedro Emiro Florez Arroyo v. Equion Energia Limited*, related to alleged environmental damages derived to deficient conditions of an Oil pipe in Colombia.[115]

Conversely, if the weapon of choice were to be international criminal law, users might be discouraged after grasping the two-folded challenge: environmental crimes are not a priority and corporations as such are not formal subjects. Usually, international criminal law 'delegates the criminal protection of the environment to the State parties to multilateral environmental treaties. The crimes thus prosecuted are, in fact, national crimes'.[116] Also, the Rome Statute of the International Criminal Court provides limited 'relevance to the environment exclusively within the context of the core crimes falling under the jurisdiction of the International Criminal Court (ICC)'.[117] In this vein, considerable attention was brought to the publication of a Policy Paper on Case Selection and Prioritization by the Office of the Prosecutor of the ICC in September 2016, to contemplate those crimes committed through, or resulting in, 'the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land'. However, despite this laudable development, 'it does not alter the current framework, as it merely sets out internal guidelines governing the exercise of prosecutorial discretion in the selection and prioritization of cases'.[118]

Moreover, the Rome Statute excludes legal persons from its scope, on the basis that corporations do not have 'a body to kick and soul to damn',[119] and that there is no global consensus on the standard for corporate liability.[120] Even though this forum does not have jurisdiction, it can prosecute individuals associated to negligent businesses.

Another option of remedy has been recurring to regional human rights bodies. Even if these bodies are deemed as one of the few alternatives to litigate human rights violations linked to environmental damages – once domestic remedies are exhausted, 'they are not generally enforcing [IEL]'.[121] The European (ECHR) and Inter-American (IACtHR) Court of Human Rights for instance, have been less willing to 'hear cases where environmental issues go beyond immediate human well-being'.[122]

In that sense, procedural rights related to the environment have been safeguarded before the IACtHR in cases related to indigenous peoples[123] and not-indigenous peoples,[124] stressing an 'undeniable link between the protection of the environment and the enjoyment of other human rights'.[125] This inter-linkage has also been pointed out in the jurisprudence of the ECHR, by

114 KRAMER, Xandra. *UK court on tort litigation against transnational corporations*: conflicts of laws. Available in: <http://conflictoflaws.net/2016/uk-court-on-tort-litigation-against-transnational-corporations/>.

115 UNITED KINGDOM. England and Wales High Court. *Pedro Emiro Florez Arroyo & others v Equion Energia Limited [formerly BP exploration company (Colombia) limited]*. EWHC 1699 (TCC), 2016.

116 MISTURA, Alessandra. Is there space for environmental crimes under international criminal law?: the impact of the office of the prosecutor policy paper on case selection and prioritization on the current legal framework. *Columbia Journal of Environmental Law*, v. 43, n. 1, p. 181-226, 2018.

117 MISTURA, Alessandra. Is there space for environmental crimes under international criminal law?: the impact of the office of the prosecutor policy paper on case selection and prioritization on the current legal framework. *Columbia Journal of Environmental Law*, v. 43, n. 1, p. 181-226, 2018. p. 214.

118 MISTURA, Alessandra. Is there space for environmental crimes under international criminal law?: the impact of the office of the prosecutor policy paper on case selection and prioritization on the current legal framework. *Columbia Journal of Environmental Law*, v. 43, n. 1, p. 181-226, 2018. p. 225.

119 VAN DER WILT, Harmen. Corporate criminal responsibility for international crimes: exploring the possibilities. *Chinese Journal of International Law*, v. 12, n. 1, p. 43-77, 2013.

120 KREMNITZER, Mordechai. A possible case for imposing criminal liability on corporations in international criminal law. *Journal of International Criminal Justice*, v. 8, n. 3, p. 909-918, 2010.

121 SHELTON, Dinah. Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk. *Journal of Human Rights and the Environment*, v. 6, n. 2, p. 139-155, 2015.

122 SHELTON, Dinah. Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk. *Journal of Human Rights and the Environment*, v. 6, n. 2, p. 150, 2015.

123 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Saramaka people v suriname*: preliminary objections, merits, reparations, and costs). IACtHR Series C No. 172, 2007. para. 147; INTER-AMERICAN COURT OF HUMAN RIGHTS. *Kichwa indigenous people of Sarayaku v. Ecuador*: merits and reparations. IACtHR Series C, n. 245, 2012. para. 183.

124 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Claude-Reyes et al v Chile*: merits, reparations and costs. IACtHR Series C, n. 15, 2006. para. 73.

125 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Kawas-Fernández v. Honduras*: merits, reparations and costs. IACtHR Series C, n. 196, 2009. para. 148.

underscoring the environmental dimension of the right to respect for privacy and family.[126] The IACtHR has a 'collective/public interest-oriented approach to the adjudication of environmental complaints',[127] a feature not very developed in the ECHR.

Despite this increasingly progressive stance on connecting the environment and human rights, the state-centred paradigm is still grained in the aforementioned bodies. Jurisprudence of said bodies stresses that the state assumes the obligation to prevent, investigate and punish human rights violations as due diligence, and failing to do this may lead to states' international responsibility, even if the wrongful act was committed by a private actor.[128] This deferral on the basis of lack of jurisdiction is the main obstacle to render MNCs liable before human rights bodies.[129]

3.2. UN initiatives

In 1977, an Intergovernmental Working Group on a Code of Conduct was appointed by the UN Commission on Transnational Corporations to elaborate the UNCCTC. This work started with several disagreements, chiefly whether the treaty had to be binding or not.[130] However, they did agree on environmental protections in its first round of negotiations, although the content of the instrument is rather broad and exhortatory.[131] Overall, the UNCCTC ensured that MNCs provide a 'stable, predictable, and transparent framework to [strength] international investments; and to help minimize [their] negative effects'.[132]

By the beginning of the 1990s, it was clear that none of the participants were interested in continuing with the negotiations, probably due to the shift of priorities towards the encouragement of FDI,[133] or because its all-encompassing approach arose suspicion around MNCs who refused to be bound by international standards, heralding the failure of the UNCCTC in 1992.[134]

In August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights adopted the Norms, a novel and comprehensive list of human rights standards for MNCs.[135] The Norms comprise a reference to numerous international legal instruments, namely human rights and environmental treaties, such as the Convention on Biological Diversity (CBD) and the Rio Declaration.[136]

Such standards, however, were criticized due to the impracticality behind uniformly applying them across different countries with diverse legal traditions and realities; and, for including rights that were not still recognized by all states.[137] For instance, the Norms envisage that MNCs shall conduct their operations in accordance to national and international environmental and human rights regulations.[138]

In spite of its ambitious and stringent language, the

126 EUROPEAN COURT OF HUMAN RIGHTS. *López Ostra v Spain*: merits and just satisfaction. ECHR App no 16798/90, 1994.; EUROPEAN COURT OF HUMAN RIGHTS. *Fadeyeva v Russian Federation*: judgment, merits and just satisfaction. ECHR App No 55723/00, 2005.; EUROPEAN COURT OF HUMAN RIGHTS. *Guerra and others. v Italy*: judgment, merits and just satisfaction. ECHR App No 14967/89, 1998.

127 PAVONI, Riccardo. Environmental jurisprudence of the european and inter-american courts of human rights. In: BOER, Ben (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 106.

128 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Velásquez-Rodríguez v Honduras*: merits. IACtHR Series C, n. 04, 1988. para. 72; INTER-AMERICAN COURT OF HUMAN RIGHTS. *International responsibility for the promulgation of laws in violation of the convention*: advisory opinion. IACtHR OC-14/94, 1994. para. 56.

129 KHOURY, Stéfanie. Transnational corporations and the european court of human rights: reflexions on the indirect and direct approaches to accountability. *Oñati Journal of Emergent Socio-Legal Studies*, v. 4, n. 1, p. 68-110, 2010.

130 SAUVANT, Karl. The negotiations of the United Nations code of conduct on transnational corporations: experience and lessons learned. *The Journal of World Investment & Trade*, v. 16, p. 11-87, 2015.

131 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 84.

132 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 80.

133 SAUVANT, Karl. The negotiations of the United Nations code of conduct on transnational corporations: experience and lessons learned. *The Journal of World Investment & Trade*, v. 16, p. 11-87, p. 55, 2015.

134 CARASCO, Emily; SINGH, Jang. Towards holding transnational corporations responsible for human rights. *European Business Review*, v. 22, n. 4, p. 432-445, 2010.

135 GELFAND, Jacob. The lack of enforcement in the united nations draft norms: benefit or disadvantage?. In: SCHUTTER, Olivier De (Ed.). *Transnational corporations and human rights*. Hart Pub, 2006. p. 314.

136 UNITED NATIONS. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*. E/CN4/Sub2/2003/12/Rev2, 2003. p. 2.

137 GELFAND, Jacob. The lack of enforcement in the united nations draft norms: benefit or disadvantage?. In: SCHUTTER, Olivier De (Ed.). *Transnational corporations and human rights*. Hart Pub, 2006. p. 316–318.

138 UNITED NATIONS. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*. E/CN4/Sub2/2003/12/Rev2, 2003.

Norms were not accepted by the Commission on Human Rights,[139] and only reached 'a level of expert legitimacy, but no political endorsement'.[140] However, its merit rests on its potential to convey its positive conceptual array onto other regimes of corporate environmental and human rights standard-setting,[141] like the UNGP and the BHRT.

As a strategy to fill the void left by hard-law approaches rehearsed in the past, the UN decided to give the 'partnership approach' a chance, launching the GC as a soft-law strategy for 'leveraging the platform' of large corporations and encouraging socially responsible corporate behaviour.[142] The GC, just like the Norms, covers broad and flexible principles that hinge upon existing UN documents,[143] namely the UDHR and the Rio Declaration.

However, the GC was not without its critics, who attributed its voluntary nature to a lack of responsiveness from some MNCs to civil society's claims regarding corporate's human rights abuses;[144] and also questioned those MNCs' continuance in the initiative.[145] Overall, critics perceive the GC as 'long on promises, short on performance, and mostly silent on transparency and objective reporting',[146] however, it does require from companies the implementation of measures based on the precautionary approach[147] and also have a procedure to handle egregious abuse of its principles, including severe environmental damage.[148] Thus, it could be said that the climate of divisiveness around this instrument may indicate that further and concrete results are yet to be seen.

3.3 .The UNGP

John Ruggie, the SRSG, made it very clear from the beginning of his mandate, that he was going to leave behind the approach taken in the Norms – who deemed them as a 'distraction', and adopted a 'principled pragmatism' instead, whose legitimacy was reached by 'consulting with a wide range of stakeholders [while] keeping businesses and government "on side"'.[149]

The result of the SRSG's acclaimed mandate was the design of the UNFBHR and the UNGP to implement it. Comprising 31 principles and corresponding commentaries, the UNGP clarify legal and policy implications.[150] They apply to all states and all business enterprises,[151] and encompass all internationally recognized rights, being the floor the International Bill of Human Rights and the principles set out in the ILO's Declaration on Fundamental Principles and Rights at Work.[152] Moreover, they rest upon three pillars designed for states and businesses who are called to flesh-out mechanisms to protect individuals from human rights abuses across the world. The first one is the duty of states to integrally protect human rights, the second entails the corporate's

139 WEISSBRODT, David. Human rights standards concerning transnational corporations and other business entities. *Minnesota Journal of International Law*, v. 23, n. 2, p. 135-171, 2014. p. 165.

140 MORGERA, Elisa. Benefit-sharing as a bridge between the environmental and human rights accountability of multinational corporations. In: Ben Boer (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 46.

141 MORGERA, Elisa. Benefit-sharing as a bridge between the environmental and human rights accountability of multinational corporations. In: Ben Boer (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 46; WEISSBRODT, David. Human rights standards concerning transnational corporations and other business entities. *Minnesota Journal of International Law*, v. 23, n. 2, p. 135-171, 2014. p. 167.

142 GHAFELE BASHI, Roya; MERCER, Angus. "Not starting in sixth gear". *UC Davis Journal of International Law and Policy*, v. 17, n. 1, p. 41-61, 2011. p. 41-61.

143 MORGERA, Elisa. The UN and corporate environmental responsibility: between international regulation and partnerships. *Review of European Community and International Environmental Law*, v. 15, n. ,1 p. 93-109, 2006. p. 99.

144 KAMMINGA, Menno. Company responses to human rights reports: an empirical analysis. *Business and Human Rights Journal*, v. 1, n. 1, p. 95-110, 2016.

145 SETHI, S. Prakash; SCHEPERS, Donald H. United Nations global compact: the promise–performance gap. *Journal of Business Ethics*, v. 122, n. 2, p. 193-208, 2013. p. 193-208.

146 SETHI, S. Prakash; SCHEPERS, Donald H. United Nations global compact: the promise–performance gap. *Journal of Business Ethics*, v. 122, n. 2, p. 193-208, 2013. p. 201.

147 MORGERA, Elisa. Multinational corporations and international environmental law. In: ALAM, Shawkat et al. (Ed.). *Routledge handbook of international environmental law*. Routledge, 2015. p. 198.

148 MORGERA, Elisa. From corporate social responsibility to accountability mechanisms. In: DUPUY, Pierre-Marie; VIÑUALES, Jorge (Ed.). *Harnessing foreign investment to promote environmental protection*. United Kingdom: Cambridge University Press, 2013. p. 338.

149 SIMONS, Penelope. International law's invisible hand and the future of corporate accountability for violations of human rights. *Journal of Human Rights and the Environment*, v. 3, n. 1, p. 5-43, 2012.

150 RUGGIE, John. *Report of the special representative of the secretary general on the issue of human rights and transnational corporations and other business enterprises*. Report submitted before session 17 of the human rights council. A/HRC/17/31, 2011.

151 RUGGIE, John. *A UN business and human rights treaty?*. Available in: <https://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>.

152 RUGGIE, John. *Report of the special representative of the secretary general on the issue of human rights and transnational corporations and other business enterprises*. Report submitted before session 17 of the human rights council. A/HRC/17/31, 2011. p. 13.

application of due diligence aimed at respecting human rights, and the third pillar underpins the necessity of effective remedies for human rights victims.[153]

It is worth noticing that the second pillar within the UNGP relies on corporate due diligence – a widely applied concept in environmental protection contexts – which involves '(i) impact assessment; (ii) stakeholder involvement in decision-making; and (iii) life-cycle management'.[154] Nonetheless, there is no evidence of synergies between the UNGP and principles or instruments of IEL.[155]

The omnipresent nature of the UNGP is undeniable; they are being used by governments, intergovernmental organizations, human rights advocate groups, and foremost, business themselves.[156] For instance, the HRC enacted two[157] resolutions on human rights and the environment, explicitly pointing out the importance of the UNGP. Furthermore, in the *Kaliña and Lokono Peoples v. Suriname* case, the IACtHR took note of the UNGP, reiterating the obligation of states to 'protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises'.[158] Additionally, the UN Committee on Economic, Social and Cultural Rights addressed the role of businesses in the adverse impacts on human rights through a General Comment, whereby the UNGP was considered a pivotal document.[159]

The UNGP have been received with enthusiasm by some,[160] arguing a global consensus and momentum as its major strength, and with scepticism by others,[161] underlining an ontological flaw entrenched to their voluntary nature. Overall, it seems that the common agreement is that a follow-up of the implementation of the UNGPs shall be undertaken. In this vein, the HRC established a Working Group on Business and Human Rights (WGBHR),[162] who stressed that information regarding state protection of human rights from companies is lacking due to the novelty of integrating the UNGP onto domestic legislation, therefore the need of a future complete assessment.[163] This reaffirms Ruggie's description of the essence of the UNGP as 'the end of the beginning'.[164]

4. Drafting the BHRT

The proposal to elaborate a BHRT under the auspices of the HRC, led by Ecuador and South Africa, was passed with 20 votes in favour, 14 against and 13 abstentions,[165] a different result to that of the unanimously endorsed UNGP just four years before, indicating a contentious future, specially around sensitive

153 RUGGIE, John. *Just business*: multinational corporations and human rights. W. W Norton & Company, 2013. p. 7.

154 MORGERA, Elisa. Benefit-sharing as a bridge between the environmental and human rights accountability of multinational corporations. In: Ben Boer (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 44.

155 MORGERA, Elisa. Multinational corporations and international environmental law. In: ALAM, Shawkat et al. (Ed.). *Routledge handbook of international environmental law*. Routledge, 2015. p. 204.

156 RUGGIE, John. *A UN business and human rights treaty?*. Available in: <https://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>.

157 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Human rights and the environment*. UN. Doc. A/HRC/RES/19/10, 2012.; UNITED NATIONS HUMAN RIGHTS COUNCIL. *Human rights and the environment*. UN Doc. A/HRC/RES/25/21, 2014.

158 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Kaliña and Lokono peoples v Suriname*: merits, reparations and costs). IACtHR Series C, n. 309, 2015. para. 224.

159 UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment no. 24 on State obligations under the international covenant on economic, social and cultural rights in the context of business activities*. Treaty Body General Comment E/C.12/GC/24, 2017. para 2.

160 SECK, Sara. Canadian mining internationally and the UN guiding principles for business and human rights. *Canadian Yearbook of International Law*, v. 49, p. 51-116, 2011. p. 51-116; ANAYA, James. Statement by Professor James Anaya special Rrapporteur on the rights of indigenous peoples. FORUM ON BUSINESS AND HUMAN RIGHTS, 2012. Available in: <http://unsr.jamesanaya.org/statements/forum-on-business-and-human-rights-2012-statement-by-professor-james-anaya>.

161 WETTSTEIN, Florian. Normativity, ethics, and the UN gGuiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, v. 14, n. 2, p. 162-182, 2015; LÓPEZ, Carlos. The "ruggie process": from legal obligations to corporate social responsibility? In: DEVA, Surya; BILCHITZ, David (Ed.). *Human rights obligations of business*. Cambridge University Press, 2013.; BLITT, Robert. Beyond Ruggie's guiding principles on business and human rights: charting an embracive approach to corporate human rights compliance. *Texas International Law Journal*, v. 48, n. 1, p. 33-62, 2012.

162 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Human rights and transnational corporations and other business enterprises*. A/HRC/RES/17/4, 2011. para. 11.

163 WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES. *Report of the working group on the issue of human rights and transnational corporations and other business enterprises*. UN Doc. A/70/216, 2015. para 3.

164 RUGGIE, John. *Just business*: multinational corporations and human rights. W. W Norton & Company, 2013. p. 204.

165 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. UN. Doc. A/HRC/RES/26/9, 2014.

issues – like direct obligations on MNCs. Overall, its main foreseeable risk, if negotiations are successful, is a 'diluted standards' type of instrument.[166]

Except for China, states that voted against the proposition are the ones with the largest and most influential MNCs in the world. This is of particular interest since the resolution is circumscribed to the regulation of MNCs exclusively, leaving national corporations out of its scope.[167] Another sign of early contention is that countries who did not support the BHRT, did sponsor a resolution on the extension for three more years of the mandate of the WGBHR, whose main task is the study of the implementation of the UNGP[168].

Bearing in mind that the idea of a BHRT is not a new one, this revised hard-law approach, advocated by an important number of NGOs, scholars and states alike,[169] might be a political sentiment of restlessness, probably stirred by the modest results of past initiatives – a sentiment that seeks to level the playing field through a diplomatic process. However, what is already obvious is that this open-ended process will take several years of negotiations until a treaty is finally adopted, which is a fair point from the UNGP's advocates, who strive for its implementation as an interim pragmatic measure.[170]

The HRC in its Resolution 26/9, decided that the first two sessions of the OEIGWG ought to be dedicated to conduct 'constructive deliberations on the content, scope, nature and form of the future international instrument'[171] and recommended that relevant stake-holders should submit inputs on this regard.[172] In this vein, the OEIGWG, chaired by the representative of Ecuador, had conveyed three sessions up to date in July 2015, October 2016[173] and October 2017[174] respectively. In all sessions, the presence of states, intergovernmental organizations and NGOs that supported the creation of the group were welcomed and acknowledged,[175] who actively participated in shaping the *travaux préparatories*[176] of the proto-treaty. However, the complete absence of the United States and the timid presence of the European Union did not go unnoticed.[177]

Discussions were generally conveyed by general statements from state's delegates, which highlighted the inter-linkage between the environment and human rights, such as the delegation of Algeria, who stated that 'environmental degradation [and] dumping of toxic wastes […] by [MNCs], affect, marginalise and impoverish groups disproportionally and exacerbate existing human rights concerns';[178] a statement echoed by Indonesia[179] and China,[180] who noted that despite the leading

166 NOLAN, Justine. A business and human rights treaty. In: BAUMANN-PAULY, Dorothée; NOLAN, Justine (Ed.). *Business and human rights*: from principles to practice. Routledge, 2016. p. 72.

167 GANESAN, Arvid. Towards a business and human rights treaty?. In: BAUMANN-PAULY, Dorothée; NOLAN, Justine (Ed.). *Business and human rights*: from principles to practice. Routledge, 2016. p. 74.

168 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Human rights and transnational corporations and other business enterprises*. UN. Doc. A/HRC/RES/26/22, 2014. para. 10.

169 LAGOUTTE, Stéphanie. New challenges facing states within the field of human rights and business. *Nordic Journal of Human Rights*, v. 33, n. 2, p. 158-180, 2015. p. 178.

170 RUGGIE, John. *The past as prologue?*: a moment of truth for UN business and human rights treaty. Available in: <https://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf>. p. 6.

171 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. UN. Doc. A/HRC/RES/26/9, 2014. para. 2.

172 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. UN. Doc. A/HRC/RES/26/9, 2014. para. 2.

173 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. A/HRC/34/47, 2017.

174 UNITED NATIONS 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, 2018.

175 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 6–10.

176 SHAW, Malcolm. *International law*. 6. ed. United Kingdom: Cambridge University Press, 2008. p. 935.

177 SHAW, Malcolm. *International law*. 6. ed. United Kingdom: Cambridge University Press, 2008. p. 39.

178 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 6.

179 INDONESIAN DELEGATION. *Statement by Indonesian delegation at the 1st session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/GeneralComments/States/Indonesia1.pdf>. p. 2.

180 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 7.

role of MNCs in global economic development, they also could injure human rights and the environment, which is why the inclusion of these issues in tandem with development are important.

NGOs' representatives also made numerous and relevant remarks about the importance of the environment, asserting that depletion of natural resources had an impact on the right to self-determination and an adequate standard of living,[181] while positing the need for an international court on climate issues.[182] In these lines, some delegations encouraged the inclusion of environmental principles, like the use of the best technology, polluter-pay principles (PPP) and FPIC; while at the same time highlighted the interdependence and indivisibility of human rights.[183] South Africa for instance, encouraged the inclusion of effective remedies for environmental damage.[184]

During the three sessions, several panels of discussion were organized, each of which addressed core elements of the treaty. [185] Thus, the analysis of the negotiations will be narrowed as to only include the topics related to direct obligations of MNCs in the context of environmental damage linked to human rights violations. The examination will be based on the *travaux préparatoires* of the treaty's drafting process, including the official reports of the three sessions, the document that sets out the elements for the draft, participants' submissions and non-official bulletins.

4.1. Principles of the new Treaty

During all the sessions, discussions began to stir on issues related to the principles that should be rooted in the treaty via oral addresses from some state delegations, legal experts and NGOs. However, most contributions touched upon a myriad of issues that do not fit neatly into the definition of principles as such, like the type of corporations that should be regulated,[186] or the range of human rights that should be protected.[187]

Additionally, the anchoring of the principles within the treaty, which would allow to understand the interpretation of the context of the treaty, and the potential crystallization of currently recognized principles of IEL and their inter-play with general principles of international law, was largely obviated in the official report of the first session, and marginally touched upon in the subsequent two sessions, an aspect that is mirrored in the 'elements of the BHRT' document, where some wide-ranging principles were laid down,[188] none of them referred to protecting the environment.

Some states, for instance, recommended that the principles should be included as an operative part of the instrument in order to facilitate its implementation,[189] a perspective shared by Ecuador, who in addition stated that hierarchies among principles should be averted.[190]

181 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 32.

182 UNITED NATIONS 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, 2018. para. 23.

183 UNITED NATIONS 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, 2018. para. 23.

184 SOUTH AFRICAN DELEGATION. *Opening statement delivered by South Africa*. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SOUTHAFRICAS_Opening_StatementbyAmbMinty_Panel1.pdf>. p. 3.

185 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 2. Topics ranged during the last three sessions can be summarized as follows: general architecture of the international legally binding instrument; principles to be incorporated; scope of application; general obligations; responsibility and liability; access to justice, effective remedy and international cooperation.

186 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 44.

187 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 46.

188 CHAIRMANSHIP OF THE OEIGWG. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2018. Available in: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf>. p. 3.

189 BOLIVIAN DELEGATION. *Panel I*: principios, conceptos y elementos, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel1/States/BOLIVIA_PLURINATIOANL_STATE_OF.pdf>.

190 ECUADORIAN DELEGATION. *Panel II*: ámbito de aplicación de un instrumento prospectivo: alcance del instrumento; empresas transnacionales y otras empresas comerciales, conceptos y naturaleza jurídica en el derecho internacional, 2015. Available

Some references were made with regards to the importance of expressly mentioning the principles within the future treaty in order to avoid erroneous interpretations or unnecessary legal voids.[191] Contrariwise, it was also stressed that the principles should be placed in the preamble of the treaty and reflected in the treaty provisions.[192]

Principles, on this regard, may have three entwined purposes: the first one is to interpret the treaty as a whole during its implementation; [193] secondly, to interpret it in the context of legal recourse before a compliance mechanism set in the treaty or by any other international adjudicative body; and thirdly, to guide and determine the scope and the wording of specific provisions.

Principles steering a treaty towards a coherent body of law have been already rehearsed in international environmental treaties, namely the United Nations Framework Climate Change Convention (UNFCCC), where principles like the 'common but differentiated responsibilities and respective capabilities', precaution--prevention and sustainable development have been drawn in an explicit article therein and have been accommodated all through the Convention's provisions.[194] A shared feature with the CBD, where the principle of prevention of transboundary environmental harm is stressed.[195]

Principles of IEL have been developed by vast, diverse and even fragmented types of national and international instruments,[196] demonstrating the key role that plays soft-law at embedding principles, such as the Rio Declaration, greatly endorsed by states[197] and further included in several treaties. Thus, if environmental principles are discussed, they will serve as an authoritative way to resolve ambiguities, fill in gaps,[198] codify and progressively develop[199] the law that is being resolved by the treaty.

Outlining general principles as an avenue to provide evidence of *opinio juris* and legitimacy,[200] is not only confined to the realms of environmental law, but it is also reflected in the process of law making of the international human rights regime.[201]

Thus, placing different types of principles within the new treaty is likely to be the approach opted by some states and NGOs. However, written and oral contributions during the sessions have been characterised of being significantly imprecise and almost figurative, thus rendering it difficult to predict how exactly those invoked principles would be introduced into the text or how they would shape its content. Still, the fact that some participants are willing to address the challenges that the treaty presupposes by means of IEL principles, is a step forward towards a clarification of the extent of those principles in the context of corporate accountability.

For instance, the precautionary principle was specifically invoked during the first session – although in an indeterminate manner, by the delegation of Ecuador[202] and several international NGOs,[203] suggesting that sta-

in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel2/States/ECUADORStatement-OEIWG-PanelII.pdf>. p. 4.

191 CUBAN DELEGATION. *Panel I*: principios para un instrumento jurídicamente vinculante sobre corporación transnacionales y otros empresas en relación con los derechos humanos, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel1/States/CUBA.pdf>. p. 2.

192 MCCORQUODALE, Robert. *Principles for an internationally legally binding instrument on TNC and other business enterprises with respect to human rights*. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/McCorquodaleIGWGPanel060715.pdf>.

193 UNITED NATIONS. *Vienna convention on the law of treaties (1969)*. New York: Treaty Series, v. 1155, n. 18232, 1987. p. 331.

194 UNITED NATIONS. *United Nations framework convention on climate change*. FCC/INFORMAL/84/Rev1, 1992. art. 3.

195 UNITED NATIONS. United Nations conference on environment and development: convention on biological diversity. *International Legal Materials*, v. 31, n. 4, p. 818-841, 1992.

196 SANDS, Philippe. *Principles of international environmental law*. 2. ed. Cambridge University Press, 2003. p. 169.

197 BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International law and the environment*. 3. ed. United Kingdom: Oxford University Press, 2009. p. 27.

198 SHELTON, Dinah. Normative hierarchy in international law. *The American Journal of International Law*, v. 100, n. 2, p. 291-323, 2006.

199 BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International law and the environment*. 3. ed. United Kingdom: Oxford University Press, 2009. p. 30.

200 BOYLE, Alan; CHINKIN, Christine. *The making of international law*. United Kingdom: Oxford University Press, 2007. p. 224.

201 BILCHITZ, David. The necessity for a business and human rights treaty. *Business and Human Rights Journal*, v. 1, n. 2, p. 203-227, 2016.

202 ECUADORIAN DELEGATION. *Panel II*: ámbito de aplicación de un instrumento prospectivo: alcance del instrumento; empresas transnacionales y otras empresas comerciales, conceptos y naturaleza jurídica en el derecho internacional, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel2/States/ECUADORStatement-OEIWG-PanelII.pdf>. p. 4.

203 FRIENDS OF THE EARTH INTERNATIONAL. *Written statement submitted by friends of the earth international*. OEIWG, 2015. p. 3; TOXIC WATCH ALLIANCE. *Proposals for legally enforceable*

tes should refrain from authorizing, promoting or facilitating the operations of MNCs when the likelihood of an impairment of human rights and the environment is extant.

Said formulation poses a number of questions regarding the implications of how the precautionary principle will be developed, essentially because the scope of the definition of the principle under international law is still unclear,[204] and secondly because the proposals, as were submitted, tend to overlap the principle of prevention and precaution, a conceptual slip that potentially could become a bottleneck for future discussions.

Though, what it is clear is that the stakeholders' proposals do suggest a 'strong' interpretation of the principle, analogous to that of the World Charter for Nature, which envisages stymieing the activities which are likely to cause irreversible damage to nature or to recede the activities if a probable adverse effect to the environment is not fully understood.[205]

Moreover, it opens the question on who exactly is providing the evidence to determine whether the operations are innocuous to human rights and the environment: will it be the enterprise - thus implying a reverse of the burden of proof,[206] or the state? The former implies that the treaty might offer the mechanisms whereby MNCs should comply in accordance to the spirit of the principle, including the performance of an environmental impact assessment,[207] as it was suggested during the sessions and in the 'elements of the BHRT' document as a State's obligation to regulate due diligence for parent companies and their supply chains.[208]

This has already been explored not only in the GC, where 'companies are expected to carry out assessments of their environmental impacts and environmental risks',[209] but also in the Norms, where it is stressed that enterprises should respect the precautionary principle when risk assessments are implemented.[210]

On the contrary, if the states are the ones that should shoulder the onus of proof, then the treaty might define the risks involved in MNCs' operations, and explicitly mention the effective or proportional measures to be taken in order to mitigate them. This specific formulation could inhibit cases like *Tătar v. Romania*, where despite the fact that the ECtHR did signal the importance of the precautionary principle[211] as binding European law,[212] it relied on assorted domestic and international sources.[213] Therefore, the BHRT may be a possible way to codify and clarify the precautionary principle on this regard.

mandatory treaty on transnational corporations, banks, other business enterprises, human rights and its historical context. OEIWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/TWAProposals_for_Legally_Enforceable_Mandatory_Treaty_on_TNCs_Banks_other_BusinessEnterprisesHumanRights.pdf>. p. 2; GLOBAL CAMPAIGN TO DISMANTLE CORPORATE POWER AND STOP IMPUNITY. *Eight proposals for the new legally binding international instrument on transnational corporations and human rghts*. OEIWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Global_Campaign_to_Dismantle_Corporate_Power_andStop_Impunity_June-2015_en.pdf>. p. 3; FIAN INTERNATIONAL. *Written submission by FIAN international*. OEIWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/FIAN_International.doc>. p. 8.

204 FITZMAURICE, Malgosia. *Contemporary issues in international environmental law*. Edward Elgar, 2009. p. 27.

205 UNITED NATIONS. World charter for nature. *Environmental Policy and Law*, v. 10, n. 2, p. 34-41, 1983. p. 34-41.

206 SCHRÖDER, Meinhard. Precautionary approach/principle. In: WOLFRUM, Rudiger (Ed.). *Max Planck encyclopaedia of public international law*. United Kingdom: Oxford University Press, 2014. p. 10.

207 UNITED NATIONS INTERNATIONAL LAW COMMISSION. *Yearbook of the international law commission 2000*. Geneva: United Nations, v. 2, part. 2, para. 716, 2005. para. 716.

208 UNITED NATIONS 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, 2018., para. 26; UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016.; CHAIRMANSHIP OF THE OEIGWG. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2018. Available in: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf>. p. 7.

209 MORGERA, Elisa. The UN and corporate environmental responsibility: between international regulation and partnerships. *Review of European Community and International Environmental Law*, v. 15, n. ,1 p. 93-109, 2006. p. 105.

210 UNITED NATIONS. *Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*. UN Doc E/CN4/Sub2/2003/38/Rev2, 2003.

211 EUROPEAN COURT OF HUMAN RIGHTS. *Tătar c Roumanie*. ECHR App. No. 67021/01, 2009. para. 120.

212 SHELTON, Dinah; BEDERMAN, David. Tătar C. Roumanie. *The American Journal of International Law*, v. 104, n. 3, p. 247-252, 2010.

213 SHELTON, Dinah; BEDERMAN, David. Tătar C. Roumanie. *The American Journal of International Law*, v. 104, n. 3, p. 247-252, 2010.

It is noteworthy that if the precautionary principle is inserted as an open-to-interpretation provision, it might widen the margin of appreciation that an international court could afford in a ruling as a result of a contentious case; precluding the development of a subsidiarity role of the international courts and law-makers,[214] a useful feature specially in environmental related cases.[215] Therefore, flexible rules for states, may confer them an ample range of options to justify the breach of an obligation.[216]

The precautionary principle could be designed to be an obligation of conduct, result, or a mix of the two. The first one will provide broad guidelines, as revealed in the context of social, economic and cultural rights;[217] while the second one will set specific, measurable and objective processes, emulating unambiguous provisions found in some international environmental instruments, like the Protocol of Environmental Protection to the Antarctic Treaty, prohibiting the extraction of minerals.[218] The third one could be inspired by the Cartagena Protocol on Biosafety to the CBD, which broadly invokes the precautionary principle to justify the rationale of the instrument,[219] and contemplates a scientifically sound risk assessment whose costs shall be borne by the exporting country;[220] just like the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, where the operator bears the costs of prevention and the state of origin undertakes the necessary expenditure to put in place administrative, financial and monitoring mechanisms.[221]

If a hybrid logic were to be transposed onto the context of the precautionary principle within the BHRT, perhaps requiring a risk assessment of MNCs' operations in host countries could be an obligation of conduct; but at the same time, offsetting its costs onto the home state, an obligation of result. Concomitantly, domestic legislation could oblige locally registered MNCs to fund those risk assessments, placing the obligation of this matter on corporations as an extension of states' obligation of conduct.

Additionally, it may be useful to rely on previous efforts in order to flesh out standards that might not only protect biodiversity, but also the rights of local communities that may be affected by extractive MNCs. For this, the Akwé: Kon Voluntary Guidelines provide suitable insights on environmental and social impact assessments.[222]

Furthermore, other principles related to the environment were also pointed out during discussions; for example, the 'reversal of the burden of proof'[223] and the PPP.[224] However, given the lack of a depth and thorough debate about the implications of those proposals, it is still too precipitous to extrapolate their outcome, although from the businesses perspective, reversing the burden of proof would entail an alteration of due process.[225] Moreover, it may be inaccurate to define as

214 SAUL, Matthew. The european court of human rights' margin of appreciation and the processes of national parliaments. *Human Rights Law Review*, v. 15, n. 4, p. 745-774, 2015.

215 MÜLLEROVÁ, Hana. Environment playing short-handed: margin of appreciation in environmental jurisprudence of the european court of human rights: environment playing short-handed. *Review of European, Comparative & International Environmental Law*, v. 24, n. 1, p. 83-92, 2015.

216 SHANY, Yuval. Toward a general margin of appreciation doctrine in international law? *European Journal of International Law*, v. 16, n. 5, p. 907-940, 2005.

217 WOLFRUM, Rüdiger. Obligation of result versus obligation of conduct: some thoughts about the implementation of international obligations. In: ARSANJANI, Mahnoush et al. (Ed.). *Looking to the Future*. Brill, 2010. p. 367.

218 WOLFRUM, Rüdiger. Obligation of result versus obligation of conduct: some thoughts about the implementation of international obligations. In: ARSANJANI, Mahnoush and others (Ed.). *Looking to the Future*. Brill, 2010. p. 369.

219 SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY (Ed.). *Cartagena protocol on biosafety to the convention on biological diversity*: text and annexes, 2000. Duty of care around living modified organisms that may pose a risk on biological diversity and human health.

220 SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY (Ed.). *Cartagena protocol on biosafety to the convention on biological diversity*: text and annexes, 2000.

221 UNITED NATIONS INTERNATIONAL LAW COMMISSION. *Yearbook of the international law commission 2001*. New York: United Nations, v. 2, 2007. p. 155.

222 SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY. *Akwé Kon*: voluntary guidelines for the conduct of cultural, environmental, and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, 2004. para. 61.

223 CHAIRMANSHIP OF THE OEIGWG. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* 2018. Available in: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf>. p. 10.

224 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 51.

225 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the third session of the open-ended intergovernmental working group on*

a self-standing principle the 'shift of the burden of proof', since it could already be implied depending on the interpretation given to the precautionary principle. As for the PPP, its scope will be discussed further in the section of corporate liability.

To conclude, the environmental principles that were mentioned, even if invoked in an undefined manner, shows the will to accept the conceptual and practical challenges of adapting their scope into the context of a human rights treaty, an area of international law where such principles may be deemed as 'alien'.[226] However, for forthcoming sessions, it may be relevant to additionally discuss the scope of other principles instilled in treaties such as the UNFCCC, like the principle of 'common but differentiated responsibilities', mostly because it could be helpful to understand that the costs linked to social and environmental risk assessments, either borne by states or MNCs, should consider each country's special circumstances, a measure that could level the playing field for developing countries and their MNCs.[227]

4.2. Ratione Personae: what enterprises should be included?

According to HRC Resolution 26/9, the scope of regulation had initially been constrained to MNCs and 'other business enterprises'. The latter is a category explained in a footnote within the same resolution indicating only 'business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law'.[228]

Firstly, it is still unclear whether a footnote has equivalent normative authority as the core of the resolution, or is just a flexible reference, subject to further interpretation or modification.[229] The former compartmentalizes only enterprises with a transnational character, clashing with those who pursued a broader interpretation encompassing all business enterprises - even local companies,[230] which is underpinned by the UNGP[231] and echoed by certain states and NGOs alike.[232] Contrariwise, some states asserted, in a generic fashion, that MNCs should be the only ones to be regulated, claiming that the impacts of human rights are directly linked to the size and structure of MNCs, and that the spirit of the treaty should address the current gap created by undefined MNCs.[233]

One commentator emphasized that legally binding all businesses to comply with all forms of human rights standards would alter the objective of the BHRT.[234] Whereas regulating only MNCs would imply establishing their definitions either within the treaty or later in domestic legislation.[235] The formula retrieved in the 'elements for the BHRT' document emphasized that 'a legal definition of MNCs and other businesses is not required, since the determinant factor is the activity undertaken, particularly if such activity has a transnational character'.[236] Furthermore, it has been indicated in that

transnational corporations and other business enterprises with respect to human rights. A/HRC/37/67, 2018. para 52.

226 MORGERA, Elisa. Benefit-sharing as a bridge between the environmental and human rights accountability of multinational corporations. In: BOER, Ben (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 49.

227 NOLLKAEMPER, André. Sovereignty and environmental justice in international law. In: EBBESSON, Jonas; OKOWA, Phoebe (Ed.). *Environmental law and justice in context*. United Kingdom: Cambridge University Press, 2009. p. 260.

228 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. UN. Doc. A/HRC/RES/26/9, 2014. para. 1.

229 LOPEZ, Carlos; SHEA, Ben. Negotiating a treaty on business and human rights: a review of the first intergovernmental session. *Business and Human Rights Journal*, v. 1, n. 1, p. 111-116, 2016.

230 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 12.

231 RUGGIE, John. *Guiding principles on business and human rights*: implementing the United Nations "protect, respect and remedy" Framework. A/HRC/17/31, 2011. p. 13.

232 NAMIBIAN DELEGATION. *Panel III*. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel3/States/Namibia.pdf>.

233 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 58.

234 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 14.

235 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 14.

236 CHAIRMANSHIP OF THE OEIGWG. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2018. Available in: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf>. p. 4.

same document that the instrument should apply to human rights abuses resulting from any business activity with a transnational character, including entities directly or indirectly controlled by them.[237]

The quandary regarding the definition of MNCs in a treaty is redolent of the times when the Norms were drafted, [238] whose final outcome did envisage a vague definition of MNCs,[239] including 'all business entities, regardless of their stated corporate form or the international or domestic scope of their business'.[240] A 'broad and inclusive' formula is also present in the GC[241] and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy,[242] indicating that the OEIGWG has a range of multifaceted and rehashed options to choose from.

Moreover, some NGOs' delegates proposed a 'hybrid option', upon which no type of businesses should be excluded from regulation, while simultaneously drawing provisions addressing specific challenges for MNCs only.[243] They argued that the footnote in Resolution 26/9 is not entirely clear, assuming that a clear-cut definition of MNCs in the treaty will not only be problematic with respect to overlooking variables that define their 'transnational' character, but also may contribute to the creation of loopholes.[244] In a similar vein, other NGOs decried the 'one-size-fits-all' approach by underscoring the irrelevance of the structure of the enterprise in the milieu of human rights encroachments, recommending the establishment of flexible rules that take into account the size, context and type of business enterprises.[245]

Finally, it might sound tempting, from an environmental protection perspective, to regulate more thoroughly MNCs that profit from the most pollutant activities deployed specially in developing countries. However, the reality is that human rights violations alleged in the context of environmental hazards, have been correlated with all business sectors.[246] Thus, regulating a segment of MNCs would contradict the universality and non-hierarchical definition of human rights, an aspirational tenet in the treaty. Notwithstanding, if all types of business enterprises were to be included in the treaty, it could be an opportunity to expand environmental protection standards in all supply chains, which may lead to take into consideration climate change related policies or biodiversity protection mechanisms, as already stressed in the OECD Guidelines.[247]

4.3. Ratione Materiae: what rights should be included?

The 'subject matter' of the BHRT should bridge the historical chasm between civil and political rights on the one hand, and economic, social and cultural rights on the other, according to a commentator,[248] while drawing three potential options that should be analy-

237 CHAIRMANSHIP OF THE OEIGWG. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. 2018. Available in: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf>. p. 5.

238 WEISSBRODT, David; KRUGER, Muria. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights current developments. *American Journal of International Law*, v. 97, n. 4, p. 901-922, 2003.

239 UNITED NATIONS. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*. E/CN4/Sub2/2003/12/Rev2, 2003.

240 WEISSBRODT, David; KRUGER, Muria. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights current developments. *American Journal of International Law*, v. 97, n. 4, p. 901-922, 2003. p. 909.

241 WEISSBRODT, David. Human rights standards concerning transnational corporations and other business entities. *Minnesota Journal of International Law*, v. 23, n. 2, p. 135-171, 2014. p. 140.

242 INTERNATIONAL LABOUR ORGANIZATION - ILO. Tripartite declaration of principles concerning multinational enterprises and social policy. *International Legal Materials*, v. 41, n. 1, p. 184-201, 2002. para 6.

243 TREATY ALLIANCE. *Panel II*: scope. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel2/Others/SOMOJointStatement.pdf>. p. 1.

244 TREATY ALLIANCE. *Panel II*: scope. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel2/Others/SOMOJointStatement.pdf>. p. 2.

245 INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *Joint oral statement on the scope of the legally binding instrument*: TNCs and other business enterprises. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel3/Others/ESCR-NET_Joint_Statement.pdf>. p. 2.

246 MORGERA, Elisa. Benefit-sharing as a bridge between the environmental and human rights accountability of multinational corporations. In: BOER, Bem. (Ed.). *Environmental law dimensions of human rights*. United Kingdom: Oxford University Press, 2015. p. 41.

247 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *OECD guidelines for multinational enterprises*, 2011. p. 43.

248 DEVA, Surya. *Scope of the proposed instrument:* what human rights to be covered?. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Surya_Deva.pdf>. p. 1.

sed with regards to the breadth of human rights that should be protected: the first one should only address 'gross' human rights abuses; the second should only refer to the 'core' human rights treaties; and the third one is to embrace all human rights instruments while establishing specific provisions with more severe sanctions for 'gross' abuses.[249]

The first option was largely discredited by virtually all stakeholders, while the second was considered too narrow, even if it resonates with the minimum set of rights in Principle 12 of the UNGP.[250] The third option reconciles with the stance of countries like Bolivia,[251] Cuba,[252] Ecuador[253] and South Africa,[254] whose views underscore the importance of not omitting environmental rights, the rights of indigenous peoples and even the right to development, invoking the universality of rights enshrined in the Vienna Declaration and Programme of Action.[255] Nearly all NGOs followed said stance, while adding the right to food and nutrition,[256] the rights of environmental defenders,[257] the eradication of poverty and a gender-based perspective.[258]

If the afore mentioned stance finds consensus, the obvious question is what will happen to those rights underpinned in international instruments that have no universal recognition, such as regional human rights instruments.

Accordingly, should all types of human rights be included, then both, a self-standing right to a healthy environment as well as procedural and substantive rights related to environmental protection, would automatically be annexed into the BHRT. This includes instruments that protect an autonomous right to a healthy or decent environment, like the recently adopted Escazú Convention on Environmental Rights;[259] but also the Aarhus Convention, deemed as 'an important extension of environmental rights and of the corpus of human rights law',[260] which acknowledges the importance of the environment to the enjoyment of basic human rights[261] and mentions private actors[262] when contravening national environmental law.[263] Likewise, the 169 ILO Convention on Indigenous and Tribal Peoples, which protects the FPIC of indigenous peoples in projects that may

249 DEVA, Surya. *Scope of the proposed instrument:* what human rights to be covered?. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Surya_Deva.pdf>. p. 2.

250 RUGGIE, John. *Report of the special representative of the secretary general on the issue of human rights and transnational corporations and other business enterprises*. Report submitted before session 17 of the human rights council. A/HRC/17/31, 2011. p. 13.

251 BOLIVIAN DELEGATION. *Panel IV*: derechos humanos a ser cubiertos bajo el instrumento con respecto a las actividades de las empresas transnacionales y otras empresas. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Bolivia_Plurinational_State_of.pdf>.

252 CUBAN DELEGATION. *Panel IV*: qué violaciones a los derechos humanos deben estar cubiertas bajo el instrumento sobre las empresas transnacionales y otras empresas comerciales?. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Cuba.pdf>. p. 1.

253 ECUADORIAN DELEGATION. *Panel IV*: qué derechos humanos a ser cubiertos bajo el instrumento sobre las empresas transnacionales y otras empresas de negocios? OEIGWG, 2015 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Ecuador.pdf>. p. 2.

254 SOUTH AFRICAN DELEGATION. *Panel IV*: human rights to be covered under the instrument with respect to activities of TNCs and other business enterprises? OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/SouthAfrica.doc>. p. 1.

255 UNITED NATIONS. United Nations world conference on human rights: Vienna declaration and programme of action. *International Legal Materials*, v. 32, n. 6, p. 1661-1687, 1993.

256 FIAN INTERNATIONAL. *Oral statement of FIAN international*: panel IV. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Others/FoodFirst_Information_and_Action_NetworkFIAN.pdf>. p. 2.

257 FIDH. *Panel IV*: Scope/Human rights to be covered under the instrument with respect to activities of TNCs and other business enterprises?. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Others/International_Federation_for_Human_Rights_Leagues_FIDH.pdf>. p. 1.

258 CENTRE FOR APPLIED LEGAL STUDIES. *Panel IV*: human rights to be included. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Others/Center_for_Applied_Legal_Studies.pdf>.

259 UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN. *Regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean*. 2018.

260 BOYLE, Alan. Human rights and the environment: where next?. *European Journal of International Law*, v. 23, n. 3, p. 613-642, 2012. p. 624.

261 UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE. Convention on access to information, public participation in decision-making and access to justice in environmental matters. *International Legal Materials*, v. 38, n. 3, p. 517-533, 1999.

262 LAVRYSEN, Luc. The Aarhus Convention: between environmental protection and human rights. In : MARTENS, Paul; MELCHIOR, Michel (Ed.). *Liège, Strasbourg, Bruxelles*: parcours des droits de l'homme, Anthémis, 2010. p. 655.

263 UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE. Convention on access to information, public participation in decision-making and access to justice in environmental matters. *International Legal Materials*, v. 38, n. 3, p. 517-533, 1999. p. 524.

directly affect them, and sets the obligation of carrying out social and environmental impact assessments[264] -a legal tool in several cases before regional human rights bodies,[265] might also be included.

With that said, including rights related to the environment into the BHRT, might be a good opportunity to convey environmental protection in human rights rhetoric, coalescing in a harmonious manner with current IEL.[266] However, due to a lack of universal state support of said rights in international law – due to technical and political components better resolved in domestic fora,[267] it will be interesting to witness how these discussions evolve within this drafting process.

4.4. Responsibility and obligations of corporations: revisiting pillar two of the UNGP

Pillar two of the UNGP and its role in the BHRT's drafting process was pivotal in this discussion. According to some delegates, 'responsibility', in the context of corporations, should be differentiated from connotations found in the UNGP on the one hand, and in CSR contexts on the other.[268]

Cuba proposed that companies shall disclose all the information regarding preventive plans of human rights protection and other due diligence procedures.[269] The Ecuadorian delegation stressed that direct obligations for corporations can be found already in several instruments of international law, namely the Convention on Civil Liability for Oil Pollution Damage, which might inspire the design of direct obligations upon companies in the treaty.[270] The South African delegation deemed that the UNGP should set the ground for liability and accountability for corporations in international human rights.[271]

NGOs proposed the collective responsibility of MNCs with respect to their subsidiaries.[272] Moreover, it was advised that states should pass national legislation aiming to define obligations for MNCs to abstain from any activity that could cause ecological harm; to conduct independent ex ante and ex post human rights and environmental impact assessments; to put in place access to information mechanisms for individuals and communities potentially affected by MNCs' operations; to implement on-going human rights and environmental monitoring systems; and to comply with judiciary and administrative decisions.[273]

According to some participants, the standard whereby business enterprises would certainly be bound to, is human rights due diligence, which would include several elements – like FPIC of indigenous peoples,[274] and whose definition and implementation should be left to states looking to regulate companies operating at home or abroad, while taking due consideration of their supply chains.[275]

264 INTERNATIONAL LABOUR ORGANIZATION - ILO. Convention concerning indigenous and tribal peoples in independent countries. *International Legal Materials*, v. 28, n. 6, p. 1382-1392, 1986.

265 COURTIS, Christian. Notes on the implementation by latin american courts of the ILO convention 169 on indigenous peoples. *International Journal on Minority and Group Rights*, v. 18, n. 4, p. 433-460, 2011.

266 BOYLE, Alan. Human rights and the environment: where next?. *European Journal of International Law*, v. 23, n. 3, p. 613-642, 2012. p. 633.

267 HANDL, Günter. Human rights and the protection of the environment. In: EIDE, Asbjørn; KRAUSE, Catarina; ROSAS, Allan (Ed.). *Economic, social & cultural rights*: a textbook. 2. ed. M Nijhoff Publishers, 2001. p. 305.

268 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 25.

269 CUBAN DELEGATION. *Panel VI*: aumentando la responsabilidad de las empresas transnacionales y otras empresas. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel6/States/Cuba.pdf>. p. 2.

270 ECUADORIAN DELEGATION. *Panel IV*: qué derechos humanos a ser cubiertos bajo el instrumento sobre las empresas transnacionales y otras empresas de negocios? OEIGWG, 2015 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Ecuador.pdf>. p. 2.

271 SOUTH AFRICAN DELEGATION. *Panel VI*: enhancing the responsibility of transnational corporations and other business enterprises to respect human rights, including prevention, mitigation and remediation. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel6/States/South_Africa.pdf>. p. 2.

272 CETIM. *Panel VI*. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel6/Others/CETIM.pdf>.

273 FIAN INTERNATIONAL. *Oral statement of FIAN international:* panel VI. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel6/Others/FoodFirst_Information_and_Action_Network_FIAN.pdf>. p. 1.

274 UNITED NATIONS HUMAN RIGHTS COUNCIL. *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50, 2016. para. 86.

275 FIDH. *Panel VI*: enhancing the responsibility of TNCs and other business enterprises to respect human rights, including pre-

In the document of the 'elements for a BHRT', it was stated that MNCs shall have both positive and negative obligations. The former is related to creating, implementing and monitoring internal policies aligned with internationally recognized human rights standards; while the latter is connected to refraining from activities that would undermine the rule of law.[276]

In this vein, it was suggested to ponder the relevance of the UNFCCC, the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer, as instruments that set out compliance mechanisms and annexes subject of modification at the meeting of the parties to ensure precision and flexibility as a strategy for enhancing compliance and establish due diligence gauges.[277]

It is worth clarifying that during the discussions, stakeholders were mostly using the definition of 'responsibility' as an obligation rather than as a breach thereto.[278] With this in mind, two conflicting postures arose: direct obligations for MNCs on the one hand, and indirect obligations through states on the other. However, in-depth debate about the implications of either of those positions was notoriously absent.

The 'direct-obligation' approach is based on the need that corporations – as power-holders, shall also protect human rights, thus striking a balance under international law between the rights of corporations enshrined in BITs, and human rights embedded in the BHRT, provided that both are anchored in international agreements, thus granting them equal value.[279] Its main shortcoming, however, is that it overlooks fundamental distinctions between the private and the public realms, misconceiving or overlapping each dimensions' essential roles,[280] and giving free rein to private entities to 'capture' an international regime designed to protect individuals, as was underscored by some NGOs.[281]

Furthermore, it is still unclear how exactly those 'direct obligations' will be executed, or how they are going to abate the inconsistency that stems from the imposition of obligations for 'private subjects of international law' who will likely refrain to be bound by a norm that opposes their interests. The options to deal with this is that either MNCs become also part of the treaty or – as in the international humanitarian law regime with respect to rebel groups – they are bound by default to the treaty.[282]

Contrariwise, the 'indirect obligations' approach is already an existent paradigm, where states are the means for MNCs' compliance of human rights obligations, therefore, adding an environmental dimension therein should be less complex. Then again, since it entrusts human rights protection exclusively upon the state, it falls short in recognizing a universal duty of protection.[283]

A good example of the 'direct obligation' approach is Section 1502 of the Dodd-Frank Act, a US domestic law that seeks to raise investors and consumers' awareness through transparency 'on potential corporate complicity in human rights abuses, primarily in the Democratic Republic of the Congo'.[284] Domestic and foreign companies, as a form of due diligence, must report the origin of certain minerals in their products in order to

vention, mitigation and remediation. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel6/Others/International_Federation_for_Human_Rights_Leagues_FIDH.pdf>. p. 1.

276 CHAIRMANSHIP OF THE OEIGWG. *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2018. Available in: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf>. p. 6.

277 UNITED NATIONS 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, 2018. paras. 97, 98.

278 NOLLKAEMPER, André. Responsibility of transnational corporations in international environmental law: three perspectives. In: WINTER, Gerd (Ed.). *Multilevel governance of global environmental change*. United Kingdom: Cambridge University Press, 2006. p. 182.

279 BILCHITZ, David. The necessity for a business and human rights treaty. *Business and Human Rights Journal*, v. 1, n. 2, p. 203-227, 2016. p. 216.

280 BILCHITZ, David. Corporations and the limits of state-based models for protecting fundamental rights in international law. *Indiana Journal of Global Legal Studies*, v. 23, n. 1, p. 143-170, 2016.

281 FIAN INTERNATIONAL. *Written submission by FIAN international*. OEIWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/FIAN_International.doc>. p. 9–10.

282 NOLLKAEMPER, André. Responsibility of transnational corporations in international environmental law: three perspectives. In: WINTER, Gerd (Ed.). *Multilevel governance of global environmental change*. United Kingdom: Cambridge University Press, 2006. p. 195.

283 BILCHITZ, David. Corporations and the limits of state-based models for protecting fundamental rights in international law. *Indiana Journal of Global Legal Studies*, v. 23, n. 1, p. 143-170, 2016. p. 166.

284 NARINE, Marcia. From Kansas to the Congo: why naming and shaming corporations through the Dodd-Frank act's corporate governance disclosure won't solve a human rights crisis emerging issues in social enterprise. *Regent University Law Review*, v. 25, p. 351-401, 2012.

avoid the funding of local groups linked to human rights violations.

Although the cited example is confined to national jurisdiction and does not incorporate a direct environmental component, it nonetheless evinces the positive impact behind drawing obligations for companies as a mandatory due diligence requirement to operate. In that vein, states under the treaty could flesh out due diligence obligations that not only touches upon human rights, but also environmental protection.

Principle 17 of the UNGP contemplates corporate due diligence as a way to identify, prevent, mitigate and account for adverse human rights impacts, including current and potential ones.[285] In that regard, the Norms,[286] as a way to materialize the concept of due diligence, enshrined the need to carry out social and environmental assessments before and during the life cycle of the operation, ensuring 'that the burden of the negative environmental consequences does not fall on vulnerable racial, ethnic and socioeconomic groups'.[287] Therefore, corporate due diligence could be delineated taking into account existent standards of environmental and social impact assessments intertwined with nascent standards on human rights impact assessments.[288]

Regardless of the approach taken by the OEIWG with respect to direct or indirect obligations for MNCs, fixing binding standards of corporate due diligence is arguably a step forward towards filling international law lacuna; additionally, it is a good opportunity to merge standards from two different law regimes, a challenge that may find insights in current national and international law, as was demonstrated. Said examples could also be transposed onto state-run companies, a category barely mentioned during the discussions and whose grey areas could ignite further contention, even if Principle 4 of the UNGP takes due notice of their importance.[289]

285 RUGGIE, John. *Guiding principles on business and human rights*: implementing the United Nations "protect, respect and remedy" Framework. A/HRC/17/31, 2011. p. 16.

286 WEISSBRODT, David. Human rights standards concerning transnational corporations and other business entities. *Minnesota Journal of International Law*, v. 23, n. 2, p. 135-171, 2014. p. 153.

287 MORGERA, Elisa. *Corporate accountability in international environmental law*. United Kingdom: Oxford University Press, 2009. p. 180.

288 MASSARANI, Tarek; TATGENHORST DRAKOS, Margo; PAJKOWSKA, Joanna. Extracting corporate responsibility: towards a human rights impact assessment. *Cornell International Law Journal*, v. 40, n. 1, p. 135-169, 2007.

289 RUGGIE, John. *Guiding principles on business and human rights*: implementing the United Nations "protect, respect and remedy" Framework. A/HRC/17/31, 2011. p. 9.

4.5. Liability for businesses

Delegates highlighted that the treaty should address frequent litigation obstacles to render MNCs accountable, like complex corporate structures or the doctrine of *forum non conveniens*.[290] Moreover, it was claimed that standards should adapt to different civil and criminal liability contexts or diverse legal systems and traditions, while also allowing inter-state cooperation for legal enforcement and liability for all stages in the supply chain. In addition, the level of liability could be proportional to the level of due diligence measures taken from a parent company vis-à-vis its subsidiaries, implying that rules should be adjusted on a case-by-case basis.[291]

Conversely, a delegate from an employers' organization proposed that instead of focusing on standards, the treaty should have an approach where specific conducts should be penalized and a pragmatic victim-oriented approach should be embraced.[292] Moreover, defining the jurisdiction where the harmful conduct took place and sanctioning them based on the level of damage inflicted should be the focus.[293]

Bolivia and Cuba stressed that impairments of human rights perpetrated by parent companies and/or their subsidiaries should amount to the executives' liability.[294] To this, Venezuela proposed a list of harmful conducts and their corresponding sanctions therein.[295]

290 DEVA, Surya. *Legal liability of TNCs and other business enterprises:* what standards and for which conducts?. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel7/Surya_DevaVII.pdf>. p. 1.

291 DEVA, Surya. *Legal liability of TNCs and other business enterprises:* what standards and for which conducts?. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel7/Surya_DevaVII.pdf>. p. 2.

292 SUAREZ, Roberto. *Legal liability of transnational corporation*. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel7/Roberto_Suarez.pdf>. p. 3.

293 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and human rights:* commencing discussions on a legally binding instrument. South Centre Bulletin. Available in: <http://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf>. p. 31.

294 BOLIVIAN DELEGATION. *Panel VII:* responsabilidad legal de las empresas transnacionales. OEIGWG, 2015. Available in: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel7/States/Bolivia_Plurinational_State_ofVII.pdf>.

295 MOHAMADIEH, Kinda; URIBE, Daniel. *Business and hu-*

Ecuador recommended setting a nationality test in order to lift the corporate veil, which may include, *inter alia,* the country where the company is domiciled, the jurisdiction where its operations take place or the nationality of their shareholders.[296]

An NGO cited the Australian criminal code regarding 'fault elements other than negligence', whereby it is stated, *inter alia*, that either the body corporate's board of directors or a high managerial agent could be held liable if expressly, tacitly or impliedly authorised or permitted the commission of an offence.[297] Furthermore, shared liability of MNCs for the 'activities of their subsidiaries, suppliers, licensees and subcontractors', was also stressed.[298]

Moreover, the need of drawing legal liability provisions to shift the burden of proof from the claimant to the defendant was proposed by an NGO, since 'those affected by corporate injustice, the complex organisational processes within a company and its business relationships are extremely difficult to determine and prove'.[299]

All this begs the question of whether due diligence could be considered a measure that attenuates or exempts liability of MNCs and their subsidiaries, or not. The outcome of this question will depend on whether the PPP, if included in the treaty, will be extensive to the parent company and its subsidiaries or restrictive to each supplier in the value chain. In this sense, international liability regimes are mostly designed around the concept of strict limited liability for private operators in specific high risk activities,[300] like the movement of ultra-hazardous substances, where private due diligence is unknown, and paradoxically an integral implementation of the PPP is yet to be consolidated.[301]

If the BHRT includes the PPP, there should be a balance between the strict liability standard and the implications of implementing MNCs due diligence, which may be used as a potential defence argument should they commit wrongful acts. It is noteworthy that the SRSG indicated that human rights due diligence, by itself, should not absolve a company from liability;[302] a caveat that resonates with the formula in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, whereby an operator is exempted from liability, *inter alia*, if the act was caused by a third party intending to cause damage, and having implemented safety measures first.[303]

Perhaps the first step to implement the PPP under this new treaty is to identify the polluter or the human rights transgressor, to whom a nationality test could be applied, and depending on the size of the company, determine whether home states should assume part of the burden as 'residual sources of redress'.[304] This could be seen as a progressive implementation of principles 13 and 16 of the Rio Declaration, with respect to liability and compensation for adverse effects of environmental damage, and the internalization of environmental costs.[305]

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304 BOYLE, Alan. Globalising environmental liability: the interplay of national and international law. *Journal of Environmental Law*, v. 17, n. 1, p. 3–26, 2005. p. 8.

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5. Conclusions

It is clear that since 2006, the prolific role of the HRC in bolstering the human rights regime is undeniable,[306] a contribution that certainly extends to the current endeavour of crafting a BHRT, which indubitably is a new opportunity to keep developing a vital service for humanity. In that sense, a new BHRT is feasible, although it entails colossal challenges that will have to be dealt with caution, without repeating mistakes from the past;[307] and a way to do it, is by understanding that law making processes are frequently diplomatic facades, veiling each country's political agendas.[308] That is why, the drafters of the BHRT should consider the risks of paucity of precision when assigning direct duties to MNCs and other businesses; namely a potential distortion of the human rights regime by consigning states' obligations to non-state actors[309]. This risk may increase taking into consideration that the main proponents and supporters of the treaty are countries not particularly deemed as democratic,[310] demonstrating the importance of legislative rigour and a vibrant diversity of voices in the HRC.

To illustrate the previous point, almost every stakeholder that was present in all three sessions had similar views on nearly all the basic structure of the BHRT, except for the contended point regarding the scope of regulation. States were keen on regulating only MNCs, while NGOs and experts suggested to extend it to all types of businesses. Fortunately, an understanding was reached as to regulate all businesses entities with a transnational character, avoiding a potential collapse that might stalled subsequent negotiations. This goes without mentioning the absence of key actors, like the US, which without them, thwarting the adoption of a final outcome is a foreseeable scenario, analogous to the unsuccessful experience of the UNCCTC and the Norms.

Evidently, it is difficult to assess, at least at this early stage of drafting, what the substantive content, operative procedures, or practical shortcomings the BHRT will entail, specially for environmental considerations; however, the chances for environmental protection are multiple if drafters start discussing them in subsequent drafting stages. What may spark further debate on environmental dimensions are the broad assertions regarding environmental principles that stakeholders made during the first three sessions. But again, vaguely worded declarations might be interpreted as an attempt to internationalize domestic standards, an ambitious endeavour that should be meticulously examined.

Notwithstanding, it is worth of notice that several IEL instrument were mentioned during the sessions; signalling an attempt of cross-fertilization between distinct areas of law during these stages of the drafting, and to that end, there is a multiple array of IEL tools that could be useful in the future. Needles to say, the HRC is a human rights body, not a conference of the parties of an environmental agreement; and from what was perceived at this early stage, the chasm that divides both regimes, has not yet been bridged.

Ostensibly, the UNGP and other voluntary initiatives designed to provide guidance on corporate human rights responsibility, will keep developing and be progressively inserted onto global law and policy, concomitantly with the negotiations of the BHRT, however, if an honest and useful addition of environmental dimensions within these initiatives are intended to be included, it is 'still necessary to identify the relationship between human rights obligations and environmental protection in order to determine what environmental responsibilities we expect corporations to respect'.[311]

Considering that this document has mainly addressed the question of corporations' responsibility to respect human rights and the environment – or the second pillar in UNGP's vernacular, the plethora of ramifications around these discussions are still ill-explored; and it hints the need to keep examining the way in which the rest of the pillars interweave with other phenomena that might be slightly out of the scope of the HRC. That path must be followed in order to clinch this heated and elongated debate. Of course, the focus of this

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unresolved matter should always be the global victims, and in that category, it might be wise to make room for the environment.

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Los Objetivos de Desarrollo Sostenible en Europa y su Intersección con el Marco de los Negocios y los Derechos Humanos

Sustainable Development Objectives in Europe and its intersection with the framework of Business and Human Rights

Paolo Davide Farah

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Paolo Davide Farah**

Resumen

El estado de la implementación de los Objetivos de Desarrollo Sostenible (ODS) en la Unión Europea (UE) en el contexto del Marco de los Negocios y los Derechos Humanos de la UE merece consideración. Este capítulo sigue una aproximación verticalista: explora los marcos legales y políticos relevantes de la UE, tiene en cuenta la Agenda 2030 para el Desarrollo Sostenible de la Comisión Europea y los ODS y los avances relacionados tanto en la UE como a un nivel internacional más amplio, así como la estrategia de la Comisión Europea concerniente a la responsabilidad social corporativa (RSC) y las cuestiones relacionadas con ella, con el objetivo de examinar su compatibilidad y, eventualmente, sugerir propuestas integradoras.

Abstract

The state of implementation of the Sustainable Development Goals (SDGs) in the European Union (EU) in the context of the EU framework governing business and human rights (B&HR) is worthy of consideration. This chapter follows the top-down approach: it explores the relevant EU legal and policy framework, takes into account the overarching European Commission's 2030 Agenda for Sustainable Development and the SDGs and related developments at the EU and broader international level, as well as the European Commission's strategy concerning corporate social responsibility (CSR) and issues related therewith, aiming at examining their compatibility and, eventually, suggesting integrating proposals

1. Introducción

El estado de la implementación de los Objetivos de Desarrollo Sostenible (ODS) en la Unión Europea (UE) en el contexto del marco de la UE que rige los negocios y los derechos humanos merece consideración. La naturaleza de los ODS y su impacto en los distintos sistemas legales requiere un reconocimiento de su interconexión inherente y de la interdependen-

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cia de aspectos económicos, sociales, culturales y medioambientales; visto desde la perspectiva legal, esto implicaría reinterpretar y articular las normas existentes a la luz de las realidades sociales e implementar los cambios relevantes.[1] Este capítulo seguirá una aproximación verticalista, explorando los marcos legales y políticos relevantes, tomando en consideración la Agenda 2030 para el Desarrollo Sostenible de la Comisión Europea y los ODS y los avances relacionados tanto en la UE como a un nivel internacional más amplio, así como la estrategia de la Comisión Europea concerniente a la responsabilidad social corporativa (RSC) y las cuestiones relacionadas con ella.

Este capítulo examinará la compatibilidad de los respectivos marcos y, eventualmente, sugerirá propuestas integradoras. En general, la aproximación socialmente responsable a los negocios es entendida como un prerrequisito necesario para la consecución de los ODS en la práctica. Sin embargo, los pasos de la UE en este respecto han sido criticados por no ocuparse adecuadamente de las negativas consecuencias sociales y medioambientales de las actividades del sector privado.[2] La falta de medidas concretas destinadas a fomentar la implementación de los ODS en la práctica hace también necesario analizar los existentes marcos regulatorios a nivel nacional y de la UE desde la perspectiva de los ODS y evaluar su potencial para contribuir a la realización de dichos ODS.[3]

El análisis aplicará *inter alia* una aproximación basada en los derechos humanos incorporando estándares internacionales de derechos humanos, persiguiendo el desarrollo como uno de los métodos de investigación subyacentes. Esta aproximación fomenta la necesidad de monitorizar y rendir cuentas, que son percibidos como cruciales para la realización de los objetivos en la práctica y la ausencia de los cuales ha sido repetidamente criticada.[4] La investigación de los ODS también presupone una aproximación interdisciplinaria a la investigación. Por tanto, el análisis de los marcos políticos y legales relevantes aplicará los elementos del razonamiento del Nuevo Realismo Legal, que acentúa *inter alia* la necesidad de tener en cuenta datos empíricos relevantes.[5] A este respecto, datos estadísticos, proporcionados por ejemplo por Eurostat, o seleccionados de estudios de caso de Estados Miembro de la UE, podrían ser usados como fuentes. Dada la esperada variedad de cuestiones específicas relacionadas con la implementación de los ODS y los asuntos relacionados con ellos a nivel nacional, los estudios de caso serán usados solamente como una muestra no probatoria con el fin de ilustrar ciertos puntos, en caso de ser relevantes y aplicables. Al mismo tiempo, una aproximación así tiene el potencial de reconectar la implementación verticalista empezando al nivel de la UE con las realidades de niveles nacionales para prevenir la ocurrencia de potenciales brechas a nivel práctico.

2. El Camino desde los Objetivos de Desarrollo del Milenio hasta los Objetivos de Desarrollo Sostenible

El predecessor de los Objetivos de Desarrollo Sostenible (ODS) podría encontrarse en los Objetivos de Desarrollo del Milenio proclamados en el 2001. El incentivo para su adopción podría ser visto como la necesidad de responder al proceso de globalización, que es duramente criticado en tanto se discute que sus beneficios se distribuyen de manera bastante desigual, mientras que los costes deben ser asumidos por todos.[6] En particular, incluso sin subestimar las ventajas que la globalización ha traído a millones de personas, tiene que considerarse cómo mejorar el gobierno y regular el libre comercio en vista de reducir o eliminar los riesgos y

1 B. Mayer, 'Sustainable development law on environmental migration: the story of an obelisk, a bag of marbles, and a tapestry'. *Environmental Law Review*, 2012, 14, 111, 113.

2 European Coalition for Corporate Justice, *EU Action Plan Overlooks Human Rights Risks of Corporate Activities*, 23 de Noviembre de 2016, https://business-humanrights.org/sites/default/files/documents/EU%20Action%20Plan%20on%20SDGs%20overlooks%20risks%20of%20corporate%20activity%20%28ECCJ%20Press%20Release%29.pdf (last accessed 25 March 2018).

3 SDG Watch Europe, *Statement on the European Commission's Communication on European Action for Sustainability*, 23 de Noviembre de 2016, www.sdgwatcheurope.org/single-post/2016/11/23/Statement-on-the-European-Commission%E2%80%99s-Communication-on-European-action-for-sustainability (last accessed 25 March 2018).

4 E. Bonnar, 'Exploring the human rights based approach principles and the value of their pragmatic application in being integrated with national performance frameworks as part of the Sustainable Development Goals implementation, monitoring, follow-up and review'. *Scottish Human Rights Journal*, 2016, 3.

5 A. Huneeus, 'Human rights between jurisprudence and social science'. *Leiden Journal of International Law*, 2015, 28, 255–256.

6 J. Briant Carant, 'Unheard voices: a critical discourse analysis of the Millennium Development Goals' evolution into the Sustainable Development Goals'. *Third World Quarterly*, 2016, 38, 16.

daños que ocurren a las preocupaciones no comerciales como la protección del medio ambiente y el desarrollo sostenible, la salud pública, los derechos humanos, bienestar social, los intereses de los consumidores, y la seguridad alimentaria y de los productos. En mayor medida, los resultados de los Objetivos de Desarrollo del Milenio pueden ser vistos de forma más bien positiva, especialmente en el progreso con respecto a la lucha contra la pobreza, el hambre y las enfermedades.[7] Los Objetivos de Desarrollo del Milenio fueron proyectados para durar hasta 2015; sin embargo, la comunidad internacional ya estaba mirando y planificando para el período siguiente.

La base para los ODS fue establecida en 2012 con la adopción del documento *The Future We Want* producido en Rio+20. Este documento estipulaba que incluso a pesar de que los ODS habían sido concebidos como globales en su naturaleza y universalmente aceptados, necesitaban tener en cuenta "[d]iferentes realidades nacionales, capacidades y niveles de desarrollo".[8] Además, respondiendo a la crítica asociada con los Objetivos de Desarrollo del Milenio, los ODS fueron diseñados explícitamente para integrar aspectos económico, sociales y medioambientales de una forma holística.[9] El proceso que llevó a la adopción de los ODS fue también apoyado por el marco Compacto Global de la ONU - centrándose principalmente en la relación entre los negocios y los derechos humanos - que resaltó la contribución de los negocios a la hora de fomentar los ODS a través de acciones de negocios responsables.[10] En 2015, la Agenda para el Desarrollo Sostenible fue adoptada en la 70º Asamblea General de la ONU, introduciendo 17 ODS y 169 objetivos asociados, que entraron en vigor en 2016.[11] A diferencia del marco de seguimiento de los Objetivos de Desarrollo del Milenio, el seguimiento de los ODS se basa en un marco multinivel, incluyendo reportes nacionales, globales, regionales y temáticos.[12] Los países son alentados a desarrollar indicadores a niveles nacional y subnacional, los cuales deberían complementar indicadores globales.[13] Además, en contraste con los Objetivos de Desarrollo del Milenio, que se centraban principalmente en países en desarrollo, los ODS se centran tanto en países en desarrollo como en países desarrollados.[14]

En el contexto de la UE, el desarrollo sostenible es un objetivo fundamental incluido en el Artículo 3 del Tratado de la Unión Europea (en lo sucesivo "TUE").[15] Los objetivos del marco coherente de desarrollo sostenible podrían ser localizados remontándonos al año 2006, cuando la UE introdujo la Estrategia de Desarrollo Sostenible de la UE, estableciendo siete prioridades y objetivos clave hasta 2010.[16] Esto fue seguido por la Estrategia Europa 2020, defendiendo un crecimiento inteligente, sostenible e inclusivo, acompañado a su vez de cinco objetivos.[17] Sin embargo estas iniciativas, espe-

7 J.D. Sachs, 'From Millennium Development Goals to Sustainable Development Goals'. *Lancet*, 2012, 379, 2206. Véase también P.D. Farah, 'Trade and progress: the case of China'. *Columbia Journal of Asian Law*, 2016, 30, pp. 97–107; P.D. Farah and E. Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law*. Nueva York/Londres: Routledge, 2016.

8 U. Pisano *et al.*, 'The Sustainable Development Goals (SDGs) and their impact on the European SD governance framework'. *ESDN Quarterly Report*, 2015, no. 35, 6.

9 U. Pisano *et al.*, 'The Sustainable Development Goals (SDGs) and their impact on the European SD governance framework'. *ESDN Quarterly Report*, 2015, no. 35, 6.

10 UN Global Compact, *The Role of Business and Finance in Supporting the Post-2015 Agenda*, Julio 2014, www.unglobalcompact.org/docs/news_events/9.6/Post2015_WhitePaper_2July14.pdf (último acceso el 25 de Marzo de 2018); véase también Pisano, op. cit.,12.

11 UN General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development,* UN Resolution A/RES/70/1, 25 de Septiembre de 2015, disponible online: http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 25 March 2018); European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Next Steps for A Sustainable Europe: European Action for Sustainability*, Document SWD(2016) 390 Final, Estrasburgo, 22 de Noviembre de 2016, https://ec.europa.eu/europeaid/sites/devco/files/communication-next-steps-sustainable-europe-20161122_en.pdf (último acceso el 25 de Marzo de 2018).

12 Eurostat, *Sustainable Development in the European Union: 2015 Monitoring Report of the EU Sustainable Development Strategy*, 2015, 34, http://ec.europa.eu/eurostat/documents/3217494/6975281/KS-GT-15-001-EN-N.pdf (último acceso el 25 de Marzo de 2018).

13 J. Bequiraj, 'Future perfect: measuring access to justice in the post-2015 development framework'. *Public Law* 2016, 549.

14 J. Bequiraj, 'Future perfect: measuring access to justice in the post-2015 development framework'. *Public Law* 2016, 549.

15 A. Renda, 'How can sustainable development goals be "mainstreamed" in the EU's better regulation agenda?'. *CEPS Policy Insights*, 2017, 12.

16 Council of the European Union, *Renewed EU Sustainable Development Strategy*, Document 10917/06, Brussels, 5–16 June 2006. Por primera vez, los principios guía tras el desarrollo sostenible son incluidos en un marco único desde la perspectiva de la estrategia de la UE hacia el desarrollo sostenible. Estos principios incluían cambio climático y energía limpia; transporte sostenible; consumición y producción sostenibles, conservación y gestión de los recursos naturales; salud pública; inclusión social, demografía y migración; los retos de la pobreza global y el desarrollo sostenible; y más tarde también la educación y la formación; y la investigación y el desarrollo. Véase también U. Pisano, op. cit., 20.

17 European Commission, *EUROPE 2020 A Strategy for Smart,*

cialmente la Estrategia Europa 2020, han sido criticadas por incluir ciertas ambigüedades e inconsistencias que consisten, por ejemplo, en la falta de cooperación – y de incentivos para cooperar – por parte de los Estados Miembro, la falta de objetivos significativos en campos como la investigación y el desarrollo, y una excesiva aproximación verticalista que socava la legitimidad política.[18]

En 2016, la Agenda 2030 de la UE fue presentada haciéndose eco del concepto de los ODS previstos por la ONU.[19] Sin embargo, a este respecto debe mencionarse que los ODS son formulados como objetivos globales y existe la necesidad – así como el reto – de adaptarlos para que sean adecuados a las necesidades de la UE, por no hablar de las necesidades y circunstancias específicas de sus Estados Miembro.[20] La clave a este respecto radica en la habilidad de la UE de acomodar su marco político y encontrar un compromiso sobre el desarrollo sostenible que refleje los intereses y prioridades de la UE en general, mientras se deja suficiente discreción y posibilidades para que los distintos Estados Miembro se centren y enfaticen sus propios intereses. Una de las opciones preferidas a este respecto podría ser vista en la llamada descentralización de las metas de los ODS y descomponerlos en metas adaptadas específicamente a cada Estado Miembro, mientras podría ser beneficioso introducir metas específicas incluso al nivel subnacional, con la intención de reflejar las necesidades específicas de regiones dentro de los respectivos Estados Miembro.[21]

3. Un Marco de Gobernanza de los ODS Participativo e Inclusivo: ¿El Desafío Pendiente?

Tal y como ya se ha mencionado, las iniciativas y planes previos a la adopción de los ODS han sido en gran medida criticados por su subyacente aproximación verticalista, tildados por algunos como el llamado "cockpit-ismo", "la ilusión de que la dirección verticalista de gobiernos y organizaciones intergubernamentales puede abordar problemas por sí sola".[22] Incluso a pesar de que los documentos que erigen el marco de los ODS hacen referencia a la "participación activa de todas las partes interesadas",[23] sólo se ocupan brevemente de los negocios, la sociedad y las ciudades.[24] La precondición necesaria para la realización de los ODS es el marco de gobernanza inclusivo, que involucre a todas las partes interesadas importantes, incluyendo no solamente a los gobiernos, sino también a la sociedad civil y al sector privado.[25] Esta aproximación refleja el concepto de la

Sustainable and Inclusive Growth, Document COM (2010) 2020 Final, Bruselas, 3 de Marzo de 2010. Estos objetivos incluyen: el 75 por ciento de la población entre los 20 y 64 años debería estar empleada, el 3% del PIB de la UE debería ser invertido en I+D; cumplir con los objetivos climáticos y energéticos 20/20/20, incluyendo un incremento del 30 por ciento en la reducción de emisiones; el porcentaje de abandono temprano escolar debería estar por debajo del 10 por ciento y al menos el 40 por ciento de la generación juvenil debería tener formación más allá de la secundaria; 20 millones menos de personas deberían estar en riesgo de pobreza. Véase también U. Pisano *et al.*, 'The Sustainable Development Goals (SDGs) and their impact on the European SD governance framework'. *ESDN Quarterly Report*, 2015, no. 35, at 21–22.

18 A. Renda, op. cit., 7.

19 Council of the European Union, *A Sustainable European Future: The EU Response to the 2030 Agenda for Sustainable Development*, *Council Conclusions*, Document 10370/17, Bruselas, 20 de Junio de 2017.

20 A. Renda, op. cit., 8.

21 Ibid., 8.

22 M. Hajet *et al.*, 'Beyond cockpit-ism: four insights to enhance the transformative potential of the Sustainable Development Goals'. *Sustainability*, 2015, 1652.

23 Véase por ejemplo, United Nations, Rio+20s UNDP, *The Future We Want, Outcome of the Conference,* A/CONF.216/L.1, Rio de Janeiro, Brasil, 20–22 de Junio de 2012.

24 Hajet *et al.*, op. cit., 1653.

25 Como demonstración de la necesidad de involucrar a todas las partes relevantes interesadas, en este particular caso de sociedad civil, podría mencionarse por ejemplo el ODS 15, declarando "proteger, restaurar y promover el uso sostenible de ecosistemas terrestres, gestión sostenible de bosques, combatir la desertificación, y frenar y revertir la degradación de la tierra y frenar la pérdida de biodiversidad". En el contexto de la UE, este ODS se materializa en las Directrices sobre Aves y Hábitats y la conexión de áreas protegidas bajo el marco Natura 2000. Uno de los principales objetivos de estas directrices es frenar la pérdida de biodiversidad en la UE. De acuerdo con el art. 6 (3) y (4) de la Directriz de Hábitats, los planes de desarrollo y los proyectos están sujetos a la llamada evaluación apropiada. Sin embargo, la práctica de llevar a cabo una evaluación apropiada ha sido criticada ante el hecho de que a menudo no cumple con los elevados estándares impuestos en este proceso. Esta situación es uno de los factores que ha contribuido a la continua pérdida de biodiversidad en la UE. De acuerdo con los informes ambientales de ONGs, una participación más intensa del público interesado, supervisando el proceso y a menudo siendo capaz de proporcionar aportes específicos a las respectivas localidades, podría tener el potencial de redimir estas deficiencias. La reciente sentencia del Tribunal de Justicia de la Unión Europea, *Lesoochranárske združenie VLK vs. Obvodný* úrad *Trenčín,* C-243/15 incluso abre las posibilidades de participación pública en el proceso apropiado de análisis bajo el art. 6 (3) de la Directriz de Hábitats. Ejemplos como este demuestran que la participación en asuntos muy concretos de las partes interesadas relevantes, como la sociedad civil, es crucial para la realización de los ODS en la UE. Véase Justice and Envi-

llamada "sociedad energética", resaltando "el potencial transformador de las múltiples iniciativas para el desarrollo sostenible adoptadas por varios agentes de cambio dentro de las sociedades a lo largo del mundo".[26]

En particular, el sector privado, con su amplio alcance, tecnologías innovadoras y su habilidad para aportar soluciones, debería ser intensamente incluido dentro del marco del desarrollo sostenible.[27] Los sectores de los negocios y las finanzas deberían participar como agentes de cambio, lo cual podría facilitarse para acelerar la economía verde. La narrativa de la sostenibilidad ha penetrado ya en la lógica de los negocios. Ejemplos al nivel internacional incluyen, por ejemplo, las Iniciativas del Reporte Integrado implementadas por organizaciones como el Marco Internacional del Reporte Integrado, o la Iniciativa de Reporte Global para integrar los informes sostenibles y financieros,[28] Acción 2020 proclamada por el Consejo Empresarial Mundial para el Desarrollo Sostenible y la iniciativa Risky Business,[29] evaluando el riesgo económico del cambio climático en los Estados Unidos.[30] Las directrices y recomendaciones adoptadas bajo los auspicios de la OCDE son también muy influyentes a nivel internacional, de la UE y nacional. Valiosos ejemplos, que son también implementados a nivel nacional, incluyen, por ejemplo, las *Líneas Directrices de la OCDE para Empresas Multinacionales y la Realización Responsable de Negocios* (de aquí en adelante "Directrices de la OCDE") [31] o la recomendación *Enfoques Comunes en Materia de Medio Ambiente y Créditos a la Exportación con Apoyo Oficial (Enfoques Comunes)*.[32] Las directrices de la OCDE también fomentan la adopción de códigos de conducta de socios comerciales, proveedores y subcontratistas, expandiendo de este modo el número de negocios que se adhieren a estándares similares.

En la UE, el marco de desarrollo sostenible necesita ser visto en el contexto de la responsabilidad social corporativa (RSC) y los esfuerzos para implementar los Principios Rectores de la ONU sobre las Empresas y los Derechos Humanos. El papel de la estrategia de la ONU sobre la responsabilidad social corporativa a la hora de implementar los principios globales sobre las Empresas y los Derechos Humanos desarrollados por la ONU ha sido también mencionado en la *Comunicación de la Comisión Europea sobre la Responsabilidad Social Corporativa* en el año 2011, según la cual una mejor implementación de los principios globales en Empresas y Derechos Humanos contribuiría igualmente a la consecución de los objetivos de la UE.[33] Esta suposición ha sido reiterada posteriormente en la Estrategia sobre la Responsabilidad Social Corporativa de la Unión Europea en el año 2014. Al nivel de la UE se ha entendido que una aproximación completamente verticalista desde Bruselas no sería una varita mágica que llevara al cumplimiento de esos objetivos en el conjunto de la UE: el reconocimiento de esto podría ser visto por ejemplo en el hecho de que la Comisión Europea animara a los Estados Miembro a desarrollar sus propios Planes de Acción Nacional (PAN) sobre la implementación de los Principios Rectores de la ONU.[34] Con todo, la participa-

ronment, *Making Natura 2000 Impact Assessments Truly Appropriate: NGO Proposal for an Action Plan* (January 2017), available online: www.justiceandenvironment.org/fileadmin/user_upload/Publications/2016/NaturaActionPlanProposal_january2017.pdf (último acceso el 25 de Marzo de 2018).

26 Hajet *et al.*, op. cit., 1656.

27 J.D. Sachs, op. cit.

28 Disponible online: http://integratedreporting.org (último acceso el 25 de Marzo de 2018).

29 El Consejo Empresarial Mundial para el Desarrollo Sostenible trabaja "con compañías miembro a lo largo de la cadena de valores para proporcionar soluciones de negocio de impacto a las cuestiones de desarrollo más desafiantes con el objetivo de ser una voz líder de los negocios para la sostenibilidad", disponible online: https://www.wbcsd.org (último acceso el 25 de Marzo de 2018), y el Risky Business se centra "en cuantificar y divulgar los riesgos económicos devenidos de los impactos de un clima cambiante" (disponible online: https://riskybusiness.org) (último acceso el 25 de Marzo de 2018).

30 Hajet *et al.*, op. cit., 1657.

31 OECD, *Guidelines for Multinational Enterprises*, 19, disponible online: www.oecd.org/daf/inv/mne/48004323.pdf (último acceso el 20 de Marzo de 2018).

32 OECD, Trade and Agriculture Directorate, Trade Committee, Working Party on Export Credits and Credit Guarantees, *Revised Text for the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the 'Common Approaches')*, Document TAD/ECG(2016)3, Paris, 6 de Abril de 2016, disponible online: www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote='TAD/ECG%282016%293&doclanguage=en (último acceso el 25 de Marzo de 2018).

33 European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, Document COM(2011) 681 Final, Bruselas, 25 de Octubre de 2011, disponible online http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf (último acceso el 25 de Marzo de 2018).

34 European Commission, *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights, State of Play*, Document SWD(2015) 144 Final, Bruselas, 14 de Julio de 2015, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/swd_2015_144_f1_staff_working_paper_en_v2_p1_818385.

ción y la activación efectiva de aquellas partes interesadas que no están únicamente conectadas en la práctica con el marco de gobernanza estatal, como la sociedad civil y el sector privado, sigue siendo cuestionable.

La Estrategia Europea sobre la Responsabilidad Social Corporativa establece una agenda consistente en distintas etapas, incluyendo *inter alia* la integración de los principios de RSC en educación, formación e investigación, enfatizando las políticas de responsabilidad social corporativa a nivel nacional y subnacional y un mejor alineamiento de las aproximaciones europea y global a dichos principios.[35] Esto indica el reconocimiento de la necesidad de aplicar una aproximación de gobernanza multinivel, activando e involucrando a un amplio número de partes potencialmente interesadas. Los Estados Miembro de la UE al menos suscriben oficialmente la necesidad de introducir una aproximación de gobernanza multinivel: por ejemplo, la Estrategia Nacional de Lituania para el Desarrollo Sostenible ve los principios en Responsabilidad Social Corporativa como la prioridad subyacente del desarrollo económico sostenible, mientras que la participación de empresas e interlocutores sociales es vista como una precondición crucial para su consecución.[36]

4. Compatibilidad de ODS y el Marco de las Empresas y los Derechos Humanos en la UE

Incluso aunque no se haya mencionado explícitamente, la cooperación con el sector de los negocios al nivel de la UE podría ser relevante con respecto a múltiples ODS. Por ejemplo, el ODS 8 recoge la promoción de un "crecimiento económico sostenido, inclusivo y sostenible, empleo pleno y productivo y trabajo decente para todos". La movilización del sector de los negocios podría contribuir al logro del objetivo de un 75 por ciento de personas de entre 20 y 64 años empleadas. La participación del sector de los negocios en este respecto es especialmente alentada por la acción de la UE sobre la Responsabilidad Social Corporativa y la Conducta de Negocios Responsable,[37] que fomenta *inter alia* mejores y más sostenibles condiciones laborales y ambientales.

Las llamadas Directivas Contables 2013/34/EU del Parlamento Europeo y del Consejo del 26 de Junio de 2013 y la Directiva 2014/95/EU del 22 de Octubre de 2014[38] son ejemplos de legislación de la UE que facilitan el camino a la implementación en la práctica de esos objetivos. Ellos requieren *inter alia* la divulgación de una amplia gama de información no financiera, como por ejemplo de aspectos medioambientales, sociales y laborales.[39]

De forma similar, con respecto al ODS 9, que declara la ambición de "construir una infraestructura resiliente, promover la industrialización inclusiva y sostenible y fomentar la innovación", el sector negocios debería representar un socio crucial para la UE y los gobiernos nacionales. Tomados en conjunto con los recursos financieros y los objetivos perseguidos por los Fondos Estructurales y de Inversión Europeos, la colaboración con el sector de los negocios debería aportar frutos en forma de una posición fortalecida de la UE en el campo de la innovación global.[40]

Igualmente beneficioso podría ser el papel del sector privado con respecto al ODS 7 – centrado en asegurar el acceso a una energía asequible, fiable y sostenible – y el ODS 13, destinado a abordar el cambio climático.[41] Una de las precondiciones para esto podría ser vista *inter alia* al ocuparse de los asuntos medioambientales.

pdf (último acceso el 25 de Marzo de 2018).

35 Ibid., 7.

36 Permanent Mission of the Republic of Lithuania, *Lithuania's Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights*, 7 de Febrero de 2015, www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania_NationalPlanBHR.pdf (último acceso el 25 de Marzo de 2018).

37 European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Next Steps for A Sustainable Europe: European Action for Sustainability*, op. cit., 5.

38 *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC*; *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*. Véase también European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Next Steps for A Sustainable Europe: European Action for Sustainability*, op. cit., 10.

39 European Commission, *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights, State of Play*, op. cit., 10.

40 European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Next Steps for A Sustainable Europe: European Action for Sustainability*, op. cit., 6.

41 Ibid., 5.

El papel del sector privado es mencionado explícitamente en el ODS 17, que busca "fortalecer los medios para implementar y revitalizar la colaboración global para el desarrollo sostenible". La Comisión Europea, en estrecha colaboración con los Estados Miembro, debe implementar políticas que fomenten el empleo, el crecimiento sostenible y la inversión tanto en Europa como fuera de ella, a través de movilizar *inter alia* al sector privado.[42] La base legal relevante a este respecto podría ser vista en el Artículo 207 (1) TFUE, estimulando que la política comercial común debe ser dirigida en línea con los principios y objetivos de la acción externa de la UE, el Artículo 208 (1) TFUE, indicando lo mismo sobre la política de desarrollo de la UE, el Artículo 212 TFUE sobre la cooperación económica, financiera y tecnológica con terceros países, y el Artículo 214 TFEU para la ayuda humanitaria.[43] Un documento político importante a este respecto es la Comunicación de la Comisión Europea, *Un Papel Más Fuerte del Sector Privado en Lograr un Crecimiento Inclusivo y Sostenible en Países en Desarrollo*,[44] que se centra en la integración del sector privado dentro del marco de desarrollo y cooperación de la UE, mientras estipula que el sector privado necesita adherirse *inter alia* a los estándares de derechos humanos.[45] Los estándares de RSC deben también ser promovidos en países en desarrollo a través del diálogo político y la cooperación y desarrollo. Una forma de gobernanza multinivel que involucre a partes interesadas desde distintos ámbitos podría encontrarse también en la Comunicación, *Una asociación mundial para erradicar la pobreza e impulsar el desarrollo sostenible después de 2015*,[46] que promueve una forma inclusiva de asociación global que involucre tanto al sector privado como a la sociedad civil. La activación y la participación del sector privado es alentada expresamente; por esta razón, la Comunicación acentúa por ejemplo la necesidad de un marco legislativo y regulatorio efectivo. Esto podría tener el potencial de crear una forma del llamado efecto Bruselas,[47] que podría a su vez acercar el marco legislativo y regulatorio de los estados no miembros de la UE a los estándares de la UE sobre hacer negocios de forma responsable.

5. El Camino a Seguir: Seguimiento del Progreso Hacia los ODS

Las estadísticas de Eurostat no reflejan explícitamente la contribución de las respectivas partes interesadas en la consecución de los ODS. Por ejemplo, con respecto al ODS 8, en él se repara en el crecimiento económico promedio en la UE así como en los Estados Miembro;[48] sin embargo, el aporte exacto del sector privado y su papel en este contexto no queda claro a través de los datos estadísticos. Con respecto a la tasa de empleo promedio la situación es similar: la tasa de empleo del 70.1 por ciento implica el papel positivo del sector privado en la creación de oportunidades para la población europea; sin embargo, Eurostat no proporciona información más detallada a este respecto.[49]

Los indicadores respectivos al ODS 9 – aspirando a construir infraestructura resiliente, promover la industrialización inclusiva y sostenible y fomentar la innovación – parece ser más inclusivo, ya que dicho ODS realiza una petición a las industrias para investir recursos en desarrollo e innovación así como en tecnologías

42 Ibid., 7.

43 Ibid., 4–5.

44 European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries,* Document COM(2014) 263 Final*,* Bruselas, 13 de Mayo de 2014, disponible online: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A52014DC0263&qid=1400681732387&from=EN (último acceso el 25 de Marzo de 2018).

45 European Commission*, Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights, State of Play*, op. cit., 37–38.

46 European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Global Partnership For Poverty Eradication And Sustainable Development After 2015,* Document COM(2015) 44 Final*,* Bruselas, 5 de Febrero de 2015, disponibel online: https://ec.europa.eu/europeaid/sites/devco/files/com-2015-44-final-5-2-2015_en.pdf (último acceso el 25 de Marzo de 2018).

47 En este caso sería probablemente una versión más suave del efecto de Bruselas, en tanto intenta principalmente introducir y fortalecer ciertos estándares mínimos – no necesariamente completamente "hard law" – en otros países. En general, el efecto de Bruselas describe la capacidad de la UE de exportar sus estándares al resto del mundo a través de su legislación, sin la necesidad de usar otras instituciones u otros medios de cooperación. Los países que comercian con la UE tienen entonces la tendencia de ajustarse a los estándares de la UE. Véase A. Bradford, 'The Brussels Effect'. *Northwestern University Law Review*, 2012, 107, 2.

48 En la UE se ha visto un crecimiento más bien constante de un 1 por ciento del PIB. Véase Eurostat, *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, 2016, 71, http://ec.europa.eu/eurostat/documents/3217494/7745644/KS-02-16-996-EN-N.pdf/eae6b7f9-d06c-4c83-b16f-c72b0779ad03 (último acceso el 25 de Marzo de 2018).

49 Ibid., 73.

respetuosas con el medio ambiente y procesos de producción.

Por este motivo, el llamado Índice de la eco-Innovación trabaja con distintos indicadores agrupados en cinco campos: aportes de eco-innovación, actividades de eco-innovación, producción de eco-innovación, eficiencia de recursos y resultados socioeconómicos. El Índice de la eco-Innovación tiene el potencial de identificar países con industrias más avanzadas y respetuosas con el medio ambiente.[50] La contribución hacia la economía verde al nivel de la UE también podría ser vista en el mecanismo de los sistemas de gestión medioambiental, que son codificados *inter alia* por estándares internacionales, como ISO 14001 y EMAS.

Otras ambiciones del ODS 9 podrían ser vistas en hacer las industrias más sostenibles y en incrementar su proporción en el empleo, mientras se combinan esas intenciones y objetivos con la aplicación de tecnologías avanzadas y respetuosas con el medio ambiente.[51] La revisión de los datos sobre gastos en investigación y desarrollo representa un instrumento específico para determinar y evaluar países y regiones con industrias avanzadas. De esto se desprende que la investigación promedio y la intensidad del desarrollo de la UE está clasificada por detrás de Corea del Sur, Japón y Estados Unidos; sin embargo, es todavía más avanzada que en Rusia, que podría ser vista como un representante de los países BRICS.[52] En el contexto de la UE, la mayor intensidad de inversión en investigación y desarrollo podría ser vista en los países nórdicos, como Finlandia, Suecia y Dinamarca, seguidos de los Estados Miembro de Europa Occidental y Central, como Austria, Alemania, Bélgica y Francia. La cola de la escala pertenece a los Estados Miembro del Sur y el Este de la UE, en los cuales la inversión en investigación y desarrollo es la mitad del promedio de la UE o incluso menos.[53] Por otro lado, la mayor proporción de inversión en alta y media-alta tecnología podría ser vista en los Estados Miembro del Centro y el Este de la UE, como la República Checa, Eslovaquia, Alemania o Hungría.[54] El enfoque puesto en el tipo de negocios que tiene el potencial de emplear a un amplio número de personas así como usar y aplicar tecnologías respetuosas con el medio ambiente demuestra la naturaleza holística de los ODS, integrando aspectos sociales, económicos y medioambientales.

El impacto de los negocios en los derechos económicos y sociales podría verse también en el ODS 10, que defiende reducir las desigualdades entre países y en el interior de éstos. Esto debería traducirse en un crecimiento sostenido de los ingresos, mientras se promueve la inclusión económica y social y la reducción de las desigualdades.[55] Cuando se están realizando las respectivas mediciones, se tienen en cuenta las eventuales irregularidades concernientes a la medición por medio del PIB per cápita: parte de los ingresos podría ser retenida por corporaciones y gobiernos y parte de ella podría ser transferida al exterior, por ejemplo, en el caso de corporaciones multinacionales.[56]

Con respecto al ODS 13 – combatir el cambio climático – podría mencionarse que la UE ha reducido sus emisiones de gases de efecto invernadero en un 23 por ciento en comparación con 1990, lo cual es atribuido principalmente a las reducciones en el suministro y el uso de energía a lo largo de todos los sectores.[57] Incluso aunque esto no sea resultado únicamente de la estrategia de la UE en RSC, sino principalmente resultado de esfuerzos deliberados realizados por medio de varios instrumentos centrados en afrontar el cambio climático, como el esquema de control de emisiones de la UE, el papel crucial del sector de los negocios a este respecto no se puede subestimar. Compromisos voluntarios por parte de compañías con respecto a la evaluación de la huella medioambiental en general y de la huella del car-

50 Eurostat, *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, op. cit., 80.

51 Ibid., 78.

52 Brasil, Rusia, India, China y Sudáfrica. Eurostat, *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, op. cit., 78.

53 Sin embargo, también hay excepciones: países como Eslovenia, la República Checa, Estonia y Hungría invierten en innovación e innovación un porcentaje superior del PIB que sus vecinos. Véase Eurostat, *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, op. cit., at 79.

54 Ibid., 81.

55 Ibid., 85.

56 Por ejemplo, el elevado PIB de Irlanda y Países Bajos es en gran medida resultado de la presencia de un amplio número de subsidiarias extranjeras de compañías multinacionales, que representan una porción significativa del PIB promedio. Un ejemplo de este fenómeno en el contexto de los Estados Miembro nacionales podría también representar la región de Bratislava en Eslovaquia. Se considera si no se ha hecho cargo adecuado de estas prácticas, también involucrando un mayor contexto de esquemas de optimización de impuestos. Véase Eurostat, *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, op. cit., 89.

57 Ibid., 109.

bón en particular también representan contribuciones valiosas, que suplementan y refuerzan el cumplimiento de compromisos vinculantes.[58]

En tanto el ODS 17 y su meta de implementar y revitalizar la asociación global para el desarrollo sostenible están interesados, el papel del sector privado es esencial debido al hecho de que dicho ODS se centra en el proceso de implementación más que en los resultados. Por esta razón, como precondición, el ODS 17 tiene como objetivo la construcción de asociaciones inclusivas entre todas las partes relevantes interesadas, involucrando a gobiernos, el sector privado y la sociedad civil.[59]

Los datos de Eurostat trabajan con dos conjuntos principales de datos a este respecto: uno compara el gasto en Ayuda Oficial al Desarrollo, cuyo objetivo se encuentra en un 0.7 por ciento de la Renta Nacional Bruta (RNB). En realidad, el gasto colectivo de la UE se sitúa en el 0.47 por ciento de la RNB, mientras que algunos países – Suecia, Luxemburgo, Dinamarca y Países Bajos – exceden este objetivo; sin embargo, la mayoría de los Estados Miembro se encuentra por debajo de este objetivo.[60] El otro conjunto de datos se refiere a las importaciones de la UE de países en desarrollo, que están en continuo crecimiento. La razón de esto se encuentra en las intensas relaciones comerciales con China, que mientras tanto se ha convertido en el mayor exportador a la UE en su conjunto, pero las importaciones desde los países menos desarrollados también se incrementan dinámicamente.

Información adicional sobre las medidas nacionales que contribuyen a la implementación del ODS 17 podría ser encontrada en los Planes de Acción Nacional (PAN) sobre Negocios y Derechos Humanos en los países de la UE. A este respecto se hace necesario mencionar que en 2013 las organizaciones del sector de las compañías textiles holandesas presentaron un plan de acción destinado a hacerse cargo de los abusos en la industria textil, a saber, en la producción de la producción de prendas de vestir, conocido por sus insatisfactorios estándares laborales y sociales. EL objetivo de dicho plan de acción se apoya en el fomento global de los estándares de RSC.[61] La política de compras sostenibles implementada en los Países Bajos, demandando a los proveedores ya sea el unirse a una iniciativa confiable de cadena de suministros de múltiples partes interesadas, como una marca de calidad o un instituto de certificación, o llevar a cabo análisis de riesgos, es otro ejemplo de contribución concreta al cumplimiento del ODS 17.[62] Dada la naturaleza internacional de los negocios globales, esto podría prevenir la participación de compañías que no promuevan el desarrollo sostenible en los procesos de adquisición.

Mecanismos como éste reconocen el hecho de que los estándares sociales y medioambientales deben ser integrados en las normas y mecanismos que rigen las cadenas de suministro global a nivel tanto internacional como nacional. Los mecanismos de diligencia en el espíritu de las Directrices de la OCDE y los Principios Rectores sobre las Empresas y los Derechos Humanos de la ONU sirven como modelo para iniciativas a nivel nacional en Italia, donde la información sobre la realización de negocios con áreas afectadas por conflictos o de alto riesgo así como en el sector textil es ampliamente compartida con las PYMEs[63]. Iniciativas similares han sido promovidas en Dinamarca, cuyo gobierno elabora el "CSR Compass" y la Herramienta de Autoevaluación del Pacto Mundial,[64] incluyendo *inter alia* una guía para las PYMEs sobre cómo llevar a cabo la debida diligencia.[65]

6. Conclusión

Claramente hay muchas iniciativas con el objetivo de implementar los ODS a nivel internacional, de la UE y

58 *Italian National Action Plan on Business and Human Rights 2016–2021*, disponible online: https://cidu.esteri.it/resource/2016/12/49117_f_NAPBHRENGFINALEDEC152017.pdf (último acceso el 25 de Marzo de 2018).

59 Ibid., Eurostat, *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, op. cit., 135.

60 Ibid., 136.

61 Ministerio de Asuntos Exteriores de Países Bajos, *National Action Plan on Business and Human Rights*, 14 de Abril de 2014, https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf (último acceso el 25 de Marzo de 2018).

62 Ibid., 17.

63 *Italian National Action Plan on Business and Human Rights 2016–2021*, op. cit.

64 Disponible online: www.globalcompactselfassessment.org/aboutthistool (último acceso el 25 de Marzo de 2018).

65 The Danish Government, *Danish National Action Plan-Implementation of the UN Guiding Principles on Business and Human Rights*, 14 de Marzo de 2014, www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf (último acceso el 25 de Marzo de 2018).

nacional, lo que reconoce la necesidad de un marco de gobernanza inclusivo que gestione el proceso, incluyendo a todas las partes interesadas relevantes en todos los niveles. Sin embargo, la complejidad de llevarlo a cabo se ve reflejada en el progreso más bien lento a la hora de traducir los objetivos declarados desde el nivel internacional y de la UE hasta el nivel local de una forma coordinada y deliberada. El número de Planes de Acción Nacional sobre Negocios y Derechos Humanos presentado a la Comisión Europea en 2018 demuestra que acciones coherentes y coordinadas en pos de la implementación explícita de los ODS no es probablemente la prioridad diaria en muchos Estados Miembro. Aun así es muy alentada la implementación de las ideas de una "sociedad energética" en un marco de gobernanza, involucrando a todas las partes interesadas.

Con respecto al papel de los negocios y el sector privado, debe mencionarse que el consenso sobre el contenido de los principios básicos de la RSC parece ser compartido por los Estados Miembro de la UE, y estándares como las Líneas Directrices de la OCDE y los Planes de Acción Nacional sobre Negocios y Derechos Humanos se están implementando cada vez más a nivel nacional, lo cual es un signo positivo.

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Human rights and market access
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Human rights and market access*

Direitos humanos e acesso ao mercado

Danielle Mendes Thame Denny**

Abstract

This paper describes one example of how ordinary national rules can provide essential compliance regulation to assess human rights abuses. It argues that sometimes purely competitiveness, commercial or even domestic common-law doctrine between private, non-state actors can be in fact human rights claims even if never pleaded as such internationally or in courts. The example studied is the new consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015 a ground-breaking change in a national American law that impacts the whole world. Because of that all importers to America need to be able to prove that do not use forced labor in their supply chains, so they are compelled to have a chain of custody to backtrack the production up to the raw material. In response to this new scenario, new challenges arise like the uneven distribution of compliance costs between different capabilities companies from different locations. This Article sustain that legal studies have lot to gain from expanding the scope of human rights analyses to business practices but alert about the possibility of misinformation. The methodology chosen was the descriptive and normative, using case study techniques and documentary, legislative and bibliographic research.

Keywords: Human Rights Governance. Sustainable Development Goals. Global Value Chains. Market Access. Trade. Forced Labor.

Resumo

Este artigo descreve como leis nacionais internas podem ser regulamentação para o cumprimento e verificação de abusos de direitos humanos internacionalmente. A doutrina concorrencial, comercial, administrativa ou mesmo processual entre atores privados, não estatais, podem, de fato, conter reivindicações de direitos humanos, mesmo que nunca sejam assim abertamente anunciadas internacionalmente ou em tribunais. O exemplo estudado é a cláusula de demanda de consumo da lei estadunidense de execução comercial e facilitação de comércio de 2015, uma mudança inovadora em uma lei nacional americana que afeta o mundo inteiro. Por causa dela, todos os importadores para os EUA precisam provar que não usam trabalho forçado em suas cadeias de suprimentos, então são obrigados a ter uma cadeia de custódia para auditar a produção até a matéria-prima. Em resposta a este novo cenário, novos desafios surgem como a distribuição desigual de custos de conformidade entre diferentes empresas de diferentes locais e com capacidades diversas. Este artigo sustenta que os estudos jurídicos têm muito

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a ganhar com a expansão do escopo das análises de direitos humanos para as práticas de negócios, mas alerta sobre a possibilidade de desinformação. A metodologia escolhida foi a descritiva e normativa, utilizando técnicas de estudo de caso e pesquisa documental, legislativa e bibliográfica.

Palavras-chave: Governança de Direitos Humanos. Objetivos de Desenvolvimento Sustentável. Cadeias Globais de Valor. Acesso a Mercados. Comércio. Trabalho Forçado.

1. Introduction

"High performance with high integrity"[1] is the key to global business success nowadays. Besides being morally wrong, human rights neglecting can cost market access in the current governance system oriented by corporate social environmental governance, which measures ethics broadly through governmental, private, national, foreign, mandatory or voluntary strategies. In this scenario consumer boycotts, reputational losses and responsibility for noncompliance with expected conduct are not the only risks to be assessed.

In terms of competition, for example, more and more companies suffer with the lack of fair play, therefore themselves demand for stringent regulations. Most of global players are American and European corporations but their national regulation and private norms tend to impact the market as a whole regardless of international borders. An example is the consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015 [2] a ground-breaking change in a national American law that impacts the whole world.

Because of this rule all importers to America need to be able to prove that do not use forced labor in their supply chains, so they are compelled to have a chain of custody to backtrack the production up to the raw material. International organizations and civil society have an important role to play in this system of governance because in today's global-value-chain economy, profitability increases the more and better integrated are the various capillary production points around the world.

However, if this global logistic, on one hand provides gains of specialization, economy of scale and exploitation of local comparative advantages, on the other hand it presents the challenge of compliance with global ethical standards. To sell products and services to high standards markets such as the European and American, companies are subject to the limits of tolerance of these markets, if not for a moral or legal responsibility, by private and marketing requirements. Therefore, without meeting certain standards, companies can be denied access to markets and face reputational risks, what can represent effective losses[3].

Globalization has transformed the international context in several ways, but mainly by increasing the role of companies and private entities. This type of company can in the national and global economy be more important than many States [4]. In this way, its actions directly affect the lives of thousands of people, thus regarding the effectiveness or not of human rights and sustainable development goals [5]. In the same way, if commercial activity can be used to generate wealth, create jobs and distribute income, it can, on the contrary, pressure that in search of the highest income, the expenses with salaries are the smallest possible and the standards of guarantees are curtailed, thus compromising the maintenance of the dignity of the worker.

As is to be expected in the face of the greater economic power of companies, many national governments no longer exercise their capacity to demand from companies acting in their markets that they comply with social and environmental standards. Still, as trade is done in the global market, regulations of other countries may require certain conformities and private initiatives such as private certifications may create non-mandatory requirements. This non-binding characteristic is only in principle because if the criteria are not met, they can hinder the access of the products and services to

1 BAUMANN-PAULY, Dorothée; NOLAN, Justine. *Business and human rights*: from principles to practice. Abingdon: Oxon; New York: Routledge, 2016. p. 88.

2 UNITED STATES OF AMERICA. Trade Enforcement and Trade Facilitation *Act of 2015*. Disponível em: <https://www.congress.gov/114/plaws/publ125/PLAW-114publ125.pdf>.

3 ROBERTS, Peter W.; DOWLING, Grahame R. Corporate reputation and sustained superior financial performance. *Strategic Management Journal,* v.23, n.12, p.1077–1093, 2002.

4 DENNY, Danielle Mendes Thame; GRANZIERA, Maria Luiza Machado; RUDIGER, Dorothee Susanne. Direitos humanos e acesso a mercados. *Revista de Direito Econômico e Socioambiental*, v.8, n.3, p.377–409, 2018.

5 UNITED NATIONS. *Agenda 2030*. 2015. Disponível em: <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>.

the more consolidated markets or block a significant amount of price differential that would be possible (charging more from superior quality those that shows compliance with standards).

The intricate point to engage business with human rights and social environmental sustainability is to quantify the costs and benefits, in other words risk assessment and mitigation. However, there are methodological inconsistencies in this questioning because it is a trans disciplinary and complex issue, which demands a normative, non-empirical approach because the causal link is often unclear between an action and its positive or negative impact on the reputation and value of a company for example. In addition, there is a moral option that requires, intrinsically, a certain level of long-term ethical commitment of the company to maintain the business model ahead.

Consequently, legal studies have lot to gain from expanding the scope of human rights analyses to a more business oriented direction taking into consideration its practical ways to manage the interdependence and to deal with the diversity of regulation therefore recognizing that international organizations and civil society have an important role to play in the governance of this system. This paper is not arguing that it should start to serve this purpose; rather that it already does so. Legal scholars only need to start systematically to recognize this fact and build upon it to better articulate the overlap between human rights claims and corporate claims. Indeed, this is the approach taken by many nations around the world through a more explicit incorporation of the language of primary rights into business and of business governance practices into laws and regulation.

2. Global value chain

The period of globalization in the 1800s benefited from steam power and international peace to put in place a profitable and effective way of transporting goods across borders. Some nations were in the position of taking advantage of this process and established their global dominance. This was the era designated "Great Divergence"[6] when countries would gain from exploring their differences as competitive advantages. The new globalization though is driven by information technology, which made possible the cheap and accurate movement of ideas across borders.

This enabled the labor-intensive work to move abroad where human resources are cheaper and social environmental regulation weaker. Business became structured in global value chains – GVCs [7] and propelled by a rapid industrialization process of a handful of developing nations. This is what can be denominated the "Great Convergence" [8]. This economic interdependence, with fast-paced technological changes and common social environmental challenges make the world more unpredictable, and hard to control but at the same time has auspicious effects, including to developing countries.

> GVCs offer tremendous economic potential. GVCs are especially key for developing countries since GVCs enable the use of intermediate products from abroad and take over the part of the production process that suits it best without having to build an entire industry. Integration in international production networks is thus regarded a promising growth strategy. [...] In 2010, more than 25% of global gross exports were double-counted. In a world of GVCs, gross exports are therefore no longer sufficient for studying trade patterns as they mask the underlying structure and overstate export performance [9].

Rich and developing countries alike face unprecedented policy challenges. The traditional international menace of declared war between nations became unlikely to most countries apart from some few exceptions [10]. Most places, however, struggle with more urgent threats coming from disruptive non-state forces, such as terrorist attacks. And are also constantly defied by problems associated with diffuse, long term and resis-

6 BALDWIN, Richard. *The great convergence*: information technology and the new globalization. Cambridge, Massachusetts: Belknap Press; Harvard University Press, 2016. p. 12.

7 UN FORUM ON SUSTAINABILITY STANDARDS. *Policy brief*: fostering the sustainability of Global Value Chains (GVCs). p. 4. Disponível em: <https://unfss.org/2017/04/11/fostering-the-sustainability-of-global-value-chains-gvcs/>. Acesso em: 11jun.2017.

8 BALDWIN, Richard. *The great convergence*: information technology and the new globalization. Cambridge, Massachusetts: Belknap Press; Harvard University Press, 2016. p. 12.

9 UN FORUM ON SUSTAINABILITY STANDARDS. *Policy brief*: fostering the sustainability of Global Value Chains (GVCs). p. 4. Disponível em: <https://unfss.org/2017/04/11/fostering-the-sustainability-of-global-value-chains-gvcs/>. Acesso em: 11jun.2017.

10 HITCHCOCK, William I.; LEFFLER, Melvyn P.; LEGRO, Jeffrey W. (Org.). *Shaper nations*: strategies for a changing world. Cambridge, Massachusetts: Harvard University Press, 2016.

tant causes, like human rights abuses. "Clashes between multinational enterprises and nation-states might be growing in frequency and intensity, evoking responses from both the public and the private sectors"[11].

Consumer boycotts, reputational losses and responsibility for noncompliance with expected conduct are not the only risks to be assessed. In terms of competition, more and more companies among themselves demand fair play. Therefore, "high performance with high integrity" [12] must become the foundational goals of global business. In this context, the traditional international level in which relations between sovereign states normally take place have been complemented by other levels of governance, such as transnational and supranational.

In this new context, states share power with other institutions such as corporations, local governments, civil society organizations, and individuals. The sharp distinction by source of law is overcome by the efficiency of rulings coming from different origins. Some laws are made a single nation's legislature and can regulate the actions internationally strongly and coercively than some treaties that are the traditional international law and represent the agreement among a plurality of governments. For a plurality of reasons, the demarcation between national law and international law is increasingly flimsy.

> Formal international law is stagnating in terms both of quantity and quality. It is increasingly superseded by 'informal international lawmaking'[13] involving new actors, new processes, and new outputs, in fields ranging from finance and health to Internet regulation and the environment. On many occasions, the traditional structures of formal lawmaking have become shackles.[14]

National norms and legal relationships with pure national efficacy are rare, as well as the exclusive application of international law in a watertight manner. On the contrary, the interdependence of the national scope with the international and the public with the private sector is increasing at the same time as the complexity of the analysis. Procedures adopted voluntarily by private entities may have application nationally and, potentially; influence the legal order of other states. This would be the case of a transnational retailer that by demanding compliance to a set of standards ends up impacting the whole global supply chain that has also to comply.

Thus, with globalization, the cheapness of goods transport and the easy information exchange in real time, the production model has changed. To minimize fixed operating costs, companies outsource the suppliers of products and services using temporary contracts as demand is sought. In this way, large companies count on a vast network of possible partners to be activated to produce, transport, distribute, and market their products and services. With this, a network is formed that links individuals to small and large companies, surpassing national and foreign governments. Then the company that best manages global production logistics wins the most.

In this condition, international trade by itself can be a strong engine to promote inclusive economic growth, poverty reduction, elevation of labor standards, and a reasonable and sustainable use of natural resources. The World Trade Organization normally focus on the liberalization of international trade, but the main challenge at present time is not protectionism any more, but the "resurgent ethos of liberal capitalism" [15], that can be more unrestrained, and disguise wrongdoers behind national and subnational norms. The main problem is to handle 'social and environmental dumping'[16] that has been put

11 VERNON, Raymond. *In the hurricane's eye*: the troubled prospects of multinational enterprises. Cambridge, Massachusetts: Harvard University Press, 2001.

12 BAUMANN-PAULY, Dorothée; NOLAN, Justine. *Business and human rights*: from principles to practice. Abingdon: Oxon; New York: Routledge, 2016. p. 88.

13 The authors here cited define informal international lawmaking as: '"[c]ross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality)"' PAUWELYN, Joost; WESSEL, Ramses A.; WOUTERS, Jan. When structures become shackles: stagnation and dynamics in international lawmaking. *European Journal of International Law*, v.25, n.3, p.22, 2014.

14 PAUWELYN, Joost; WESSEL, Ramses A.; WOUTERS, Jan. When structures become shackles: stagnation and dynamics in international lawmaking. *European Journal of International Law*, v.25, n.3, p.1, 2014.

15 RUGGIE, John G. *The social construction of the UN Guiding Principles on Business and Human Rights*: corporate responsibility initiative working paper No. 67. Cambridge: John F. Kennedy School of Government; Harvard University, 2017. p. 3.

16 ANDERSON, Kym. Contributions of the GATT/WTO to global economic welfare: empirical evidence. *Journal of Economic Surveys*, v.30, n.1, p.56–92, 2016.

in place along the global chain production. Companies and countries take advantage of places where labor force and the natural resources can be exploited recklessly to produce cheaper products and services, and because of that, experiment better revenues that their competitors that comply with higher social and environmental standards.

3. Trade barriers and general exceptions

Differently from the past when barrier to free trade were basically only Tax Law, applicable on the borders, now they can originate from internal national rules, such as the national labor and environmental laws of a country. In the case study that will be analyzed in this paper, it is a trade barriers originated in national rule that determines barriers that kick in at the border, if the product to be imported does not meet certain standards, it's barred from entering the territory of the USA. Some of these non-tax barriers are regulated in the multilateral system of international trade by the treaties Technical Barriers to Trade -TBT and Sanitary and Phytosanitary Measures - SPS.

> With the surge of preferential agreements, new rules were introduced in the international trade system: investment, competition, environment and labor. There was a shift from the proliferation of tariff measures, which are already under control in the multilateral trade system, to regulatory measures, which must deserved careful consideration since they might represent another attempt of protection to the developed world and can have, overall, a deep disruptive effect on trade policies. The best example of this regulatory barriers is presented by the WTO Technical Barriers to Trade and Sanitary and Phytosanitary Agreements which aim at ruling, on a multilateral level, over measures that are created to protect human, animal or plant life or health, or the environment, but have become the 21st century model of new protectionist measures – the new regulatory barriers to trade. [17]

Labor rules can be a case of this kind of renewed protection to the develop world and can have this disruptive effect on trade policies. To clear these differences it is important to promote a better understanding of the real logic behind WTO technical barriers and sanitary and phytosanitary barriers: what is discrimination and what is the real need of protection. Both treaties (TBT and SPS) encourage members states to recognize each other's public procedures for assessing whether a product conforms to their internal regulation or not. Both agreements give the countries the right to take measures when necessary for the protection of human, animal or plant life or health, or the environment, but conditioned to appropriate levels, and if applied in a manner that do not constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, do not disguising restriction to free international trade.

The TBT Agreement covers regulatory barriers to trade, of three types technical regulations, standards and conformity assessment procedures. The technical regulations are mandatory product characteristics, processes, or production methods that require compliance otherwise state administrative sanctions are applicable. The standards are voluntary rules, guidelines or characteristics for products, processes, and production methods defined by a recognized body, each member state nominates their focal points that can be private entities that provides. The last type the conformity assessment procedures are procedures used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled [18]. They can be testing, verification, inspection and certification, which confirm that products fulfill the requirements laid down in regulations and standards, they have to be fair and equitable.

Either technical regulations or standards may be about terminology, symbols, packaging, marketing, or labeling and both types apply to product, process and production method. The difference between a standard and a technical regulation lies in compliance; while conformity with standards is voluntary, technical regulations are mandatory[19]. But member states according to the Code of Good Practice (Annex 3) should ensure that their central government standardizing bodies adopt the standards. TBT requires governments to "take such reasonable measures as may be available to

17 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade*: TBT, SPS and sustainability standards. São Paulo: VT, 2016. p. 8. Disponível em: <http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>. Acesso em: 11jun.2017.

18 WTO. *Agreement on technical barriers to trade*. Disponível em: <https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>. Acesso em: 11set.2017.

19 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade*: TBT, SPS and sustainability standards. São Paulo: VT, 2016. p. 17. Disponível em: <http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>. Acesso em: 11jun.2017.

them to ensure that local government and non-governmental standardizing bodies within their territories [...] accept and comply with this Code of Good Practice" [20]; in other words, members are responsible to ensure that 'non-governmental entities within their territories abide by disciplines laid out in the multilateral level.

On a regional and subnational level also there are innumerous intra borders regulations not applicable by the national custom authority that can add complexity to the multilateral trading system and the continuous promotion of universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable dispute of resolution system as well as meaningful and ethical trade liberalization. This kind of internal ruling can be a practice applied only by a Federal State, or a region or a company. California for example has a stringent state regulation about sustainable standards to renewables the Low Carbon Fuel Standard [21]. To be considered renewable energy the ethanol producer that want to sell there has to provide thoroughly demonstration that the production was made in conformity of what California demands.

And on the borders measures can be taken to raise barriers to trade in exceptional cases. In the multilateral mechanism of international trade, imports of products from countries that do not comply to socio-environmental sustainability standards can be object to adjustment mechanisms at the border. This is perfectly justifiable by Article XX of the GATT [22]. This type of measure would be, for example, the imposition of an import tax or even the requirement of a certain amount of certificates or permits from importers. Such border adjustments may be legally feasible.

Article XX: General Exceptions.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:[...]
>
> (b) necessary to protect human, animal or plant life or health;[...]
>
> (e) relating to the products of prison labour; [...]
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; [23]

It is legally feasible, but hard to be implemented, because Article XX (b) provides for a two-step test to determine whether a measure is justified under its provision. The party invoking Article XX (b) shall establish: (1) that the policy relating been invoked is included in the spectrum of policies intended to protect human, animal or plant life or health; the first element of the test involves the scope public health policies as well as environmental policies. This condition is relatively easy to fill.

> For example, in Thailand - cigarettes, Thailand sought to justify its restrictions on cigarette imports by saying that it aimed to protect the public from harmful ingredients of imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The Panel recognized that smoking constituted a serious risk to human health and that measures to reduce cigarette consumption therefore fell within the scope of the policies considered under Article XX (b) [24]

The second element is the requirement of "necessity" this is more difficult to establish. The Panel Thailand - Cigarettes has established that a measure is "necessary" according to Article XX (b) only when there are no alternative measures compatibles with the GATT or less incompatible whose employment could reasonably be expected to be applied, to achieve its objectives.

> In summary, the Panel considered that there were a number of measures consistent with the General Agreement that were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and that, together, could achieve the health policy objectives that the Thai government seeks by restricting the import of cigarettes in a manner inconsistent with Article XI: 1. The Panel therefore considered that Thailand's practice of allowing the sale of domestic cigarettes while not allowing the importation of foreign

20 WTO. *Agreement on technical barriers to trade*. Disponível em: <https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>. Acesso em: 11set.2017.

21 CALIFORNIA GOVERNMENT. California Air Resources Board. *Low carbon fuel standard*. Disponível em: <http://www.energy.ca.gov/low_carbon_fuel_standard/>. Acesso em: 28maio2018.

22 ESTY, Daniel. *Greening the GATT*: trade, environment, and the future. Washington: Peterson Institute for International Economics, 1994.

23 WTO. *Agreement on technical barriers to trade*. Disponível em: <https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>. Acesso em: 11set.2017.

24 UNCTAD. *General exceptions, interpretation and application of Article XX*: course on dispute settlement in international trade, investment and intellectual property. 2003. p. 57. Disponível em: <http://unctad.org/en/Docs/edmmisc232add33_en.pdf>.

> cigarettes was an inconsistency with the General Agreement because it was not 'necessary' under Article XX (b) [25]

However even if based on the exceptions of Art XX of the GATT, there may be the risk that they may be understood as protectionist measures and therefore challenged in a panel in the dispute settlement body within the World Trade Organization. Ideally, the multilateral trade body itself should carry out the metaregulation activity and, thus, contribute to the establishment of homogeneous and internationally accepted criteria. Nevertheless, the WTO has been reluctant to act on the socio-environmental issue that has been included in the agenda only via panels.

4. Behind borders measures and voluntary standards

The international trade of the XXI is different from the trade of the century. XX, whose main themes were trade liberalization through the overthrow of tariff barriers and the articulation through large international agreements with mandatory targets that proved difficult to achieve. Mega preferential agreements have replaced multilateral ones and the concern with barriers is not focused on taxation. The impediments to free trade are much more complex and difficult to negotiate in this kind of negotiation, since they often do not even necessarily present themselves as international trade measures, they are within national legal systems, they are administrative measures adopted within the borders, Behind Borders Measures, "the wolves of protectionism disguised under new sheepskin"[26].

Many unethical, asymmetrical, business-as-usual measures can arise from the unequal negotiation basis experienced in Mega External Preferential Trade Agreements, such as the Trans-Pacific Partnership (TPP), Trans-Atlantic Trade and Investment Partnership (TTIP) and the Europe Association of Southeast Asian Nations Free Trade agreement (EU-ASEAN). These initiatives are outside the scope of the World Trade Organization, don't follow the logic of regional agreements and can be very unbalanced. That's why Vera Thorstensen considers the main scope nowadays to the multilateral trade negotiations is to looking forward to implementing coherence, convergence and cooperation to the trade regulatory system [27].

Each country in the exercise of its sovereign power can dispose of its public policies in the way that it understands more convenient. Political, and economic issues are increasingly demanding a more comprehensive legal environment requiring an increasingly creative and coordinated public private articulation to achieve social and environmental sustainability. Labeling in this context can potentially become a factor important to be demanded specially for certain products with high labor intensity or consuming large chunks of natural inputs. Labels if well managed can give governments, companies and consumers valuable information, especially when they are related to attributes not immediately apparent in the final product [28].

Governments, companies and consumers can then draw on environmental, social, and other values in making purchasing decisions, and doing so put pressure on producers to conform to these values. In terms of labeling, in addition to the WTO negotiations, there is a growing trend that will have an impact on international trade and which supplements the performance of States that is voluntary labels and certification to comply with environmental and social standards in a large variety of products [29], with the increasing participation of non-state actors such as International Social and Environmental Accreditation and Labelling Alliance.

25 UNCTAD. *General exceptions, interpretation and application of Article XX*: course on dispute settlement in international trade, investment and intellectual property. 2003. p. 57. Disponível em: <http://unctad.org/en/Docs/edmmisc232add33_en.pdf>.

26 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade*: TBT, SPS and sustainability standards. São Paulo: VT, 2016. Disponível em: <http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>. Acesso em: 11jun.2017.

27 HORSTENSEN, Vera; MESQUITA, Alebe. *Coerência, convergência e cooperação regulatória nos capítulos de barreiras técnicas ao comércio e medidas sanitárias e fitossanitárias do Acordo Transpacífico*. Brasília: IPEA, 2016. p. 34. Disponível em: <http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=28762&catid=390&Itemid=406>.

28 CASTRO, Douglas. Escassez hídrica e direito internacional econômico: o Brasil como protagonista na tranferência de água para regiões áridas. *Revista de Direito Internacional*, v.13, n.1, p. 12, 2016. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3949>. Acesso em: 11jun.2018.

29 DERANI, Cristiane; DALMARCO, Arthur Rodrigues. Ecolabelling, eficiência energética e a disciplina dos PPM's na OMC: ecolabels de eficiência energética e sua consistência com as provisões do GATT e Acordo TBT. *Revista de Direito Internacional,* v.13, n.2, p. 97, 2016. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3971>. Acesso em: 11jun.2018.

> WTO rules were created to regulate public rules, but a 'new kind' of rule has become a regulatory barrier to trade – sustainability standards, which reflect a contemporary international relations on global governance – plurality of actors, plurality of institutions and plurality of norms and rules governing international society and consequently international trade. Even though private standards are not legally mandatory, they might become a de facto mandatory rule since a majority of large buyers imposes them to producers. The new words on rules are harmonization and equivalence[30].

Voluntary sustainability standards - VSS are those created by private entities, such as companies, associations and other non-governmental organizations that are not mandatory[31], but can be backed by governments or accepted as proof of compliance to achieve a kind of public waiver. Therefore even being voluntary, the non-compliance with them might mean exclusion from a specific market, or clients. They might become de facto mandatory if government accept them as a condition to enter the market or a majority of large buyers demand them on their global value chain.

There has been a significant increase in unregulated voluntary standards[32] from a group of entities, NGOs, and private companies. There is no legal compulsion for compliance, the entities involved in the setting of VSS have no power to compel implementation, but the compulsion for compliance is wielded by broad range of private adopters (for example a transnational company supply chains) that see value in their suppliers implementing these standards. The market power of the adopters renders the de facto effectiveness, the standard is set by a "commercial (for example a firm) or non-commercial (for example an NGO or industry organization) private body and is adopted by a (usually commercial) private firm or organization, and conformity is assessed by a private auditor and the standard is enforced by a private certification body [33]. They have become one of the most common contemporary trade barriers, but, unless governments back those standards, they do not fall under the TBT or the SPS agreements [34].

Regulatory gaps, unbalanced articulations and misaligned incentives risk the financial stability and compromise the implementation of human rights and social development goals. As pointed out by Jorge Viñuales, more adaptive legal systems have to be put in place "law, when considered as a regulative instrument, becomes a technology that can be fine-tuned and optimized to reach a stated purpose" [35]. Laws can have this transformative effect of incentivize what is wanted in the future and discourage what it is not. The present technological and environmental abrupt changes call for policies of this kind.

Legal changes have to take into consideration the power of business and finance adequate practices to the emergence, experimentation and refinement of new technologies and processes. Unfortunately these type of socio environmental adaptive regimes are deeply grounded on sunk investments and incentives policies, free trade does not alone lead to sustainable actions. On the contrary, social environmental responsible production tends to cost more. This especially when the aim is to increase the speed of investments and cut stages through capacity building making those who don't have access to energy, water or sanitation for example gain this access directly with the newest and more efficient socio and ecofriendly technologies.

Bearing in mind that in this new scenario a third-party manufacturer contracted abroad as a chain link of the production if it is caught violating human rights and sustainable development goals this can jeopardize the full value of the large contractor's brand and indefinitely jeopardize the economic performance of the great economic agent globally. The Spanish clothing

30 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade*: TBT, SPS and sustainability standards. São Paulo: VT, 2016. p. 17. Disponível em: <http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>. Acesso em: 11jun.2017.

31 AMARAL, Manuela Kirschner do. *Padrões privados e outras fontes não tradicionais de governança no âmbito dos regimes de mudança climática e multilateral de comércio da OMC*: conflito ou convergência? 2014. PhD, Universidade de Brasília, Brasília, 2014. Disponível em: <http://repositorio.unb.br/bitstream/10482/16504/1/2014_ManuelaKirschnerDoAmaral.pdf>.

32 UN FORUM ON SUSTAINABILITY STANDARDS. *Policy brief*: fostering the sustainability of Global Value Chains (GVCs). Disponível em: <https://unfss.org/2017/04/11/fostering-the-sustainability-of-global-value-chains-gvcs/>. Acesso em: 11jun.2017.

33 HENSON, Spencer; HUMPHREY, John. Understanding the complexities of private standards in global agri-food chains as they impact developing countries. *The Journal of Development Studies*, v.46, n.9, p.1628–1646, 2010.

34 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade*: TBT, SPS and sustainability standards. São Paulo: VT, 2016. Disponível em: <http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>. Acesso em: 11jun.2017.

35 VINUALES, Jorge E. *Foreign investment and the environment in international law*: the current state of play. Rochester, NY: Social Science Research Network, 2015. p. 63. Disponível em: <https://papers.ssrn.com/abstract=2661970>. Acesso em: 12jun.2017.

retailer Zara can be pointed out as example of the controversy. On one hand its business model depends on one of the broader international logistics structure. On the other hand it exposes the company to third-party threats like the use of child labor [36] and the unpaid manufacturing workers scandals. In this last case, shoppers at Zara stores found unusual tags left on garments, hidden in pockets left by workers from Turkish third-party manufacturer Bravo Tekstil, which produced clothes for Zara, and other big international brands like Next and Mango. The company went bankrupt overnight in July 2016, and its workers were not paid[37].

With these multijurisdictional regulatory challenges, political and civil society pressures become forceful in the operation of these companies. Then, to show corporate governance and the adoption of codes of ethics, an alternative is submitting the operation to sustainability reports and standards compliance. Being part of voluntary commitments such as the Global Compact[38] that declare in conformity with the compact principles and allow verification of their compliance with the commitments voluntarily determined by independent third parties in a transparent manner, thus enabling reporting, third-party monitoring and auditing.

5. New consumptive demand clause

American law in the Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prohibits the importation of "merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured child labor – including forced child labor". Such merchandise is subject to exclusion and/or seizure, and may lead to criminal investigation of the importers.

> 19 U.S. Code § 1307 - Convict-made goods; importation prohibited
>
> All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. "Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "forced labor or/and indentured labor" includes forced or indentured child labor.

The consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015[39] repeals the "consumptive demand" exception in 19 U.S.C. § 1307 which had tolerated the importation of forced labor-produced goods if those goods were not produced in such quantities in America enough to meet the consumptive demands of the United States. Now the new legal text is clear to ban any kind of tolerance to forced labor imported goods:

> (Sec. 609) The "consumptive demand" exception to the prohibition against importing merchandise made by convict, forced, or indentured labor under penal sanctions is repealed. This "consumptive demand" exception covers all goods, wares, articles, or merchandise mined, produced, or manufactured by such labor which are not mined, produced, or manufactured in such quantities in the United States as to meet U.S. consumptive demands.

In praxis the Commissioner of Customs, pursuant to 19 C.F.R. § 12.42, can detain the shipments of goods that are subject to "withhold release order":

> 19 C.F.R.§ 12.42 Findings of Commissioner of Customs.
>
> (a) If any port director or other principal Customs officer has reason to believe that any class of merchandise that is being, or is likely to be, imported into the United States is being produced, whether by mining, manufacture, or other means, in any foreign locality with the use of convict labor, forced labor, or indentured labor under penal sanctions, including forced child labor or indentured child labor under penal sanctions, so as to come within the purview of section 307, Tariff Act of 1930, he shall communicate his belief to the Commissioner of Customs. Every such communication shall contain or be accompanied by a statement of substantially the same information

36 MOULDS, Josephine. *Child labour in the fashion supply chain*. Disponível em: <https://labs.theguardian.com/unicef-child-labour/>. Acesso em: 28maio2018.

37 GIRIT, Selin. *Zara shoppers find labour complaints inside clothes*. BBC News, 2017. Disponível em: <http://www.bbc.com/news/world-europe-41981509>. Acesso em: 28maio2018.

38 GLOBAL COMPACT. *Dez princípios do Pacto Global*. 2017. Disponível em: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

39 UNITED STATES OF AMERICA. *Trade enforcement and trade facilitation Act of 2015*. Disponível em: <https://www.congress.gov/114/plaws/publ125/PLAW-114publ125.pdf>.

> as is required in paragraph (b) of this section, if in the possession of the port director or other officer or readily available to him.

Competitors, civil society, foreign bodies, other importers, domestic producers, or other interested persons can file complaints, electronically [40], against those that are not complying with the rule.

> 19 C.F.R.§ 12.42
>
> (b) Any person outside the Customs Service who has reason to believe that merchandise produced in the circumstances mentioned in paragraph (a) of this section is being, or is likely to be, imported into the United States and, if the production is with the use of forced labor or indentured labor under penal sanctions, [...] may communicate his belief to any port director or the Commissioner of Customs. [...] the Commissioner or his designated representative will consider any representations offered by foreign interests, importers, domestic producers, or other interested persons.

When information reasonably but not conclusively indicates that merchandise within the purview of this provision is being imported from any foreign locality with the use of convict labor, forced labor, or indentured labor under penal sanctions, including forced child labor, the Commissioner of U.S. Customs and Border Protection may issue withhold release orders pursuant to 19 C.F.R. § 12.42(e). But the ban in only to the American market, the cargo can always be released for exportation.

> (e) If the Commissioner of Customs finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported, he will promptly advise all port directors accordingly and the port directors shall thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation.

If the Commissioner is provided with information sufficient to make a precise determination that the goods in question are subject to the provisions of 19 U.S.C. § 1307, are being imported from any foreign locality with the use of convict labor, forced labor, or indentured labor under penal sanctions, including forced child labor, the Commissioner will publish a formal finding to that effect in the Customs Bulletin and in the Federal Register pursuant to 19 C.F.R. § 12.42(f).

> (f) If it is determined on the basis of the foregoing that the merchandise is subject to the provisions of the said section 307, the Commissioner of Customs, with the approval of the Secretary of the Treasury, will publish a finding to that effect in a weekly issue of the Customs Bulletin and in the Federal Register.

If in this situation importers have the opportunity to either re-export the detained shipments or to submit information demonstrating that the goods are not in violation of 19 U.S.C. § 1307.

> (g) Any merchandise of a class specified in a finding made under paragraph (f) of this section, which is imported directly or indirectly from the locality specified in the findings and has not been released from Customs custody before the date of publication of such finding in the Federal Register shall be considered and treated as an importation prohibited by section 307, Tariff Act of 1930, unless the importer establishes by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding.

Failing to do so the shipments subject to findings can be excluded or seized. To avoid a possible "withhold release order", prudently importers better implement a thoroughly due diligence over their supply chains to exactly understand where and how their products are manufactured or produced in whole or in part, in order to do a proper risk assessment. Because this due diligence costs money, the decision to implement it will depends, inter alia, on (i) whether suspect goods can always be re-exported; and on (ii) who bears any loss (for example, the importer can make a deal with his supplier that the supplier get paid only if the good passes US customs, with such a deal, the importer has much less reason to do due diligence.

The practical affect of the first withhold release orders made in regards to forced labor in over a decade in America, was on Chinese companies. The actual claims were over imported soda ash, calcium chloride, caustic soda, and viscose/rayon fiber that were made by forced convict labor and imported potassium, potassium hydroxide, potassium nitrate that was believed to be mined and manufactured using convict labor[41] and stevia

40 UNITED STATES OF AMERICA. *Customs and border protection e-Allegations portal*: official United States Government system, which may be used only for authorized purposes: the government may monitor and audit usage of this system, and all persons are hereby notified that use of this system constitutes consent to such monitoring and auditing. Disponível em: <https://eallegations.cbp.gov/Home/Index2>.

41 HAMPSEY, Meghan. *CBP enforces the ban on goods produced with forced labor with two withhold release orders*: human rights first. Disponível

and peeled garlic cultivated using convict labor.

So far the measure was been used only to curtail the "China Syndrome" [42]: rising China imports causing higher unemployment, lower labor force participation, and reduced wages in local American markets. U.S. Immigration and Customs Enforcement (ICE) agents have not been permitted to make site inspections in China since 2009, and Chinese officials deny the suspected forced labor, although they maintain a network of prison labor facilities[43].

6. Environmental, social, and governance

Going beyond the bilateral US-China trade relationships, because of the American law studied above, there is a risk that imported products from any country be excluded from the USA market because they are made with forced labor. This regulation may incentive companies to apply due diligence standards into their own subsidiaries and to require similar third-party certifications. Because of these characteristics, Environmental, Social, and Governance (ESG) reporting has become an increasing part of business strategy. Defining the right indicators to use in the company and in a sector, promoting stakeholder engagement, and enhancing the social environmental policies have become essential to achieve the long-term sustainability of the business enterprises, avoiding litigation costs and reputational risks that could eventually even compromise the finance performance of an enterprise.

According to WWF/ISEAL, what makes a standard system reliable is: 1) transparency; 2) a multistakeholder participation process, involving "the entire supply chain from businesses, civil society, governments, research institutions and NGOs, with balanced decision-making"; 3) independent verification by third party auditors or certification body; and 4) continuous improvement [44]. To multi-nationals, because they have to manage their production globally, there is a consistent increase in the demand for reliable standards, especially for accessing the impact their investments have. This is the conclusion the GIIN report of 2017 that also shows that 60% of the investors "actively track their financial performance of their investments with respect to sustainable development goals or plan to do so soon"[45].

This is seriously collected information, not just propaganda of firms saying that they are concerned and are monitoring, when in practice they are not. This investor survey is based on an analysis of the activities of 209 of the world's leading impact investing organizations, including fund managers, foundations, banks, development finance institutions, family offices, pension funds, and insurance companies. The surveyed represent a pool of impact investing assets nearly USD 114 billion.

> Impact investments are investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return. Impact investments can be made in both emerging and developed markets, and target a range of returns from below market to market rate, depending on investors' strategic goals. The growing impact investment market provides capital to address the world's most pressing challenges in sectors such as sustainable agriculture, renewable energy, conservation, microfinance, and affordable and accessible basic services including housing, healthcare, and education.[46]

Social environmental sustainability standards can vary widely especially on the level of performance they require, some are low-bar, easy to achieve, and therefore often used as a measure of only appearing sustainable without actually committing and applying the efforts needed to become really more sustainable; this kind of disguise is called 'greenwash' [47]. This disguise practice

em: <https://www.humanrightsfirst.org/blog/cbp-enforces-ban-goods-produced-forced-labor-two-withhold-release-orders>. Acesso em: 28maio2018.

42 AUTOR, David H.; DORN, David; HANSON, Gordon H. The China syndrome: local labor market effects of import competition in the United States. *American Economic Review*, v.103, n.6, p.2121–2168, 2013.

43 BOWE, Alexander. *U. S. exposure to forced labor exports from China developments since the U.S*: trade facilitation and trade enforcement Act of 2015. USA, 2017. Disponível em: <https://www.uscc.gov/sites/default/files/Research/Forced%20Labor%20Report.pdf>.

44 WWF/ISEAL. *SDGs mean business*: how credible standards can help companies deliver the 2030 agenda. New York: WWF/ISEAL, 2017. p. 15. Disponível em: <http://www.standardsimpacts.org/resources-reports/wwfiseal-report-sdgs-mean-business-how-credible-standards-can-help-companies>. Acesso em: 18maio2017.

45 MUDALIAR, Abhilash et al. *Annual Impact Investor Survey 2017*. Global Impact Investing Network, 2017. p. 15. Disponível em: <https://thegiin.org/knowledge/publication/annualsurvey2017>. Acesso em: 31maio2017.

46 GLOBAL IMPACT INVESTING NETWORK. *2017 Annual Impact Investor Survey the Global Impact Investing Network (GIIN)*. UK, 2017. Disponível em: <https://thegiin.org/assets/GIIN_AnnualImpactInvestorSurvey_2017_Web_Final.pdf>.

47 LYON, Thomas P.; MONTGOMERY, A. Wren. The means and end of greenwash. *Organization & Environment*, v.28, n.2, p.223–

can have a negative backlash on the reputation of the company using this trick. Another kind of standards is the high-bar type, which can be very demanding. Some focus on preventing worst corporate practices, others establish rigorous improvement pathways to be followed in order to achieve good governance.

The effective impact a standard can have on driving the companies to a more sustainable path, depends a lot on the qualities accessed, the process of compliance and the due diligence mechanisms. But also the external reading of the standard is very important. Because how consumers and other stakeholders value that standard is directly related with the ability of it providing incentives and mobilizing investments of the actors within the supply chains. The improve in the performance come from being seeing as a better quality player, this can provide enhanced market access, better contract terms and, very often, a direct price premium to producers (better products can cost more).

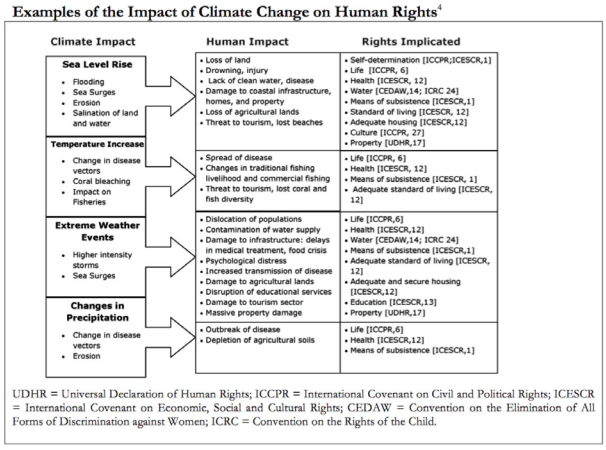
Some initiative have long worked on setting good examples this is the case of OECD Guidelines and Business and Human Rights Grievance Mechanism deals with labor standards, human rights, environment, bribery, etc. The OECD Guidelines for Multinational Enterprises [48] incorporates ILO core labor standards [49] and the UN Guiding Principles on Business and Human Rights [50]. It can provide a due diligence guidance and have an increasingly important role in helping businesses to implement these standards to global value chains.

> The grievance mechanism is globally available covering global value chains with a link to companies from any of the 48 adherent governments. [...] Between 2011 and 2016, more than 50% of all complaints brought, accepted for further examination and closed resulted in agreements between the parties. [...] Concrete results were, for example, achieved regarding implementing systems to end forced and child labor in garment supply chains, improving health and safety for agricultural workers, enhancing human rights due diligence for sport mega-events, and arranging compensation for indigenous people. [51]

Oriented by these guidelines, governments have various tools to incentivize companies to behave responsibly, notably through export credits and trade support diplomatic missions. Export credit agencies can withdraw support for companies in foreign markets as a penalty for irresponsible corporate behavior. Institutional investors, such as pension funds and sovereign wealth funds, can also have a significant potential to use finance to promote better business behavior amongst their investee companies. And increasing quantity of institutional investors demands investment approaches that consider ESG factors.

Beyond the due diligence responsibility and the economic long-term perspective, governing the ESG becomes an practical tool to manage human rights in a broad sense. Sébastien Jodoin and Katherine Lofts illustrate how for example Economic, Social, and Cultural Rights are interdependent with Climate Change[52]:

Figure 1 - Social environmental measures and Human Rights



Source: Yale, 2013

The necessity of measuring the environmental, social governance stimulated many initiatives to assess, report and manage those criteria. The Global Initiative for Sustainability Reporting [53] for example aggregates

249, 2015.

48 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *OECD guidelines for multinational enterprises*. Paris: OECD, 2011. Disponível em: <http://public.eblib.com/choice/publicfullrecord.aspx?p=797696>. Acesso em: 27maio2018.

49 INTERNATIONAL LABOUR OFFICE. *Labour standards*. Disponível em: <http://www.ilo.org/global/standards/lang--en/index.htm>. Acesso em: 27maio2018.

50 HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the United Nations 'Protect, Respect and Remedy' Framework. 2011.

51 NIEUWENKAMP, Roel. *Crash course Nieuwenkamp Responsible Business OECD*. 2018. Disponível em: <https://www.youtube.com/watch?v=ZFz2Hv4X90I&feature=youtu.be>. Acesso em: 27maio2018.

52 ODOIN, Sébastien; LOFTS, Katherine. *Economic, social, and cultural rights and climate change*: a legal reference guide. New Haven, CT: CISDL, GEM & ASAP, 2013. p. 5.

53 GRI. *Global Reporting Initiative*. Disponível em: <https://www.globalreporting.org/Pages/default.aspx>. Acesso em: 27maio2018.

many ratings that become products, targeting the investor audience. But the focus of these products have been the environment and governance aspects, leaving behind important social aspect as points out a NYU Stern report: "of the 580 ratings products aggregated by the Global Initiative for Sustainability Reporting, 97% of environmental efforts and 80% of governance efforts target 18 investors as the primary audience. When it comes to social efforts, only 14% similarly targeted investors."[54]

Reliably measuring the effectiveness of the company actions and comparing the ESG performance of companies is still something to be improved. This reveals the demand for more empirical research about the concrete results of specific actions adopted by the companies and a further integration of social environmental sustainability into the strategic planning process. But this broader approach would concretely accelerate the necessary change in the current production patterns. And private or national like the American about forced labor can provide incentives to the implementation of ESG initiatives.

7. Human rights and methodology of assessment

There is an intrinsic tension between moral ambitions as they were presented in the language of human rights declaration and treaties and how it is presented in the language of compliance reports and development goals. The traditional human rights discourse suggests that deprivations must be ended right away with top-priority remedial attention, while the metrics of reports and goals invite an incremental approach to overcoming deprivations. Because there is a certain follow up list or a set of measures to take, toward the objective the approach to it is step-by-step.

> The development goals discourse invites a diachronic, incremental approach: we gradually reduce severe deprivations over several decades. The human rights discourse, by contrast, brooks no such delay. Once we recognize a human right not to be enslaved, we must not make a 25-year plan aiming to halve the number of slaves or aiming to reduce floggings by half. Once we recognize a human right not to be exterminated, we must not make a 25-year plan to halve the killing rate at Nazi concentration camps. Once we recognize a human right not to be subjected to economic institutions under which hundreds of millions foreseeably and avoidably cannot meet their basic needs, we must not make a 25-year plan to reduce these severe deprivations by 27% but must initiate the necessary institutional reforms right away. [55]

Putting this way it is clear that is a problem of moral evaluation notwithstanding the efforts of the official incremental discourse to decline to tackle this issue explicitly this way. By contrast implicitly the current analyses often require assuming that it is "conceivable to separate the description of social events and their moral and political evaluation"[56], although it is impossible to reach value-neutral descriptions in legal analyses and quasi-natural characteristics in a society. Performing this type of culture-based assessment represents a major hurdle to the effective implementation of human rights and sustainable development goals. It can conceal that the widespread practice of creating numerical indexes and rankings to assess legal performance serve to qualify, and rank, making it easier to simplify the comparison of often complexly unequal realities.

Another challenge of the use of incremental metrics is that the division of responsibilities can be done unfairly, saddling the weakest links at the supply chain, forcing the least capable companies and countries with the largest responsibilities and costs, eventually even expelling poor players from the market. There is no doubt that companies of any size using forced labor must be expelled from market. But stringent compliance rules can raise the cost of production, creating a minimal investment threshold. So ethical small companies may face the situation that they cannot compete with wealthier ones and loose their foreign customers because they do not have the means to document that theirs production is free of forced labor.

In other words the conformity cost of a private

54 LABOWITZ, Sarah; O'CONNOR, Casey. *Putting the "S" in ESG*: measuring human rights performance for investors. New York: NYU Stern Center for Business and Human Rights, 2017. p. 8. Disponível em: <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/58cad912e58c6274180b58b6/1489688854754/Metrics-Report-final-1.pdf>.

55 POGGE, Thomas; SENGUPTA, Mitu. Assessing the sustainable development goals from a human rights perspective. *Journal of International and Comparative Social Policy*, v.32, n.2, p.83–97, 2016.

56 NASSER, Salem Hikmat; GHIRARDI, José Garcez. Around the pyramid: political-theoretical challenges to law in the age of global governance. *Revista de Direito Internacional*, v.15, n.1, 2018. Disponível em: <https://www.publicacoes.uniceub.br/rdi/article/view/4934>. Acesso em: 28maio2018.

standard for example can push the less wealthy companies out of a market if major clients or governments require these standards where the company intends to export to. And the imposition of no-forced-labor standards will raise the price of the product supplied, some companies will pick up the business of supplying the relevant product, and these companies will employ workers that are better treated than the forced laborers were treated before, creating then a virtuous cycle of curbing social and environmental dumping.

This type of unfair commercial practice is characterized by the advantages of lower price competitors acquire by illicitly lowering wages, reducing employees' benefits and avoiding sustainable practices. But deciding if a practice is this kind of dumping can be challenging. Like the 1990's discussion about inclusion of the social clause in the international trade regulation, it can reflect a "hypocritical drive to legislate a particular morality" [57]once the fight against low wages can disguise protectionism measures. Under the flag of protecting low wages workers interests, rich countries can block the access to their market to companies from developing countries.

Undoubtful the social environmental dumping is a problem, especially because he international capital flows tent to take advantages of convenient or unregulated countries. But not every export from country that has lower standards for labor rights and environmental protection gain an unfair advantage. And the asymmetries of the level of protection worldwide do not intrinsically force all countries to lower their standards in a "race to the bottom" [58] otherwise countries should be prevented to invest abroad and only trade with those that have similar labor and environmental standards.

But in this sense until what point national governments and transnational private policies can take measures to put pressure on other countries and companies to comply with their internal standards? On the one hand, there is the need to improve workplace conditions and the international legal coherence. On the other hand, it is the risk of protectionism that industrial nations pressure to raise standards to undermine the comparative advantage of lower wage trading partners, curtailing their economic development possibilities by hampering their ability to trade with mature markets. And at an extreme, some demanded standards could be too high for countries and companies to meet at their low level of development.

This inclusively is one example of difficulty of using one size fits all moral choice. The universal zero target approach for all economic and social human rights obligations is hard to work with also because of these controversies. Its not about defending that certain businesses employing forced labor should be allowed to continue to do so, but about recognizing a dialectic political decision behind the definition of what is forced labor.

Historically unfairly excessive expectations had been imposed upon the poorest. The international legal framework reflect that by avoiding the traditional idealist approach, and turning to the principle of common but differentiated responsibilities, which states that human rights and sustainable development goals should be made relevant to all countries, but that the roles and responsibilities in the implementation of them should be differentiated according to the different national realities, capacities and levels of development of different countries and also according to national policies and priorities. This in the climate accord[59] for example led to the inclusion of nationally determinable targets.

Global enterprises, given their wealth and influence, ought to be taking the lead in providing the needed resources for adaptation of their global supply chain, for example, by improving the management and the data collection in their subsidiaries. National government can encourage this international capacity building besides economic growth mechanisms and charitable activities. Legal initiatives like the end of the consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015 can in a way instill these results.

If the world's most influential agents had been held sufficiently accountable for what they owe toward making sustainable development work, the concepts of partnership and universalism would have been more meaningful, rather than what they are now likely to be-

57 LAL, Deepak. Social standards and social dumping. In: *Merits and limits of markets*. Berlin: Springer; Heidelberg, 1998. p.255–274. Disponível em: <https://link.springer.com/chapter/10.1007/978-3-642-72210-3_11>. Acesso em: 28maio2018.

58 WTO. *Understanding the WTO labour standards*: highly controversial. Disponível em: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm>. Acesso em: 28maio2018.

59 UNITED NATIONS. *Acordo de Paris*. 2015. Disponível em: <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54113/A-54113-China-080000028047bf86.pdf>.

come: a smokescreen for extreme global inequalities. [60]

The international assistance discourse is heavily focused on global economic growth and in charitable inflows. But it can represent business opportunities. Growth itself has limits, causes environmental negative externalities and poses threats to the realization of human rights. But an articulated international legal system can quantify the negative impacts and force them into the production price. In this context private sector is part of the solution by gaining profits with the green economy

> [...]green economy is the economy that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcity. [...] The development path must maintain, enhance and, where possible, rebuild natural capital as a critical economic good and as a source of public benefits, especially for the needy population [...] In a green economy, income and employment growth must be driven by public and private investments that reduce carbon emissions and pollution and increase energy and resource use, and prevent losses of biodiversity and ecosystem services. These investments need to be generated and supported by specific public spending, policy reforms and regulatory changes. The development path must maintain, enhance and, where possible, rebuild natural capital as a critical economic good and as a source of public benefits, especially for the needy population whose livelihood and security depend on nature. [61]

The greatest legal challenge, therefore, is to identify these ideological synergetic contents in search of complementarity, to promote: economic development with social and environmental responsibility. In addition to being low-carbon this new economic paradigm needs to take into account planetary boundaries and the principle of equity. In practice, this corresponds to maintaining a significant level of growth for poor countries, intermediate level of growth for emerging countries and close to zero level of growth for developed societies. Overcoming the deficits through a decrease in the inequality is the key point then.

8. Conclusion

Responsible business conduct is no longer voluntary in the sense of being optional, even though it is still not legally binding. There is an increased uptake of corporate responsibility and due diligence standards in legal instruments like the example studied here. In fact, legal or commercial consequences increasingly become applicable to the non-observance of due diligence measures. On this path, greater coherence is needed regarding international and national policies, especially by offering businesses incentives to comply with ESG and by attaching greater consequences to irresponsible business behavior.

Governments have a variety of different tools at their disposal to promote responsible business and to lead by example through economic diplomacy instruments, public procurement, state-owned enterprises, and trade and investment policies. Solution oriented legal studies have to coordinate these diverse options in their interdependent dimensions. Scholars and practitioners focusing only on the static dimension of principles of human rights and sustainable development goals are insufficiently exploring their capacity to change, when their work should promote the dialogue across divides in the business and human rights field in order to be able to push the creation of new norms, and practices complying with standards and improving corporate compliance.

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61 UNITED NATIONS ENVIRONMENT PROGRAMME. *Towards a green economy*: pathways to sustainable development and poverty eradication. Nairobi: UNEP, 2011. p. 2.

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Business and human rights in Brazil: exploring human rights due diligence and operational-level grievance mechanisms in the case of Kinross *Paracatu* gold mine

Empresas e direitos humanos no Brasil: explorando devida diligência em direitos humanos (human rights due diligence) e mecanismos de queixa a nível operacional (operational-level grievance mechanisms) no caso de Kinross e a mina de ouro em Paracatu, Minas Gerais

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Mariana Aparecida Vilmondes Türke**

Abstract

In the past decades, enterprises have been looking after more responsible social-environmental practices by designing their bylaws in compliance to the Guiding Principles on Business and Human rights (GPBHRs) and specific national requirements. This legal study explores the case of Kinross gold mine in Paracatu, Brazil, and the corporate responsibility to respect human rights. From a rights-based approach, it sheds light on the design of the firm'sdue diligence practices andoperational-level grievance mechanisms. If, on the one hand, Kinross shows policy commitment to applicable norms, on the other hand, local communities still claim to be impacted by health, infrastructural and environmental damages. In such a contentious situation, the biggest matter lies on the inability of affected stakeholders to seek redress from a firm, that tries to excuse itself by showing policies based on internationally accepted procedures.Looking at the realization of human rights and at more respectful business-community relations, this article highlights means of improving the enterprise's legal mechanisms and possible causes of inefficacy that affect the firm's ability to respect human rights.

Keywords: Human rights due diligence. Operational-level grievance mechanisms. Mining, Paracatu. Brazil. Kinross.

Resumo

Nas últimas décadas, corporações têm focado em práticas socio-ambientais mais responsáveis ao desenhar políticas internas de acordo com os Princípios Orientadores sobre Empresas e Direitos Humanos e requisitos similares de leis nacionais. Este estudo legal explora o caso da mina de ouro de Kinross em Paracatu, Minas Gerais, e a responsabilidade corporativa de

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respeitar direitos humanos. Os modelos de devida diligência e os mecanismos de queixa a nível operacional daquela empresa são elucidados com uma abordagem baseada nos direitos humanos. Se, por um lado, Kinross demonstra políticas de acordo com normas aplicáveis, por outro lado, comunidades locais ainda se queixam por impactos a saúde, infra-estrutura e meio-ambiente. Nessa situação contenciosa, o problema maior corresponde à inabilidade de partes interessadas em buscar reparação contra uma corporação, que tem como pretexto e justificativa possuir poltíticas internas condizentes com o requerido internacional e nacionalmente. Considerando a realização dos direitos humanos e relações empresa-comunidade mais respeitáveis, este artigo enfatiza maneiras de aprimorar os mecanismos legais desenvolvidos por Kinross e possíveis causas de ineficácia da habilidade dessa em respeitar direitos humanos.

Palavras-chave: Empresas e direitos humanos. Devida diligência. Mecanismos de queixa a nível operacional. Mineração. Brasil. Kinross.

1. Introduction

In 2011, a United Nations-based initiative set new guidelines on the matter of respect, protection and remediation of human rights. The Guiding Principles on Business and Human Rights (GPBHRs) clarify upon responsibilities of enterprises and States and provide a framework for implementing practices that shall prevent or mitigate potential or actual human rights impacts. The framework, alongside with the Brazilian constitution, inspires this investigation of a contentious situation observed in the city of *Paracatu*, Brazil. Local communities claim adverse health and environmental impacts due to the exploration of a gold mine run by Kinross, a Canadian enterprise.

By exploring Kinross's bylaws and publicly available statements, this article examines if the corporation corroborates to those guidelines, particularly on the matters of human rights due diligence and operational-level grievance mechanisms. The aim of this case study is to clarify if the firm's policies are committed to the GPBHRs and Brazilian constitutional principles. Since the international community has been paying more attention to environmental and social matters, the current study case will provide new evidence on the matter of business-community relations. Although there has been plenty of research about foregone environmental catastrophes and human rights impacts in Brazil, this paper sheds light upon current challenges particularly faced by Paracatu's local communities.

Local communities claim to be unable to seek redress, when addressing the enterprise to find solutions to daily issues. A possible cause to that may be the lack or misconception of operational-level grievance mechanisms and due diligence processes provided by the firm itself. If conducted efficiently, those mechanisms enable the realization of human rights. They provide channels of communication, redress and remediation, which are essential in order to prevent business-community conflicts to escalate. But, most of all, they support the respect to civil, economic, cultural, social, environmental human rights. However, the sole existence and average performance of grievance mechanisms and due diligence is also not enough; because they are not a requirement but a useful means to the realization of human rights. No corporation can be excused from its actual responsibility only by showing its policy commitment to the human rights perspective. Thus, based on the human-rights approach, the position of this paper is also that, regardless accordance of operational-level grievance mechanisms and a human rights due diligence process to accepted standards, an enterprise must show moral commitment to any adverse human rights impacts it has created.

On the one hand, it is possible that Kinross policy lacks commitment to human rights, and needs to improve its own bylaws and internal codes in order to provide a legal strategy to meet its inherent responsibility. On the other hand, it might also be that those codes are already in partial or full conformity to applicable standards. In such a possible scenario, although more harmonic business-community relations could have been expected, it will be clear that issues lie in other sphere(s) than on the policy of human rights due diligence and operational-level grievance frameworks presented on paper. This would also be a very important result, because it would highlight other matters that require attention by the firm.

Thus, the first main question is, if the enterprise's processes and mechanisms are based on human rights directives, as proposed by GPBHRs and Brazilian standards, and in to what extent could they be improved.

Kinross' bylaws will be evaluated in regard to applicable legal standards and related to general matters of the local community, constituting the first part of the normative framework. That will make possible to prescribe suggestions, turning to the second concluding part of this article. The set of standards of this paper's normative framework is limited to the GPBHRs and similar principles found in the national constitution.

This research is based on legal doctrine, jurisprudence, legislation, governmental and policy reports, as well as, specific bylaws, policies and statements publicly provided by the firm, in addition to the most recent academic research, report statements from the press, social media (blogs and watchdogs) and from non-governmental organizations. Information available in Portuguese will be prioritized, since it is the primary language of local communities. If not available, then applicable documents provided by the international corporation in English language will be explored. This is important, in order to understand how much access of information is given to the local community, something also required by the GPBHRs.

On the first section, this article presents background information regarding the city of Paracatu, local communities, Kinross operations and conflicts behind the gold mine exploration. The second section outlines the main important aspects of international and national norms on business and human rights, condensed by the GPBHRs, but limited to the aspects of human rights due diligence and operational-level grievance mechanisms. A third section explores Kinross publicly available policies, in comparison to the proposed guidelines. A fourth section prescribes possible approaches and suggestions to the matters that most require most attention in this case study.

2. Business-community relations in *Paracatu, Minas Gerais*, Brazil

Paracatu, a municipality situated in the southeast of Brazil, in the state of Minas Gerais (General Mines), has a long history in gold exploration, which dates from the 18th century[1].With a population estimated in more than 92.000 inhabitants in 2017, Paracatu's economy is mainly dependent on mining and agriculture[2]. Only the gold mine should supply 22% of the city's formal jobs[3]. Although 35,8% of the population lived in 2010 with less than half of a minimum wage, GDP per capita was estimated in approx. USD 8,371.84[4] [5]. The latest available data shows that the local GINI raised from 0,458 in 1991 to 0,744 in 2010[6], meaning high income concentration, in a city with high levels of poverty.

Situated to the north of the city of *Paracatu* is the gold open-pit mine led by Kinross Gold Corporation, which is one of the largest mining companies in the world, and is based in Toronto, Canada. Kinross Brazil integrates the group. The enterprise not only has developed an own international and national agenda for showing commitment to human rights, but also has been awarded international prizes for its corporate social responsibility practices (CSR)[7]. In 2017 and for the 8th time in a roll, the corporation was named one of Canada's top corporate citizens by Corporate Knights[8]. *Paracatu's* subsidiary was named 'Company of the Year' in the Precious Metals and Mineral category awarded by Brazil Mineral magazine[9]. In the years of 2016 and 2018, Kinross was given the RobercoSAM Bronze class award and the Industry Mover award, respectively, which are based on assessments of how firms incorporate economic, environmental and social strategies[10].

1 BARROS, J. Neves. *Mineração e Violações de Direitos:* o caso da empresa Kinross em Paracatu. New York: Business and Human Rights Resource Centre. 2018. Available in: <https://www.business-humanrights.org>. Access in: 1 Apr. 2018.

2 Fundação Instituto Brasileiro de Geografia e Estatística. *Panorama.* 2018. Available in: <https://cidades.ibge.gov.br>. Access in: 2 Apr. 2018.

3 Kinross BraSIL. *Conheça a Kinross*. 2018. Available in: <http://www.kinross.com.br/a-kinross/conheca/>. Access in: 2 Apr. 2018.

4 BRL 31,289.84 conversion in USD on May 20th, 2018.

5 IBGE (note 2, above).

6 IBGE (note 2, above).

7 Kinross BraSIL. *Our Approach*. 2017. Available in: <http://www.kinross.com/corporate-responsibility/our-approach/default.aspx>. Access in: 3 Apr 2018.

8 Kinross BraSIL. *Kinross named one of Canada's top Corporate Citizens by Corporate Knights for 8th year in a row*. 2018. Available in: <http://www.kinrossworld.kinross.com/en/articles/kinross-named-one-canada%E2%80%99s-top-corporate-citizens-corporate-knights-8th-year-row>. Access in: 3 Apr. 2018.

9 Kinross WORLD. *Paracatu named 'Company of the Year' in Brazil for second year in a row*. 2018. Available in: <http://www.kinrossworld.kinross.com/en/articles/paracatu-named-%E2%80%98company-year%E2%80%99-brazil-second-year-row>. Access in: 3 Apr. 2018.

10 Kinross Gold Corporation. *Commitments & Recognition*. 2017. Available in: <http://www.kinross.com/corporate-responsibility/commitments-and-recognition/default.aspx>. Access in: 3 Apr. 2018.

Paracatu's first open-pit mine started its operations in 1987 at Morro do Ouro (Gold Mountain), led by Rio Preto Mineração e Participações, later TVX Gold Inc. and Echo Bay, and Rio Tinto[11]. Since 2004, Kinross Brasil Mineração (Kinross) is the complete owner and operator of the gold mine, and it is expected to conclude its activities in 2030[12]. The firm extracted in 2017 the gold equivalent production of 359,959 oz[13], what makes it the largest gold mine in Latin America and represents 22% of the national production[14]. In the surroundings of the mine, residents consist of low-income and/or quilombola communities[15] [16]. Adjacent are namely the neighborhoods of *Alto da Colina, Bela Vista II, Amoreiras II, Esplanada, Sao Domingos, Santa Rita, Lagoa de Santo Antonio and Santo Eduardo*[17].

2.1. Business-community conflicts

Because of the mine, local communities claim to struggle with social, health and environmental issues. The situation has been portrayed by scientific studies, NGO reports, press and social media. Judiciary or Executive powers could not yet put an end to discussions about those potential or actual human rights impacts. Kinross has rejected allegations of misconduct, and also presented their own reports and case studies, which differ very much to those first results. Such a friction leads to unsatisfactory business-community relations.

A water damm, with a surface of two thousand hectares, has been constructed to serve as disposal for 1 billion tons of toxic waste[18]. Since the environmental tragedy of Mariana, the worst in Brazil's history, local community members have urged for more debates regarding the situation of the damm. According to the local press, a public hearing actually took place on December 2015, where Kinross managers could respond to questions of the public[19] [20].

The largest gold-mine in Latin America uses a special method in gold extraction that requires daily explosions and demands round-the-clock machinery work, but makes it possible to remove 180 tons of soil per day[21]. According to community members, the explosions are strong enough to cause earth tremors, which have led to housing structural damages particularly in the neighboring community Sao Domingos. Due to the extent of the activity, night shifts allegedly cause noise pollution too. Communities also claim that the dust coming from the explosions throw toxic substances in the atmosphere, what has been triggering diseases such as, rhinitis, sinusitis, asthma, pneumonia[22]. Locals signed a petition and pressed charges against the business activities, in order to call attention to their issues. Due to the severe allegations, the national Public Prosecution Office has installed a civil inquiry against Kinross mining exploration, the IC 1.22.021.000030/2013-88[23].

11 ANON. Massive expansion program triples mine's production. *Canadian Mining Journal,* North York, p. 16-17, Jun./Jul. 2009. Available in: <www.canadianminingjournal.com>. Access in: 15 Apr. 2018.

12 Kinross BraSIL. *Conheça a Kinross*. 2018. Available in: <http://www.kinross.com.br/a-kinross/conheca/>. Access in: 2 Apr. 2018. (note 3, above).

13 Kinross Gold Corporation. *Operations:* Paracatu, Brazil. 2017. Available in: <http://www.kinross.com/operations/default.aspx#americas-paracatu>. Access in: 2 Apr. 2018.

14 Kinross BraSIL. *Conheça a Kinross*. 2018. Available in: <http://www.kinross.com.br/a-kinross/conheca/>. Access in: 2 Apr. 2018. (note 3, above).

15 *Quilombolas* or *quilombos* are, shortly explained, self-identified black peasant communities.

16 BARROS, J. Neves. *Mineração e Violações de Direitos:* o caso da empresa Kinross em Paracatu. New York: Business and Human Rights Resource Centre. 2018. Available in: <https://www.business-humanrights.org>. Access in: 1 Apr. 2018. (note 1, above).

17 OLIVEIRA, G. V. C. *Explaining mining company and community relations in Paracatu, Brazil:* situational context and company practice, Master of Arts. Guelph: University of Guelph, 2010. Available in: <https://atrium.lib.uoguelph.ca/xmlui/handle/10214/2435>. Access in: 15 Apr. 2018.

18 FURTADO, B. Extração de ouro ameaça Paracatu. *O Estado de Minas*, Belo Horizonte, jul. 2008. Available in:<http://www.justicaambiental.org.br/noar/anexos/acervo17_080714_extracao_ouro_ameaca_paracatu.pdf>. Accessed 12 Abr. 2010.

19 SITUAÇÃO de barragens em Paracatu é esclarecida por mineradora. 2015. Available in: <http://g1.globo.com/minas-gerais/triangulo-mineiro/noticia/2015/12/situacao-de-barragens-em-paracatu-e-esclarecida-por-mineradora.html>. Access in: 10 Apr. 2018

20 LABOISSIÈRE, M. *Ministério Público Federal vê ameaça em Paracatu após tragédia em Mariana*. 2015. Available in: <https://www.em.com.br/app/noticia/gerais/2015/11/17/interna_gerais,708904/ministerio-publico-federal-ve-ameaca-em-paracatu-apos-tragedia-em-mari.shtml>. Access in: 13 Apr 2018.

21 SCHPREJER, P.; ARAUJO, E. Mina de ouro em Paracatu (MG) afeta comunidades tradicionais. In: FERNANDES, F. R. C.; ALAMINO, R. C. J.; ARAUJO, E. R. (Ed.). *Recursos Minerais e Comunidade*: impactos humanos, socioambientais, econômicos. Rio de Janeiro: Centro de Tecnologia Mineral (CETEM), 2014. p. 280-282

22 BARROS, J. Neves. *Mineração e Violações de Direitos:* o caso da empresa Kinross em Paracatu. New York: Business and Human Rights Resource Centre. 2018. Available in: <https://www.business-humanrights.org>. Access in: 1 Apr. 2018. p. 57-60.

23 BRASIL. Procuradoria da República no Município de Paracatu/Unai-MG. Inquérito Civil. *Inquérito Civil n. 1.22.021.000030/2013-88*. Instaurado para investigar danos estruturais causados às residências do acampamento em decorrência da atividade mineradora da

Although primary investigations did not evidence sound pollution above legal standards, locals pointed out on that same civil inquiry that, whenever tests were conducted, machines were put off or explosions were evidently not being conducted, so that there would be no sound pollution over legal standards. And, although the technical report about structural housing damages showed that the probable cause of deterioration is their own poor infra-structure, it was highlighted that it was a report privately commissioned by Kinross[24] [25].

Nonetheless, the release of arsenic, a carcinogenic agent, and other toxic materials in the atmosphere and water reserves due to the mining activities represent potential severe human rights impacts[26]. Scientific publications, though, differ in their conclusions if that has been contaminating environment and local population. According to a study conducted by a centre of mineral technology, CETEM, in 2014, levels of arsenic found in the people, water sheds and dust were in accordance to international standards provided by the World Health Organization[27]. Another study found that "arsenic drinking water contents did not represent risk on human health, meaning municipal water sources—fluvial water and groundwater— [were] adequate for human consumption"[28].

However in another study, concentration of arsenic was detected higher than legal standards at freshwater of watersheds and at abandoned artisanal mining sites, whereas levels in drinking water, tap water and groundwater were noted acceptable[29]. Another study finds that levels of arsenic found in sediments of *Rico* stream, in *Paracatu*, are above limits accepted by national and international standards, indicating contamination[30]. Whereas national resolution CONAMA 344/2004 and TEL (threshold effect level) require the limit of 5.9 mg.kg-1 (meaning there is no risk to the ecosystem), the study recorded values between 2,318 mg.kg-1 and 4,727 mg.kg-1 of arsenic in three different spots. Other reports published in international, national press and social media conducted by a local social movement, have also shown adults and children from neighborhoods close to the damm with levels of arsenic in urine samples higher than accepted by state, national and international standards[31] [32]. They conclude by intoxication due to arsenic[33].

Furthermore, it has been reported that local activists have been victims of harassment and threats. Social movement and community leaders, a former city mayor, and even employees on their free time have been allegedly under constant monitoring[34]. According to the same

Kinross. Representante: Ministério Público Federal. Representado: Kinross Brasil Mineração e outros. Autuação 9 Dec 2013. Paracatu, v. I, mar. 2013.

24 BRASIL. Procuradoria da República no Município de Paracatu/Unai-MG. Inquérito Civil. *Inquérito Civil n. 1.22.021.000030/2013-88*. Instaurado para investigar danos estruturais causados às residências do acampamento em decorrência da atividade mineradora da Kinross. Representante: Ministério Público Federal. Representado: Kinross Brasil Mineração e outros. Autuação 9 Dec 2013. Paracatu, v. I, mar. 2013. (note 23, above).

25 BARROS, J. Neves. *Mineração e Violações de Direitos:* o caso da empresa Kinross em Paracatu. New York: Business and Human Rights Resource Centre. 2018. Available in: <https://www.business-humanrights.org>. Access in: 1 Apr. 2018. p. 58-59. (note 1, above)

26 BARROS, J. Neves. *Mineração e Violações de Direitos:* o caso da empresa Kinross em Paracatu. New York: Business and Human Rights Resource Centre. 2018. Available in: <https://www.business-humanrights.org>. Access in: 1 Apr. 2018. p. 61-62. (note 1, above)

27 SCHPREJER, P.; ARAUJO, E. Mina de ouro em Paracatu (MG) afeta comunidades tradicionais. In: FERNANDES, F. R. C.; ALAMINO, R. C. J.; ARAUJO, E. R. (Ed.). *Recursos Minerais e Comunidade:* impactos humanos, socioambientais, econômicos. Rio de Janeiro: Centro de Tecnologia Mineral (CETEM), 2014. p. 280-282 (note 21, above).

28 Bidone, E. et al. Hydrogeochemistry of arsenic pollution in watersheds influenced by gold mining activities in Paracatu (Minas Gerais State, Brazil). *Environmental Science and Pollution Research*, New York, 2016.

29 Bidone, E. D. et al. Arsenic levels in natural and drinking waters from Paracatu, MG, Brazil. In: LITTER, Marta I. et al. *One century of the discovery of arsenicosis in Latin America (1914-2014)*. London: Taylor & Francis Group. 2014. 162-164.

30 FERREIRA, M.M. et al. *Teores de Arsênio em sedimentos superficiais do córrego Rico, Paracatu-MG*. Rio de Janeiro: Centro de Tecnologia Mineral (CETEM), 20—. Available in: <http://www.cetem.gov.br/images/programas/paracatu/Teores-de-arsenio-em-sedimentos-superficias-do-Corrego-Rico-Paracatu-MG.pdf>. Access in: 2 Apr. 2018.

31 ARAÚJO, H., & VECIANA, A. Canadian mining company spied on opponents and activists in Brazil. *The Guardian*. 13 May 2015. Available in: <https://www.theguardian.com/sustainable-business/2015/may/13/canadian-mining-company-spied-on-opponents-and-activists-in-brazil>. Access in: 10 Apr 2018.

32 LABOISSIÈRE, P. Expansão da maior mina de ouro do país assusta moradores de Paracatu. [on line] *Agência Brasil*. 16 Mar 2015. Available in: <http://agenciabrasil.ebc.com.br> Access in: 10 Apr 2018].

33 DANI, L.D. Dr.med. D.Sc. S. U. Comprovada contaminação ambiental grave, persistente e progressiva, e intoxicação da população pelo arsênio liberado pela Kinross em Paracatu. *Alerta Paracatu*, 5 Dez 2015. Available in: <http://alertaparacatu.blogspot.de/2015/12/comprovada-contaminacao-ambiental-grave.html>. Access in: 10 Apr 2018].

34 ARAÚJO, H.; VECIANA, A. *Canadian mining company spied on opponents and activists in Brazil*. 2015. Available in: <https://www.theguardian.com/sustainable-business/2015/may/13/canadian-mining-company-spied-on-opponents-and-activists-in-brazil>. Access

article, two local activists say to have left the city under death threats, apparently due to their opposition to the business operations. In response, Kinross rejected allegations, and emphasizes reaching out for dialogue with the local community through its CSR practices[35] [36].

In sum, it is possible to observe potential and/or actual adverse human rights impacts due to the mining operations of Kinross in Paracatu. Especially regarding environmental and social questions, local communities strive to find redress and grievance. Dialogue is clearly not in evidence in this case study. Even if community claims end up being exaggerated, it is of most importance that Kinross, as a powerful enterprise it is, searches for dialogue and harmony with locals. The reason is that, under a rights-based approach, a minimum of guarantees are supposed to be granted to those in less favor. But from another perspective, more harmonious relations are also profitable for the enterprise itself.

Therefore, the next section provides outlines on important aspects of international and national norms on business and human rights, limited to the aspects of human rights due diligence and operational-level grievance mechanisms. These not only generally serve to guide business on their responsibility to respect human rights, but also apply to this case study and can help dealing with those mentioned issues.

3. The International Legal Framework: About Business and Human Rights

Since the 1970's, the international community has been discussing on the matter of business enterprises and their responsibility to meet human rights. Some of the first documental initiatives consisted on the publication of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, in 1977, and the OECD Guidelines, in 2000[37]. And yet, only after the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights, in 2011, that it has become clear which are the exact expected responsibilities. The 31-principle charter proposed three basic pillars, complementary to each other. Also named the "Protect, Respect and Remedy Framework", the pillars consist of: (i) the duty of States to protect human rights; (ii) the responsibility of the firm to respect human rights; and (iii) the right to have access to remedies[38].

Although not legally bound by international law, enterprises are expected to conduct their activities within moral and ethical standards. The GPBHRs do not exclude the responsibility of firms to meet extra human rights that refer to specially vulnerable groups presented by other international treaties or national laws. In fact, there is even an expectation to promote human rights through CSR practices, depending on the scope of business activities. However, different from States, an enterprise is under current general understanding not obliged to protect[39]. Those responsibilities to which the GPBHRs refer derive from different international bills on human rights, including the 1948 Universal Declaration of Human Ri-

in: 10 Apr. 2018. (note 31, above)

35 Crossland, J. *Kinross Gold takes its ethical standards seriously*. 2015. Available in: <https://www.theguardian.com/business/2015/may/27/kinross-gold>. Access in: 13 Apr 2018.

36 Even though there could not be found any conclusive findings upon those allegations against Kinross operations in Brazil, death threats shall be taken into consideration as usual human rights violations in the region. Death threats are so common in Brazil that, according to a statement made after the last OHCHR visit to the country, between 2002 and 2013, almost 50% of all world wide cases were reported to be in Brazil. Around 6% of that amount, 51 human rights defenders of the state of Minas Gerais, where the city of Paracatu is situated, were at the time of the report under protection programme. See: UNITED NATIONS. *Statement at the end of visit to Brazil by the United Nations Working Group on Business and Human Rights*. 2015. Available in: <http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf>. Access in: 15 Apr. 2018.

37 RATNER, S. R. Corporations and Human Rights: a theory of legal responsibility. *The Yale Law Journal*, New Haven, v. 111, n. 3, p. 452-540, Dez. 2001. Available in: <https://www.yalelawjournal.org/article/corporations-and-human-rights-a-theory-of-legal-responsibility>. Access in: 28 Apr. 2018.

38 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018.

39 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018.

ghts, and the 1966 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights[40]. Mining companies might face issues related to, for instance, the right to housing, health, education, adequate standard of living, security of person, freedom of opinion and expression, non-discrimination, potable water and sanitation, safe working conditions[41].

The premise is that business shall: clearly express their intention to respect human rights, conduct human rights due diligence for the purpose of coping with human rights, and provide access to grievance and remediation, when necessary[42]. According to Principle 16, that is to be done through any appropriate means and publicized in the company's policy, such as bylaws or codes of conduct[43]. That means, too, that processes such as the ones explored in this article have to be explicitly articulated.

Human rights due diligence is an ongoing process, complementary to operational-level grievance mechanisms. They are both essential for the realization of human rights from the perspective of a firm. If efficiently carried out, they shall provide channels of communication, redress and remediation, before business--community conflicts escalate. Remediation comes as a response to adverse impacts, as a means of coping with human rights.

Since the GPBHRs set directives to be followed by business enterprises, this section summarizes the most relevant principles and guidelines particularly concerning processes that are of special relevance, also for the Kinross case. Finally, the guidelines proposed by the Brazilian Constitution supporting responsibilities of businesses will also be presented.

3.1. Human Rights Due Diligence

Human rights due diligence is an "ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights"[44]. Vital for business-community relations, it not only helps building up trust, but also, as a channel of communication, it supports redress. It shall be designed for means of identification, prevention, mitigation and accounting for solving actual or potential human rights impacts[45]. That means too, that this process must be integrated to the decisions undertaken by an enterprise, in order to determine them in the rationality of respect to human rights[46].

Human rights due diligence refers not only to a corporation conducting economic activities, but also to subsidiaries, partners, or those involved in the supply

40 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 9-10 (note 39, above).

41 Kemp, Dr. D. et al. *Why human rights matter*. 2013. Available in:<https://www.csrm.uq.edu.au/publications/why-human-rights-matter>. Access in: 28 May 2018.

42 FASTERLING, B.; DEMUIJNCK, G. J. Human rights in the Void?: due diligence in the UN guiding principles on business and human rights. *Bus Ethics*, New York, v. 116, p. 799-814. 2013. Available in: <https://doi.org/10.1007/s10551-013-1822-z>. Access in: 15 Jun. 2018]

43 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. GP 16 (note 38, above).

44 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 6 (note 39, above).

45 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. GP 15b (note 38, above).

46 FASTERLING, B.; DEMUIJNCK, G. J. Human rights in the Void?: due diligence in the UN guiding principles on business and human rights. *Bus Ethics*, New York, v. 116, p. 799-814. 2013. Available in: <https://doi.org/10.1007/s10551-013-1822-z>. Access in: 15 Jun. 2018]. p. 801 (note 42, above).

chain[47] [48]. How that may be put in practice is a hard question, since from a legal perspective and just as in this study case, core companies are usually separate entities and liability is directed to affiliate enterprises abroad, which act autonomously. As Mares points out, the core company remains complicit to impacts, and should also therefore build a due diligence process to prevent any adverse human rights impacts[49].

In a nutshell, human rights due diligence can be synthesized in four steps: identification, assessment, tracking and communication of human rights impacts. Firstly, it is necessary to identify and assess human rights impacts. Secondly, findings must be addressed and tracked and, thirdly, responses must be communicated promptly and transparently to stakeholders[50]. The final aim is to work along with affected stakeholders in order to provide means of grievance and, if necessary, remediation[51].

In the first phase of identification and assessment, it is also important to understand the circumstances in which a firm conducts its business relations. On that depends the whole scope of a human rights due diligence process. Among the different factors that influence the scope are the company's size, severity of impacts, the nature and operating context[52]. Thus, specially in the case of mining activities, the risk of social and environmental catastrophes may be taken into consideration.

After that, the process goes on to integrating solutions in a continuous basis and searching for means of addressing indicated issues, that will depend on the scope of the actual business activities[53]. Though all enterprises have the responsibility to respect human rights, the scale, complexity and irremediability of impacts will draw upon expectations of remediation and prevention[54]. Hence, the type of exploration conducted will partly design due diligence systematics. For instance, in an operational context of a highly profitable mining firm, it is justified to demand openly health, environmental and infra-structure support, or even a quota of revenues to finance the prevention of potential or to minimize actual adverse human rights impacts.

Addressing issues must be done accurately, otherwise human rights due diligence processes may be seen as biased and stakeholders lose trust on the process[55]. In order to achieve that, processes must provide transpa-

47 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. GP 13 (note 38, above).

48 Human rights due diligence "should cover adverse human rights impacts that the business enterprise may cause or contribute tothrough its own activities,or which may be directly linked to its operations, products or services by its business relationships" (UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. GP 17a (note 38, above).

49 MARES, R. Responsibility to Respect: why the Core Company should act when affiliate infringe
human rights. In: MARES, Radu (Ed.). *Siege or Cavalry Charge?*: the UN Mandate on Business and human rights the Hague. Belgium: Martinus Nijhoff, 2012.

50 Kemp, Dr. D. et al. *Why human rights matter*. 2013. Available in:<https://www.csrm.uq.edu.au/publications/why-human-rights-matter>. Access in: 28 May 2018. p. 14 (note 41, above).

51 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018.

52 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. GP 14 (note 38, above).

53 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. Seventeenth session. A/HRC/17/31 Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. GP 14 (note 38, above).

54 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect and Remedy" Framework. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. 19 (note 38, above).

55 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. 60-61 (note 38, above).

rency and accountability. Businesses need to communicate their approaches in mitigating adverse human rights impacts as well as be held accountable to external parties, especially, but not only, to interested stakeholders[56]. What kind of information should be communicated is a challenging question for many firms, since they tend to ponder on what to reveal, depending on legal risks and probable lawsuits[57]. But, between such grey lines, it is mostly important that businesses keep on their intention in demonstrating pragmatic commitment to human rights[58].

Additionally, granting accessibility is fundamental for the purposes of the GPBHRs. An enterprise shall engage with stakeholders and potentially affected groups, as well as with experts in the field, to ensure accountability, credibility and participation to that process. Especially in what comes to the most relevant stakeholders, consultation requires sensitivity to barriers. Engagement is only possible when channels of communication are made accessible, meaning that the most diverse limitations must be addressed, such as language and literacy. Experts in the field of human rights can be of great use in breaking barriers, creating and mediating communication channels. Once accessibility is granted, engagement can take place - a pivotal tool in this process. All these standards support legitimation to the due diligence process[59] [60].

Finally, a firm shall seek to mitigate potential or actual adverse impacts to human rights by using due diligence, because this process is a differentiator when perceiving impacts too[61] [62]. According to studies conducted by Mccorquodale et al among mining companies, there is a clear difference in the identification of impacts between enterprises who dedicate to human rights due diligence and those who only consider them indirectly: a 55.6% of the first group identified human rights impacts, compared to none of the second group[63]. That means that human rights due diligence provides an insight to actual or potential impacts, which are not assessed via regular risk assessments.

When facing impacts, businesses shall also take their leverage into consideration. In other words, their ability to influence other actors, as of business partners or anyhow contributors, shall be used, at least to avoid impacts even if that means finding remediation alternatives, ceasing or changing activities[64] [65].

56 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. 59 (note 39, above).

57 Addo, M., et al. *Implementing the U.N. Guiding Principles on Business and Human Rights*: the United Nations guiding principles on business and human rights. Storrs: Thomas J. Dodd Research Center, 2013, p. 22. p. 22.

58 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 57 (note 39, above).

59 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. GP 18 (note 38, above).

60 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 33 (note 39, above).

61 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. GP 18 (note 38, above). GP 13;15 (note 38, above).

62 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 16 (note 39, above).

63 McCORQUODALE, R. et al. Human rights due diligence in law and practice: good practices and Challenges for business enterprises. *Business and Human Rights Journal*, Cambridge, v. 2, p. 195–224, 2017. Available in: <https://www.cambridge.org/core>. Access in: 15 Jun. 2018.

64 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 18;49-50 (note 39, above).

65 The GPBHRs define an "impact-based negative responsibil-

3.2. Operational-level Grievance Mechanisms

Grievance mechanisms are the best form to seek redress and of guaranteeing remediation. In combination with human rights due diligence, they provide firms with means of identifying and mitigating human rights impacts[66]. In addition, comprehension of recurrent issues enables enterprises to anticipate or avoid prospective adverse impacts. Various institutions can enable state-led grievance mechanisms, such as, in the case of Brazil, courts, Ministries in their respective fields, or the Public Prosecution Office.

Typically developed by a business itself and supported by the GPBHRs, operational-level grievance mechanisms are as well legitimate, active forms of redress[67]. They are expected to be conducted under the same standards of judicial and non-judicial grievance mechanisms, and yet to require engagement and dialogue to stakeholders. Individuals or groups shall be able to formalize concerns regarding any genuine impacts and, if necessary, to seek remediation directly in contact with the enterprise[68].

Particularly in regards to this case study, the aim of an operational-level grievance mechanism can be defined as to provide means of redress against any genuine claims, but most specifically, against any potential or actual adverse human rights impacts. That means too, that the whole process requires a predictable procedure with clear and public stages, using transparent communication channels to ensure legitimation. By considering that stakeholders may not have as much leverage as their own, it is necessary that businesses ensure equitable conditions, such as "reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms"[69]. The outcome of such a process is also to ensure respect to human rights and to draw lessons, for the sake of preventing impacts. Showing interest in dialogue and in finding agreed solutions is therefore fundamental for that matter[70].

An operational-level grievance mechanism can not be treated as one more administrative procedure. In fact, it has to be faced as an active and legitimate instrument of seeking redress, in which businesses can directly respond to complaints[71] [72]. It complements human rights due diligence, provides more channels for communica-

ity", in which firms are not required to affirmatively contribute to positive impacts nor use leverage for that purpose, but to mainly use leverage to avoid impacts. And yet, differing to the general understanding, the Wood proposes the understanding that enterprises may actually have an obligation to use leverage for positive outcomes. See more: WOOD, S. The case for Leverage-Based Corporate human rights responsibility. *Business Ethics Quarterly,* Cambridge, p. 63-98, 2012. Available in: <http://digitalcommons.osgoode.yorku.ca/scholarly_works>. Access in: 3 Jun. 2018.

66 UNITED NATIONS. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.* A/HRC/11/13. 2009. Available in: <http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>. Access in: 24 May 2018.

67 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. GP 29 (note 38, above).

68 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 68 (note 39, above).

69 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. GP 29 (note 38, above).

70 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* implementing the United Nations "Protect, Respect and Remedy" Framework. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. GP 31 (note 38, above).

71 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 65 (note 39, above).

72 UNITED NATIONS. *Guiding Principles on Business and Human Rights:* implementing the United Nations "Protect, Respect and Remedy" Framework. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. 31 (note 38, above).

tion and helps the enterprise find systemic issues. Additionally, by making grievance possible on operational levels, a company allows early and direct remediation of adverse human rights impacts and prevents further escalation, something often costly[73] [74].

Building trust is crucial. The lack of it can give stakeholders the sense of losing empowerment and respect, in which case, may lead to more human rights impacts[75]. The GPBHRs provide a minimum of criteria to be in operational-level grievance mechanisms, to serve as strategy to build up trust in business-community relations[76], namely: legitimation, accessibility, predictability, equitability, transparency, rights-compatibility, source of learning, and being based on engagement and dialogue.

Since grievance can only be possible through legitimate and accountable means for all stakeholders, it is senior-level staff responsibility to ensure oversight so that investigations are fairly conducted.[77] Access can be provided only after barriers have been identified, such as language, financial costs, possible threats, or even gender and different migration backgrounds[78]. Limitations of any kind need to be alleviated, so that stakeholders are finally able to engage. Targets should be, first, directly affected stakeholders, and, then, the general public. However, as it is not always possible to foresee directly impacted parties, the more wide the accessibility to a mechanism, the better[79]. Likewise, assessment of claims deserves equitable and predictable procedures, to which stakeholders may be aware of. Findings need to be in accordance to human-rights principles and norms and be transparently reported. Only under strict standards can grievance take place efficiently[80].

Among the different examples of grievance mechanisms, literature provides a variety of solutions which support feedback, response and engagement and can be better adapted to each context. For instance, complaint boxes and call centers back confidentiality and anonymity, although only the later backs illiteracy limitations. Social workers and the installation of committees can support dialogue and understanding. However, it is not

73 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 68-69 (note 39, above).

74 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. 32 (note 38, above).

75 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. p. 14-35 (note 38, above).

76 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Seventeenth session. A/HRC/17/31Agenda item 3. 2011. Available in: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E>. Access in: 1 Apr. 2018. GP 31 (note 38, above).

77 The lack of senior-staff management in due diligence has been found to be recurrent, in a study conducted by Mccordquodale among 200 senior corporate executives. Even in enterprises with dedicated human rights due diligence, only 15.56% selected of CEOs have responded to be responsible for the identification of human rights impacts. It can be expected that, as well, operational-level mechanisms lack the same oversight from senior-staff. See more: McCORQUODALE R et al, Human Rights Due Diligence in Law and Practice… 2017 (note 63, above).

78 UNITED NATIONS. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. HR/PUB/11/04 New York and Geneva. 2011. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjxgMvP45bbAhWm34MKHQTpCzMQFggoMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FGuidingPrinciplesBusinessHR_EN.pdf&usg=AOvVaw1eXHpXS2jxinTbBidRBbsn>. Access in: 10 Apr. 2018. p. 34 (note 38, above).

79 UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 69-70 (note 39, above).

80 Nevertheless, only acknowledging and supporting redress to impacts is not enough. Thus, the third pillar of the Guiding Principles enables remediation, for which businesses carry the responsibility to provide means for or at least cooperate. Remediation includes "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition" (UNITED NATIONS. *The corporate responsibility responsibility to respect human rights*: an interpretive guide. HR/PUB/12/02 New York and Geneva. 2012. Available in: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwixm9et6ZbbAhWI14MKHe59Ab4QFggrMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FRtRInterpretativeGuide.pdf&usg=AOvVaw1hWNQhUkwmTdGkCpcjRv6_>. Access in: 10 Apr. 2018. p. 7 (note 39, above).

possible to provide anonymity and confidentiality, what might hinder complaints[81]. Depending on the case, suitable mechanisms must be chosen to provide the best access to affected stakeholders. Most used channels relate to "whistleblowing channels, such as emails and hotlines, and human resources or workplace complaints systems", and to audits, which are actually ineffective for the purpose of identifying and assessing human rights impacts[82].

It must be clear, finally, that the mere existence of a framework of due diligence and grievance may not be sufficient to make a corporation cope with human rights. If, on the one hand, a firm is able to respect human rights even without those processes, on the other hand, the simple design of these mechanisms in internal policies cannot be taken as a security or shield by enterprises, meaning they now comply with human rights. Fasterling and Dmuijnck understand that "if a corporation causes or is complicit in human rights violations, even a proper due diligence will not change the fact that the corporation violated its moral duties"[83]. Therefore, bylaws, policies or statements designed in coherence with all the above explained processes and mechanisms are only there to help, not to justify excuses to adverse impacts. An enterprise carries the responsibility against human rights impacts that may happen due to its business activities.

3.3. Business, Human Rights & the Brazilian context

Although not explicitly proposing a guiding strategy for business to respect human rights, Brazilian law subjects firms to a variety of principles and norms. The Constitution of 1988 and its following amendments states that the national economic order shall "intend to ensure everyone a life with dignity, in accordance with the dictates of social justice"[84]. It is also guided by principles of environmental protection and reduction of regional and social differences, among others[85].

In a decision of 2006, Supreme Court Min. Celso de Mello decided that environmental protection reflects an extensive concept, including not only the protection of nature, but also of cultural, artificial (as of urban space) and labor environments[86]. According to his decision, it is unacceptable to compromise health, security, culture, work, social well-being, as well as environment, for the sake of an economic activity. In other words, that means too that business enterprises are entitled to respect those as human rights under his interpretation of the Constitution, and this shall be taken into consideration for further judicial rulings.

Following constitutional articles underpin the respect of business activities towards human rights by means of regulating them. For instance, environmental impact assessments are required to be conducted prior to the commencement of any business operations that might cause adverse environmental impacts[87]. Enterprises exploiting mineral resources "shall be required to restore the degraded environment"[88]. Actual adverse environmental crimes conducted by individuals or legal entities will be subject to legal sanctions, detailed on Bill 9.605/98 of environmental crimes[89] [90]. Research

81 Barca, V. Grievance mechanisms for social protection programmes: stumbling blocks and best practice. *International Policy Centre for Inclusive Growth*, Brasília, Apr. 2015.

82 McCORQUODALE, R. et al. Human rights due diligence in law and practice: good practices and Challenges for business enterprises. *Business and Human Rights Journal*, Cambridge, v. 2, p. 195–224, 2017. Available in: <https://www.cambridge.org/core>. Access in: 15 Jun. 2018. p. 211 (note 63, above).

83 FASTERLING, B.; DEMUIJNCK, G. J. Human rights in the Void?: due diligence in the UN guiding principles on business and human rights. *Bus Ethics*, New York, v. 116, p. 799-814. 2013. Available in: <https://doi.org/10.1007/s10551-013-1822-z>. Access in: 15 Jun. 2018. p. 805-806(note 42, above).

84 BRASIL. Constituição (1988). *Emenda constitucional, 91 de 2016*. Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Access in: 21 May 2018.

85 BRASIL. Constituição (1988). *Emenda constitucional, 91 de 2016*. Art. 170 Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Access in: 21 May 2018. (note 84, above).

86 BRASIL. Supremo Tribunal Federal. *ADI 3.540 MC*. Relator: Min. Celso de Mello, j. 1º-9-2005, P, Diário da Justica 3 February 2006. *Lex*: Jurisprudência do STF. Available in: <www.stf.jus.br>. Access in: 2 May 2018.

87 BRASIL. Constituição (1988). *Emenda constitucional, 91 de 2016*. Art. 225, IV. Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Access in: 21 May 2018. (note 84, above).

88 BRASIL. Constituição (1988). *Emenda constitucional, 91 de 2016*. Art. 225, p.2. Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Access in: 21 May 2018. (note 84, above).

89 BRASIL. Constituição (1988). *Emenda constitucional, 91 de 2016*. Art. 225, p.3. Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Access in: 21 May 2018. (note 84, above).

90 BRASIL. *Lei 9.605 de 12 de fevereiro de 1998*. Dispõe sobre as sanções penais e administrativas derivadas de condutas e atividades lesivas ao meio ambiente, e dá outras providências. *Diário Oficial da União*, Brasília, 13 Feb 1998. Available in: <http://www.planalto.

and utilization of potentials, registration, monitoring, as well as the approval of concessions require licenses and specific bureaucratic arrangements[91] [92] [93].

And yet, after its mission to Brazil in 2015, a United Nations working group report concluded that "human rights risks were mainly seen as risks to a company's operations, rather than risks faced by vulnerable rights holders"[94]. Meaning that, in the country, most businesses focus on analyzing risks in relation to their projects or economic activities, instead of considering local communities' needs. Finally, the Working Group suggested the need to increase awareness of the GPBHRs framework among Brazilian entrepreneurs.

4. Exploring Kinross Human Rights Due Diligence and Operational-Level Grievance Mechanisms

Given Paracatu's contentious situation, it is expected that the cause to the issue lays on local communities being unable to seek redress due to lack or misconception of operational-level grievance mechanisms and human rights due diligence process. In order to find that out, it is necessary to evaluate Kinross policy observed in publicly available documents. First, this section will explore the due diligence process and operational-level grievance mechanisms developed by the enterprise, and later assess if they are based on human rights directives, as proposed by the Guiding Principles on Business and Human Rights and the Brazilian constitution.

4.1. Kinross policy commitments

Kinross openly stresses its policy commitment to: the UN Global Compact; the Voluntary Principles for Security and Human Rights; the Kinross Code of Business Conduct and Ethics; its "internal policies for Environment, [...] [its] procedures and practices in community relations, [its] approach to project permitting/consultation"; and "to support and respect the protection of human rights in the workplace and the community, in accordance with the Universal Declaration of Human Rights"[95]. Therefore, in alignment to Principle 15.a, Kinross shows clearly policy commitment to respect human rights. Both the international group and the Brazilian subsidiary have in their bylaws a variety of codes, documents and publications that guide their business relations, in detail in English, but also Portuguese versions.

Kinross International has published guidelines on corporate responsibility, including internal policies on environment, community relations, whistleblowing, as well as a "Ten Guiding Principles for Corporate Responsibility", a "Kinross Code of Business Conduct and Ethics", and a "Conflict-Free Gold Standard" strategy plans. It also means to require suppliers to sign a "Supplier Standards Conduct" (SSoC), making sure they not only comply to the company's Code of Conduct, but also to international standards, "including applicable anti-corruption laws, as well as the fundamental principles of the UN Global Compact respecting human rights, labour standards, environmental protection, and anti-corruption"[96].

Besides other public statements, Kinross presents a Portuguese version of its Código de Ética e Conduta de Negócios ("Code of Ethic and Business Conduct" or "Code")[97]. The Code guides all Kinross representa-

gov.br/ccivil_03/Leis/L9605.htm>. Access in: 2 May 2018.

91 OLIVEIRA, G. V. C. *Explaining mining company and community relations in Paracatu, Brazil:* situational context and company practice, Master of Arts. Guelph: University of Guelph, 2010. Available in: <https://atrium.lib.uoguelph.ca/xmlui/handle/10214/2435>. Access in: 15 Apr. 2018. p. 51 (note 17, above).

92 BRASIL. Constituição (1988). *Emenda constitucional, 91 de 2016*. Not exclusively art. 22, XII, art. 23, XI, art. 176, art. 176, p.1, art. 23, X. Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Access in: 21 May 2018. (note 84, above).

93 One of the newest actions was the enactment of Bill 12.527 in 2011, also named *Lei de Acesso à Informacao* (Bill of Access to Information). It created a public "dirty list" of business involved with slave work, under the principle of "naming and shaming". Although the list mostly focused on labor rights, it has been an achievement in the field.

94 UNITED NATIONS. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.* A/HRC/11/13. 2009. Available in: <http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>. Access in: 24 May 2018.

95 Kinross Gold Corporation. *Our Approach.* 2017. Available in: <http://www.kinross.com/corporate-responsibility/our-approach/default.aspx>. Access in: 3 Apr 2018.

96 Kinross Gold Corporation. *Our Approach.* 2017. Available in: <http://www.kinross.com/corporate-responsibility/our-approach/default.aspx>. Access in: 3 Apr 2018. (note 95, above).

97 Kinross Gold Corporation. *Código de Ética e Conduta de Negócios.* 2016. Available in: <http://www.kinross.com.br/a-kinross/nossos-valores/>. Access in: 5 Apr. 2018.

tives to e.g. promote an honest and ethical conduct and comply to applicable laws, the same basic expectation of the GPBHRs[98]. It also states that both local laws and international standards shall be observed and that violations to human rights shall not be tolerated, what shows policy commitment to respect human rights. According to the bylaws, potential or actual violations to human rights are required to be reported, meaning thus, that Kinross aims to address issues and support a human rights due diligence. The text also asserts about the firm's expectation towards "all representatives, suppliers and agents [to] respect human rights of interested parties and local communities with which Kinross makes business with"[99], in resemblance to Principle 13.

In affinity to the Brazilian constitution, socio-environmental responsibility is displayed as one of the corporation's pillar values. More specifically, Kinross commits to minimizing any adverse impacts that may be caused to communities or environment, as well as to contribute to the quality of life of the population. Such commitments are communicated on the company's website and practiced as part of CSR projects[100].

4.2. Human rights due diligence and operational-level grievance mechanisms

The corporate strategy proposed on the "Ten Guiding Principles" paper publicly recognizes the enterprise's social responsibility, and its need to maintain "strong and mutually beneficial relationships with communities and stakeholders"[101]. Among the corporation's guiding principles, principle 6 states its will to "conduct [...] all activities in accordance with accepted standards in protection and promotion of human rights[, to] respect the cultural and historical perspectives and rights of those affected by [their] operations, in particular indigenous peoples"[102]. One of the aims is to "maximize employment, business and economic opportunities for local communities from [...] existing operations and new projects"[103]. Nevertheless, the firm expresses its commitment to "maintain active engagement and dialogue with [...] civil society on CSR best practices and evolving global standards" and to provide "lasting benefits to communities [...] by supporting sustainable initiatives to develop their social, economic, and institutional fabric"[104] [105]. It is also stated that Kinross looks after "an ongoing dialogue and engagement with stakeholders in the communities where (they) operate, maintained in a spirit of transparency and good faith", and after the "highest standards of corporate governance, ethic and honesty"[106].

This concise but comprehensive proposal from Kinross "Ten Guiding Principles" can be interpreted to be in harmony with the Brazilian constitutional understanding and the GPBHRs, for the enterprise clearly accepts to act in accordance to defined standards in promotion of human rights. Kinross takes a step further towards the constitutional quest for social justice by bringing awareness and offering support to the needs of local communities, e.g. respecting cultural and historical heritages and minority rights, or developing transparent dialogue and engagement. The necessity of providing ethic and honesty standards reflects the core intention of both national and international norms. Therefore, Kinross has shown policy commitment to the crucial guidelines enlisted.

Additional Environmental[107], Community-Relations[108] and Whistleblower policies[109] are also in alignment to the GPBHRs. Although only found available on the international website on English language, the

98 Kinross Gold Corporation. *Código de Ética e Conduta de Negócios*. 2016. p. 1. Available in: <http://www.kinross.com.br/a-kinross/nossos-valores/>. Access in: 5 Apr. 2018. (note 97, above).

99 Kinross Gold Corporation. *Código de Ética e Conduta de Negócios*. 2016. p. 13. Available in:<http://www.kinross.com.br/a-kinross/nossos-valores/>. Access in: 5 Apr. 2018. (note 97, above).

100 KINROSS BRASIL. *Nossos Valores*. 2018. <http://www.kinross.com.br/a-kinross/nossos-valores/>. Access in: 23 May 2018.

101 Kinross Gold Corporation. *10 Guiding Principles for corporate responsibility, n.d.* Available in: <kinross.com>. Access in: 5 Apr. 2018.

102 Kinross Gold Corporation. *10 Guiding Principles for corporate responsibility, n.d.* p.6. Available in: <kinross.com>. Access in: 5 Apr. 2018. (note 101, above).

103 Kinross Gold Corporation. *10 Guiding Principles for corporate responsibility, n.d.* p.8. Available in: <kinross.com>. Access in: 5 Apr. 2018. (note 101, above).

104 Kinross Gold Corporation. Kinross Gold Corporation. *10 Guiding Principles for corporate responsibility, n.d.* p.10. Available in: <kinross.com>. Access in: 5 Apr. 2018. (note 101, above).

105 Kinross Gold Corporation. *10 Guiding Principles for corporate responsibility, n.d.* Available in: <kinross.com>. Access in: 5 Apr. 2018. P.9 (note 101, above).

106 Kinross Gold Corporation. *10 Guiding Principles for corporate responsibility, n.d.* p. 2-3. Available in: <kinross.com>. Access in: 5 Apr. 2018. (note 101, above).

107 Kinross Gold Corporation. *Environmental Policy.* 2017. Available in: <kinross.com>. Access in: 5 May 2018.

108 Kinross Gold Corporation. *Community Relations Policy*. Available in: <kinross.com>. Access in: 5 May 2018.

109 Kinross Gold Corporation. *Whistlebower Policy*. 2016. Available in: <kinross.com>. Access in: 5 May 2018.

guidelines also apply to the Brazilian subsidiary. Recurrent on the texts is the statement that those internal policies shall not only make all workers accountable, but also be ensured by Chief Executive Officer and Chief Operating Officer, and supported by Regional Vice-Presidents, General Managers, Department Heads and Supervisors, as well as maintained by a Corporate Safety and Sustainability Department[110] [111] [112]. Depending on the matter, a particular Committee shall monitor the development of those policies too[113] [114] [115]. That is in alignment to interpretations on the GPs.

Internal policy on environment has, among its objectives, to "meet or exceed applicable laws"[116]. Plus, in conformity to Principles 17 and 19, it aspires to minimize adverse impacts, as well as to assess and mitigate environmental risks. Besides that, the agenda supports transparent audit and report, as well as channels of communication for stakeholders, as required by Principle 18. In the pursue to actively promote human rights, Kinross also looks at managing its environmental footprint.

The Community Relations policy sustains a strategy for an "on-going dialogue with stakeholders in the communities [...], maintained in a spirit of transparency and good faith"[117], by monitoring local contexts, assessing and minimizing impacts. Transparent report and engagement with local communities are also covered by the policy. That is all in accordance to the proposed design of human rights due diligence, just as required by Principles 15, 17, 18 and 21.

Even more enlightening is Kinross' Whistleblowing policy. It concerns mechanisms to 'detect and prevent or deter "improper activities"'[118]. Thus, even though it does not make clear reference to them, the firm presents in this policy its operational-level grievance mechanisms, in alignment to Principles 29 to 31. Communication channels include post, e-mail, internet site, toll-free hotline, and, as part of its CSR strategy in Paracatu, regular community meetings[119] [120]. Assessment procedures are designed to be predictable, transparent and legitimate and aim at providing accountability and trust building. Section 5b describes factors to be taken into account during investigations of reports, including subject, nature, seriousness and credibility of allegations. By seriousness, the text clarifies it as meaning the urgency and scope of investigations, thus similar to the concept of severity and scope of human rights due diligence[121]. According to Kinross, claims are also confidential and, upon request, anonymous[122]. The platform EthicsPoint supports reporting as through the company's Intranet site, an external website[123] or an "integrity hotline toll-free phone"[124]. After filling up a report, it is also possible to receive updates on the matter with a given password. All communication channels are available in the country's primary language, Portuguese.

Moreover, it is also possible to observe a detailed description of the firm's human rights due diligence process on that same document. The policy shows clear procedures for transparent reporting and accountability. First, it enlists among reportable matters any violations to human rights, laws, or internal policies and appoints reportable representatives[125]. This is in harmony with Principles 21 and 22. The commitment to protect whistleblowers and provide confidentiality is again in accor-

110 Kinross Gold Corporation. *Environmental Policy*. 2017. Available in: <kinross.com>. Access in: 5 May 2018. (note 107, above).
111 Kinross Gold Corporation. *Community Relations Policy*. Available in: <kinross.com>. Access in: 5 May 2018. (note 108, above).
112 Kinross Gold Corporation. Whistlebower Policy. 2016. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above)
113 Kinross Gold Corporation. *Environmental Policy*. 2017. Available in: <kinross.com>. Access in: 5 May 2018. (note 107, above).
114 Kinross Gold Corporation. *Community Relations Policy*. Available in: <kinross.com>. Access in: 5 May 2018. (note 108, above).
115 Kinross Gold Corporation. *Whistlebower Policy*. 2016. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above)
116 Kinross Gold Corporation. *Environmental Policy*. 2017. Available in: <kinross.com>. Access in: 5 May 2018. (note 107, above).
117 Kinross Gold Corporation. *Community Relations Policy*. Available in: <kinross.com>. Access in: 5 May 2018. (note 108, above).
118 Kinross Gold Corporation. *Whistlebower Policy*. 2016. p.1. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above, original emphasized).
119 Kinross BraSIL. *Fale Conosco*. 2018. Available in: <http://www.kinross.com.br/fale-conosco/>. Access in: 23 May 2018.
120 Kinross BraSIL. *Ouvidoria*. 2018. Available in: <http://www.kinross.com.br/fale-conosco/ouvidoria/>. Access in: 23 May 2018.
121 Kinross Gold Corporation. *Whistlebower Policy*. 2016. p.8. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above).
122 Kinross Gold Corporation. *Whistlebower Policy*. 2016. p.11. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above).
123 Kinross BraSIL. *Ouvidoria*. 2018. Available in: <http://www.kinross.com.br/fale-conosco/ouvidoria/>. Access in: 23 May 2018. (note 120, above).
124 Kinross Gold Corporation. *Whistlebower Policy*. 2016. p.11. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above).
125 Kinross Gold Corporation. Whistlebower Policy. 2016. p.2. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above).

dance do the GPBHRs and the Brazilian constitution[126]. Since the general concept of Kinross Whistleblower policy is to identify and address claims, it can be inferred that it also frames the firm's human rights due diligence process.

Indeed, mechanisms designed by Kinross are among sources of sustainable learning expected by the GPBHRs, that enable monitoring and assessment in the context of operational-level grievance mechanisms and human rights due diligence. Finally, the enterprise's policy can be understood as rights-compatible, for in alignment to GPBHRs and the Brazilian constitution.

4.3. CSR practices in Paracatu

Specifically in regard to CSR practices in Paracatu, Kinross has been supporting communities in matters such as health, culture, social, education, gender- and indigenous-development, environment and environmental education, and has even created formal dialogue channels with local leaders. According to the company's disclosed information, 3.8 million USD were spent in a project for the revitalization of Paracatu's Rico creek, including cleaning up, planting vegetation alongside riverbanks and even creating a recreational park[127].

Project *Fábrica de Biscoitos* (Cookies Factory) financed the implementation of a baking factory in the low-income community of Sao Domingos. It aimed at promoting jobs and gender empowerment by supporting regional culinary traditions[128]. In the area of culture and education, Kinross also claims to support 8 municipal public schools with cultural and leisure programs. In 2017, the firm says to have offered 480 hours of gastronomy, dance, theatre and audiovisual activities[129]. A Center for Environmental Education engages 15 public schools, and per year more than one thousand students.

Among those projects led by Kinross, attention must be drawn to communication channels created with local communities within the project Rodas de Diálogo ("Dialogue Wheels"). The goal is that managers meet regularly with locals and use that as an open communication channel, in which any affected stakeholders could "clarify questions" and "know more" about operations[130]. The *Comitê de Desenvolvimento Sustentável* (Sustainable Development Committee, also referred to as the 'Stakeholder Committee'), also meets regularly to address and discuss mining impacts. It is formed by direct neighborhood communities. Nonetheless, meetings and public hearings have been also hold with other city neighborhoods of *Paracatu*. Special attention shall be given upon the findings of a previous research, which found out that local members feel that the enterprise "is very good at listening and understanding […], but […] does not always address their concerns"[131]. Meetings are perceived to be too formal and, instead of planting dialogue, they provide only an one-way platform of information[132]. Although these CSR practices commit towards the respect and promotion of human rights as expected by the GPBHRs, communication channels still lack in efficiency.

In its publications, the firm shows understanding for community complaints, addressing for instance the matter of air dust prevenient from mining crushing. In an internal magazine, it justifies the expansion of the "dust management program significantly by increasing the use of dust surfactants, installing additional water spray systems, reducing the area of active vehicle movement within the mining area during the dry season, and improving dust monitoring systems and programs"[133]. Kinross has also guaranteed the installation of the gold mine with international and national certificates, such as the International Cyanide Management Code (ICMI), OSHAS 18001, ISO 14001 e SA 8000[134].

126 Kinross Gold Corporation. Whistlebower Policy. 2016. Available in: <kinross.com>. Access in: 5 May 2018. (note 109, above)

127 KINROSS WORLD. *Environmental stewardship:* the Kinross way. 2012. p.6.

128 Kinross BraSIL. *Relacionamento com a comunidade quilombola*. 2018. Available in: <http://www.kinross.com.br/project/relacionamento-com-a-comunidade-quilombola/>. Access in: 2 Apr. 2018.

129 Kinross BraSIL. *Programa integrar*. 2018. Available in:<http://www.kinross.com.br/project/programa-integrar/>. Access in: 3 Apr. 2018.

130 Kinross BraSIL. *Rodas de Diálogo*. 2018. Available in: <http://www.kinross.com.br/project/rodas-de-dialogo/>. Access in: 3 Apr. 2018.

131 OLIVEIRA, G. V. C. *Explaining mining company and community relations in Paracatu, Brazil:* situational context and company practice, Master of Arts. Guelph: University of Guelph, 2010. Available in: <https://atrium.lib.uoguelph.ca/xmlui/handle/10214/2435>. Access in: 15 Apr. 2018. p. 87 (note 17, above)

132 OLIVEIRA, G. V. C. *Explaining mining company and community relations in Paracatu, Brazil:* situational context and company practice, Master of Arts. Guelph: University of Guelph, 2010. Available in: <https://atrium.lib.uoguelph.ca/xmlui/handle/10214/2435>. Access in: 15 Apr. 2018. p. 92 (note 17, above)

133 KINROSS WORLD. *Environmental stewardship*: the Kinross way. 2012. p. 10 (note 127, above).

134 Kinross BraSIL. *Conheça a Kinross*. 2018. Available in: <http://

On polemic issues, such as the matter of arsenic exposure, Kinross provides detailed clarification about the mining process on its website, but the latest study results provided are, however, from 2012 and 2013[135]. This is a transparent means of communication, welcomed by the GPBHRs. And yet, controversies between corporation and community have not yet been solved.

As much effort as it seems to have been taken through policies and CSR practices, it is possible to infer from legal claims, press and NGOs reports that community-business relations are still contentious. If, on the one hand, Kinross presents itself as standing for applicable standards, just as required by international and national human rights norms, on the other hand, local communities deal with potential and/or actual human rights impacts. And, even if allegations against the corporation are proven false, the dilemma continues in the unharmonious relations between local community and Kinross.

5. Suggestions to lessons learned

It has become clear that Kinross shows general policy commitment to human rights and has designed a human rights due diligence process and operational-level grievance mechanisms in general compliance to the GPBHRs and to the Brazilian Constitution. The company also develops a variety of CSR strategies for that purpose. However, in the case of the Paracatu's gold mine, though all policy commitment, it is still clear that business-community relations are contentious. That means that the issue does not lie directly on the designed framework of the processes here explored.

As argued before and seen in this case study, the sole creation of a due diligence process or installation of grievance mechanisms has not guaranteed respect to human rights. Most of all, the corporation cannot justify its conduct for only presenting compatible policies, if in practice it is causing adverse potential or actual impacts. In such a case, more commitment of the core company and of senior-level staff can ensure that policies are efficiently conducted. Additionally, better training to local personnel can also reduce current limitations and improve harmony in business-community relations.

Attention shall as well be portrayed to the following points, which could make the enterprise's policy framework more efficient. Kinross could first of all update and publish studies that regard the operation's size, severity, nature and context. Main policies are not available in Portuguese language, owing more descriptive policy commitment to local stakeholders which might not be able to understand all policies informed in English language. A human rights due diligence process could be inferred from policy statements, but that can be clearly and with more strategic details stated as such in a local policy document and led by a special department. Such an approach can also support local senior-level staff conducting investigations. Although operational-level grievance mechanisms are documented in detail, Kinross could publish quantitative and qualitative results upon all findings and investigations for the general public. Under those circumstances, it should be easier to make the enterprise accountable, and hence, more efficient, by observing how it is conducting due diligence and grievance.

6. Conclusion

The largest gold open-pit mine in Latin America led by Kinross, a Canadian corporation, is the cause of adverse human rights impacts in the city of Paracatu, Brazil. Local communities complaint of, among others, health, environmental, infra-structural issues, and mostly because they do not find means of efficiently communicating, receiving feedback and finding common solutions. Although the enterprise has a strong corporate social responsibility local agenda and has created different means of communication, Kinross' due diligence process and operational-level grievance mechanisms still fail in fulfilling their designed task.

Ultimate causes of the lack in efficiency require a new study, but already hint to that the lack of senior-level staff capability on ensuring policy commitment. Low-quality of training to local personnel has been also a limiting factor. However, the policy presented on bylaws and different public means is already sufficient to show the corporation's commitment to the GPBHRs

www.kinross.com.br/a-kinross/conheca/>. Access in: 2 Apr. 2018. (note 3, above).

135 Kinross BraSIL. R*esultados de Estudos sobre Arsênio Paracatu e Referências*. 2018. Available in: <http://www.kinross.com.br/duvidas-frequentes/resultados-de-estudos-sobre-arsenio-paracatu-e-referencias/ >. Access in: 3 May 2018.

and to Brazilian constitutional standards. But, the sole compatibility on paper does not guarantee respect to human rights. Neither Kinross nor any corporation can be excused from its responsibility to respond to adverse human rights created by its own business activity, even if by showing policy commitment.

Since response to impacts have been disappointing, the enterprise must finally develop a moral commitment to human rights, take advantage of an already constructed framework, improve it and use it as a means of achieving the best possible business-community relations. Embedding human rights due diligence and grievance mechanisms to the enterprise's routine is a tricky assignment, but it is the final means of guaranteeing that human rights are respected.

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Human rights and extractive industries in Latin America: what responsibility of corporations and their States of origin for human rights violations in the Inter-American Human Rights System?

Derechos humanos e industrias extractivas en América Latina: ¿cuál es la responsabilidad de las empresas y sus Estados de origen por violaciones de derechos humanos ante el Sistema Interamericano de Derechos Humanos?

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Abstract

The second half of the twentieth century reached expansion of external trade, followed in some cases by improvement in democratic processes and living conditions. Nevertheless, the strong rise of economic globalization and trade among countries started to challenge the enjoyment of some human rights. Investment agreements redefine economic landscapes, but simultaneously some of them threaten civil and political rights, as well as economic, social and cultural rights. Before this situation, in the field of human rights and extractive industries in Latin America, the issue related to responsibility of corporations and their States of origin for human rights violations in the inter-American human rights system arises. Inter-American standards and prospects on responsibility for human rights abuses committed by corporations operating in a third State are discussed in this paper. We concluded that even if international standards on this issue are still strengthening, positive developments can be arising.

Keywords: Global market. Human rights. Concessional agreements. Corporations. International responsibility of the State.

Resumen

La segunda mitad del siglo veinte trajo consigo la expansión del comercio, seguido en algunos casos de mejoramiento en los procesos democráticos y las condiciones de vida. Sin embargo, el auge de la globalización económica y el comercio entre países comenzó a desafiar el goce de algunos derechos humanos. A pesar de que los acuerdos de inversión redefinen perspectivas económicas, la ejecución de algunos de ellos amenaza el goce de los derechos civiles y políticos, así como de los derechos económicos, sociales

y culturales. Ante esta situación, en materia de derechos humanos e industrias extractivas en América Latina, surge la cuestión de la responsabilidad de las empresas y sus Estados de origen por violaciones de derechos humanos ante el sistema interamericano de derechos humanos. En este artículo se discuten los estándares y perspectivas interamericanos sobre responsabilidad por violaciones de derechos humanos de empresas que operan en terceros países. Concluimos que a pesar de que los estándares internacionales en este tema aún están consolidándose, están surgiendo desarrollos positivos.

Palabras clave: Mercado global. Derechos humanos. Acuerdos de inversión. Empresas. Responsabilidad internacional del Estado.

1. Introduction

> "The existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the 'rule of the game' and as an umpire to interpret and enforce the rules decided on."
>
> Milton Friedman.

After two world wars, millions of deaths because of diseases, starvation, indiscriminate killings and tortures, the second half of the twentieth century arrived and ended with two relevant lessons. The first one is that countries economically isolated suffer from shortage and lags, and are lead to underdevelopment. The second one is that human rights recognition dignifies lives of societies, humanizing and civilizing the relationship between human beings and the State. Current Western world cannot live without a diversified global market and a set of human rights effectively recognized.

Global market and human rights became great advances of the last half of the twentieth century. They became, also, complementary. Trade and investment agreements, components of the global market, emerged as mechanisms to settle trading balances between the first-world countries and the others, and to contribute to sustainable development. Likewise, a set of human rights protected prerogatives in which market is based, such as the right to pursue a project of life and the freedom of labor. Economic liberalization to increase competitiveness and recognition of human dignity for all by virtue of their status as persons are not competing aims by themselves, on the contrary, at some point, one depends on the other.

Nevertheless, the States and international organizations are no longer the sole involved in global commitments. An intermingling of actors and interests is making both concepts switch their focus, although history has taught current Western world that it should not renounce to global market or to human rights guarantee. More specifically, some projects related to extractive industries in Latin America are being conducted in conditions of environmental damage, intimidation, death of social and communal leaders, police repression, house arrest and arbitrary detention, criminalization of social protest, forced or involuntary displacement, and militarization of the populations.

This paper begins by considering investment agreements in times of protection of human beings; continues by addressing responsibility of corporations and States of origin for human rights abuses in times of concessional agreements boom in Latin America; and concludes by discussing the inter-American standards and prospects on responsibility for human rights violations committed by corporations operating in a third State.

2. Investment agreements in times of protection of human beings

After decades of protectionism during the world wars, the second half of the twentieth century led to expansion of economic globalization followed, in numerous cases, by improvement in democratic processes and/or living conditions. As an example brought by the International Monetary Fund, most of the East Asia countries, which were among the poorest ones forty years ago, are currently prosperous and dynamic due to the implementation of liberalization policies.[1] This section departs from considering the intermingling of actors and interests in the global scenario and concludes by questioning the forgetfulness of the State obligation to ensure the enjoyment of human rights when negotiating or executing investment agreements.

The Organization for Economic Co-Operation and

1 INTERNATIONAL MONETARY FUND. *La globalización*: ¿amenaza u oportunidad? Available in: <https://www.imf.org/external/np/exr/ib/2000/esl/041200s.htm>.

Development (OECD), in a report titled *Trading out of Poverty: How Aid for Trade Can Help* says that trade is central to economic growth and poverty reduction, but "while low- and middle- income countries have made substantial progress in dismantling their trade barriers over the past two decades, this has not appeared to unleash sustained export growth in all of them."[2] The reduction of poverty, one of the benefits that trade and investment agreements bring, does not appear to be received by some developing countries, nor by all social groups in the States. According to the OECD, "[r]ecent country case studies confirm that the link between export growth and poverty reduction has been mostly positive, but there are nonetheless some negative cases, indicating that other factors may be hindering the impact of trade or are much more important in determining the process of poverty reduction."[3]

Economic politics are shaped by the interaction of multiple actors. Therefore, reaping the benefits that investment agreements could bring should consider divers agents and interests, which intermingle. There is in this point a concern that goes beyond the content of the law and that considers the form it is born and developed, looking at the behavior of engaged actors on the transnational practice.[4] Timothy Shaw, Andrew Grant and Scarlett Cornelissen claim that

> Regional development in the twenty-first century is as much a function of corporate strategies and informal sectors as endless inter-governmental negotiations and declarations. Private sectors and state priorities may or may not be compatible, but neither can be ignored . . . hence, in the new century, regional development may be more advanced by corporate strategies rather than by state directives.[5]

As a consequence of performance of private sectors in the world trade, conclusion of trade and investment agreements promoting objectives of companies has proliferated. Corporations, national and transnational, are genuinely interested in the market structure, which channels the negotiation processes between the States and the content of several provisions in international treaties relating these matters. About the current relevance of market structure in trade negotiation processes, Kim Moonhawk argues that

> [A]s the structure of the international economy has evolved throughout the post-World War II era, states' focus has shifted away from market *access* –as defined by tariffs and other "at-the-border" measures– toward market structure. Market structure is shaped by the extent of competition within an industry and in an economy more broadly. It varies between perfect competition with a high level of competition and monopoly with no competition.[6]

Concessional agreements in Latin American extractive industries are examples of that kind of competition. On the subject of competition on trade-related field, the assessment of Dani Rodrik in the sense that "we need smart globalization, not maximum globalization"[7] is true. Rodrik also claims that markets and governments are complements and not substitutes, and that markets work best not where the States are weaker, but where they are stronger, because the prosecution of aims such as the preservation of legitimacy of markets by protecting people from the risks and insecurities markets bring with them is required.[8] The protection of people from these risks and insecurities is impacted by an intermingling of interests.

Sovereignty, governance and legitimacy concepts are challenged and rethought. As an example of this, Immanuel Wallerstein argues that

> All states are theoretically sovereign, but strong states find it far easier to "intervene" in the internal affairs of weaker states than vice versa, and everyone is aware of that. Strong states relate to weak states by pressuring them to keep their frontiers open to those flows of factors of production that are useful and profitable to firms located in the strong states, while resisting any demands for reciprocity in this regard. In the debates on world trade, the United States and the European Union are constantly demanding that states in the rest of the world open their frontiers to flows of manufactures and

2 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. Trading out of poverty: how aid for trade can help. *OECD Journal on Development*, v. 10, n. 2, p. 7-41, 2010. p. 12.

3 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. Trading out of poverty: how aid for trade can help. *OECD Journal on Development*, v. 10, n. 2, p. 7-41, 2010. p. 14.

4 MANGE, Flávia Foz. As características do direito transnacional como metodologia: análise sob o enfoque dos aspectos processuais da arbitragem, *Revista de Direito Internacional*, v. 13, n. 3, p. 126-144, 2016. p. 130.

5 GRANT, Andrew. Introduction and overview: the study of new regionalism(s) at the start of the second decade of the twenty-first century. In: SHAW, Timothy; GRANT, Andrew; CORNELISSEN, Scarlet. *The ashgate research companion to regionalisms*. Surrey: Routledge, 2012. p. 16.

6 MOONHAWK, Kim. Inspecting the termites: market structure and WTO's consideration process of PTAs. *American Political Science Association*, 2013. p. 7.

7 RODRIK, Dani. *The globalization paradox*. New York: W. W. Norton & Company, 2011. p. 8.

8 RODRIK, Dani. *The globalization paradox*. New York: W. W. Norton & Company, 2011. p. 8.

> services from them. They however quite strongly resist opening fully their own frontiers to flows of agricultural products or textiles that compete with their own products from states in peripheral zones. Strong states relate to weak states by pressuring them to install and keep in power persons whom the strong states find acceptable, and to join the strong states in placing pressures on other weak states to get them to conform to the policy needs of the strong states . . . Strong states relate to weak states by pressuring them to follow their lead in international arenas (treaties, international organizations). And while strong states may buy off the individual leaders of weak states, weak states as states buy the protection of strong states by arranging appropriate flows of capital.[9]

Saskia Sassen describes the current panorama as "the consolidation of a transnational economy that has its center of gravity in the North Atlantic system both in terms of the intensity and value of transactions, and in terms of the emerging system of rules and standards."[10] And she continues, arguing that it results in "a mix of new strengthened forms of private authority and partly denationalized state authority, such as the instituting of private interests into state normativity."[11]

Some believe that "global markets suffer from weak governance, and are therefore prone to instability, inefficiency, and weak popular legitimacy."[12] We argue that the weak popular legitimacy that global markets can eventually have is because human rights arguments are not raised when negotiating and/or executing trade and investment agreements. Collaboration between public and private sectors to manage global affairs is noticeable; the point is that aspects that confer legitimacy to the market such as the respect for human rights are constantly left behind. In this regard, it seems relevant the assessment of Friedrich Hayek in the sense that

> [t]here are, in the last resort, no economic ends [and] the economic efforts of the individuals as well as the services which the market order renders to them, consist in an allocation of means for the competing ultimate purposes which are always non-economic.[13]

3. Responsibility of corporations and states of origin for human rights abuses in times of concessional agreements boom in Latin America

Investment agreements redefine the economic landscape of a country, but simultaneously some of them threaten the right to food, collective rights of specially protected subjects, labor rights and the right to health. Investment agreements are supposed to be a mechanism to settle trading balances between the first-world countries and the others, and to foster sustainable development; however, some of them are benefiting transnational corporations at the expense of the enjoyment of human rights in some areas of the world. Indeed, the companies whose transnational activities allegedly or demonstrably have adverse socio-environmental impacts are potentially protected by a wide array of investment protection agreements.[14] Human rights continuously yield to concessions made by the States with a view to attract investors. Problematic issues are the agreements that also involve countries indicted of serious human rights violations.

In terms of responsibility of corporations and the States of origin for human rights abuses, one of the most current cases is that one related to violations committed by some enterprises incorporated under the laws of Canada acting in the field of extractive industries in Latin America. This statement is sustained in the analysis of 24 cases located in Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Mexico, Panama and Peru, set out in the framework for the 149th Ordinary Period of Sessions of the Inter-American Commission on Human Rights (IACHR) in 2013, in a public regional hearing about the situation of human rights of the affected people due to mining activities in the Americas and the responsibility of the host countries, States of origin and companies.[15]

9 WALLERSTEIN, Immanuel. *World systems analysis*. London: Duke University Press, 2004. p. 55.

10 SASSEN, Saskia. The State and globalization. In: HALL, Rodney Bruce; BIERSTEKER, Thomas J. (Ed.) *The emergence of private authority in global governance*. Cambridge: Cambridge University Press, 2002. p. 98.

11 SASSEN, Saskia. The State and globalization. In: HALL, Rodney Bruce; BIERSTEKER, Thomas J. (Ed.) *The emergence of private authority in global governance*. Cambridge: Cambridge University Press, 2002. p. 106.

12 RODRIK, Dani. *The globalization paradox*. New York: W. W. Norton & Company, 2011. p. 6.

13 HAYEK, Friedrich A. *Law, legislation, and liberty*: a new statement of the liberal principles of justice and political economy. London: Routledge, 1976. p. 320.

14 MONEBHURRUN, Nitish. Mapping the duties of private companies in international investment law. *Revista de Direito Internacional*, Brasília, v. 14, n. 2, p. 50-71, 2017. p. 53.

15 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Audiencia*: Situación de derechos humanos de las personas

According to the information provided by the Petitioners, 75% of the world's mining companies are registered in Canada, and about two-thirds of this percentage operates in Latin America. A specific number of these projects are being executed in conditions of environmental damage, intimidation, death of social and communal leaders, police repression, house arrest and arbitrary detention, criminalization of social protest, forced or involuntary displacement, and militarization of the populations.[16] The contamination of the gorges Tibia and Cuajiniquil in Honduras in 2008 as a consequence of infiltration of the acid drainage coming from the activity of Entre Mares Company and the prosecution in 2012 of 200 people in Argentina for protesting against the project *Alumbrera* were cited as examples.[17]

In this respect, regarding environmental damage caused by the activity of corporations, it should be taken into account that an environment of sufficient quality has become an inherent condition for the full respect of some human rights such as the right to life, health, private and family life, food, an adequate living standard, right to property and cultural rights. In this sense, the Protocol of San Salvador provides in Article 11 that *"[e]veryone shall have the right to live in a healthy environment."*[18] Some human rights violations are explained taking into account that the well-being of each individual or community, particularly indigenous peoples, has a high correlation to the surrounding level of environmental quality.

The cases reported in the public hearing mentioned above were endorsed in a new public hearing conducted on October 28th, 2014 before the IACHR about the impact on Canadian mining activities in Latin America.[19] According to the information provided by the Petitioners, companies developing mining projects are impacting social, cultural, environmental, and economic well-being of communities, particularly indigenous peoples, violating systematically their human rights, despite their status as specially protected subjects according to the international human rights law.[20] Similar acts of intimidation and death of social and communal leaders were denounced in a new case in Mexico.[21]

Those concerns were put on the table once again. Within the framework for the 154th Ordinary Period of Sessions of the IACHR, in a public regional hearing about companies, human rights and prior consultation in the Americas, the Petitioners emphasized the importance of the companies as fundamental actors within the society, the relevance to achieve real development through their actions, and that human rights are not an obstacle for the economic development, but a condition to obtain it.[22] The use of the concept of territory

afectadas por la minería en las Américas y responsabilidad de los Estados huéspedes y de origen de las empresas mineras. Available in: <https://www.youtube.com/watch?v=6M7gX1snfCQ>.

16 Precautionary measures on the specific subject of the impact on Canadian mining activities in Latin America are still pending. Nevertheless, for further information on the context in which human rights abuses related to the execution of megaprojects are committed, see, as examples, the following precautionary measures granted by the IACHR: PM 50/14 – Campesino Leaders of Bajo Aguán (Honduras), issued considering killings, disappearances, kidnappings, torture, threats, violent evictions, persecution and accusations to which peasant farmers were subjected for the alleged purpose of forcing them to sell their lands; PM 140/14 – Yomaira Mendoza and others (Colombia), granted on the basis of the serious risk of their rights to life and personal integrity; and PM 195/13 – Leaders and Human Rights Defenders from the Community of Nueva Esperanza and the Regional Council of the Florida Sector (Honduras), issued considering the serious risk of their lives and physical integrity as a consequence of their work to oppose various mining projects executed in the area.

17 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Audiencia*: Situación de derechos humanos de las personas afectadas por la minería en las Américas y responsabilidad de los Estados huéspedes y de origen de las empresas mineras. Available in: <https://www.youtube.com/watch?v=6M7gX1snfCQ>.

18 ORGANIZATION OF AMERICAN STATES. *Additional protocol to the American Convention on Human Rights in the area of economic, social and cultural rights*. Available in: <http://www.cidh.org/Basicos/Portugues/e.Protocolo_de_San_Salvador.htm>.

19 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Audiencia*: Impacto de las empresas mineras canadienses sobre los derechos humanos en América Latina. Available in: <https://www.youtube.com/watch?v=OWYue8FP9ZY&feature=youtu.be>.

20 Several of the human rights abuses regarding the indigenous communities begin by irregularities in the ancestral land acquisition processes. We cannot avoid taking into account that guaranteeing the collective right to property of indigenous communities is a first step to ensure their social, cultural, environmental and economic well-being, and also a first step to protect them from illegitimate or arbitrary appropriation or occupation and from deterioration of its natural resources. For further information about human rights abuses committed in the framework of megaprojects execution, see resonated cases before the IACHR such as PM 382/10 – Indigenous Communities of the Xingu River Basin (Brazil), granted considering that the lives and personal integrity of the beneficiaries were at risk due to the impact of the construction of Belo Monte hydroelectric power station.

21 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Audiencia*: impacto de las empresas mineras canadienses sobre los derechos humanos en América Latina. Available in: <https://www.youtube.com/watch?v=OWYue8FP9ZY&feature=youtu.be>.

22 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Audiencia*: empresas, derechos humanos y consulta

as a barrier to guarantee the rights of the victims was queried once more.[23] It is in this context that companies are being increasingly encouraged, especially by the civil society, by the national legislation of some States and by some international instruments, to adopt responsible behaviors, mainly when their activities have cross-border effects.[24]

Before this situation, it remains the question about the effectiveness of Article 36 of the Organization of American States (OAS) Charter regarding the activity of transnational enterprises in the territory of Member States, in accordance to which

> [t]ransnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.[25]

Repeatedly, the exclusive interests of companies are presented as national interests. Notwithstanding, we argue that private interests or agendas cannot be superimposed to well-being of communities when both collide, primarily because trade and investment agreements are based on the logic of being economic and social development tools for the societies they serve. In this regard, the Office of the United Nations High Commissioner for Human Rights (OHCHR) affirms that "[w]ithout the introduction of appropriate safeguards and transitional measures, trade rules and policies could have adverse effects on the right to food, worker's rights and other rights of small farmers and the rural poor."[26]

Thus, would it be possible to apply extraterritorially the concept of acquiescence by the States regarding human rights violations committed by companies incorporated under their jurisdiction? Currently, without the evidence of political or financial support, it appears defeasible. Prosecuting people for acts of corruption committed outside the territory is legally viable in some countries, why is not it still possible for human rights abuses when the State exercises authority over a person even if she is not a public servant? The problems exposed above could raise violence levels in regions traditionally affected by social inequality, high poverty and distrust of the justice system such as some Latin American countries,[27] and even worse when the agreements involve countries indicted of gross human rights violations. The increase of violence restricts community development, and so remains in a vicious circle.

4. Inter-american standards and prospects on responsibility for human rights abuses committed by corporations operating in a third state

Some legal scholars assert that the authority of the law depends "[…] on its justice or at least its ability to secure justice."[28] In this regard, the notion of justice is currently entrenched in the protection of the human beings regardless their sex, race, religion, political opinion, language, national or social origin or other status. Few dare to dissent that in our current times, the recognition and guarantee of inherent rights of human beings because of their status as persons are a part of the general sense of justice. This section exposes the inter-American standards on responsibility for human rights violations committed by corporations operating in a third State and then presents a mechanism seeking to reconcile human rights imperatives with trade objectives: human rights considerations set out in arbitral awards. Various awards contain several references to the necessity of applying standards of treatment in a way that protects the so-called non-commercial values (i.e. values not pertaining to the protection of property but relating to the safeguard of other essential interests such as environment and human health).[29]

previa en América. Available in: <https://www.youtube.com/watch?v=wFqc7ccS7Mw>.

23 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Audiencia*: empresas, derechos humanos y consulta previa en América. Available in: <https://www.youtube.com/watch?v=wFqc7ccS7Mw>.

24 ANDRADE, Priscila Pereira de. A emergencia do direito transnacional ambiental, *Revista de Direito Internacional*, v. 13, n. 3, p. 18-28, 2016. p. 19.

25 ORGANIZATION OF AMERICAN STATES. *Charter of the organization of American States*. Available in: <https://www.oas.org/dil/port/tratados_A-41_Carta_da_Organiza%C3%A7%C3%A3o_dos_Estados_Americanos.htm>.

26 HARRISON, James. *Human rights and world trade agreements*: using general exception clauses to protect human rights. New York: Office of the High Commissioner for Human Rights, 2005. p. 2.

27 AYALA, Natalia. Derechos humanos y globalización: un análisis preliminar para América Latina. *Desarrollo, Economía, Ecología y Equidad*, p. 2-17, 2003. p. 13.

28 FINNIS, John. *Natural law and natural rights*. Oxford: Clarendon Press, 2001. p. 260.

29 ZARRA, Giovanni. Right to regulate, margin of appreciation

First of all, States have the duty to *respect* human rights under all circumstances–except from situations in which there is a permission to restrict certain rights–but they do not have the legal duty to *ensure* or *protect* the human rights of people that live outside their territory or jurisdiction, as a general rule. Taking into consideration this situation, the extraterritorial responsibility of the home States of corporations involved in human rights violations–whether directly or through corporate policies that acquiesce in impairments caused by their subsidiaries in third countries–becomes an issue of current debate.

The State duty to respect and guarantee human rights is enshrined in some international treaties. The International Covenant on Civil and Political Rights, e. g., in Article 2(1) states that *"[e]ach State Party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind."*[30] The American Convention on Human Rights, for its part, in Article 1(1) provides that

> [t]he States Parties [...] undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination.[31]

At a very first moment, the duties of the State were defined as abstaining from violating fundamental freedoms, but this view changed progressively. Currently, the State duties are understood not only as obligations to respect, but also to protect and ensure civil and political rights, as well as economic, social and cultural rights by means of positive measures that give effectiveness to human rights. Under these conditions, in the inter-American human rights system, in accordance with the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, the States are obliged to take positive measures to ensure human rights, including in relation to their actual or potential violation by private parties.

The IACHR has addressed State responsibility for acts committed abroad when the acts or omissions have an impact outside the territory of the respondent State. For instance, in the inter-State petition PI-02 *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia,* Report on Admissibility No. 112/10, it was established that

> [T]he States not only may be held internationally responsible for the acts and omissions imputable to them within their territory but also for those acts and omissions committed wherever they exercise jurisdiction [...]. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.[32]

Similarly, the IACHR has also addressed State responsibility for acts committed in another country when the alleged violator of an international duty is under the authority or effective control of the respondent State. In this sense, in the Decision on Request for Precautionary Measures of the Detainees at Guantanamo Bay issued in March 2002 and the inter-State petition PI-02 *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia,* the IACHR stated that both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man have extraterritorial application with respect to acts of military occupation, military action or detention.[33]

That said, although the OAS Charter defines that transnational corporations are subject to the laws and jurisdiction of the courts of the countries in which they operate, no decisions have been issued establishing criteria for attributing State responsibility for the conduct of corporations operating in third countries. Under current inter-American standards, the acts of corporations abroad are not considered directly attributable to their State of origin, unless those companies perform government functions with the support and cooperation of

and proportionality: current Status in investment arbitration in light of Philip Morris v. Uruguay, *Revista de Direito Internacional*, v. 14, n. 2, p. 95-120, 2017. p. 96.

30 UNITED NATIONS. *International covenant on civil and political rights*. Available in: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

31 ORGANIZATION OF AMERICAN STATES. *American convention on human rights*. Available in: <https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm>.

32 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Report on admissibility no. 112/10 Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia (2010)*. § 90-91. Available in: <www.cidh.org/annualrep/2010eng/EC-CO.PI-02ADM.EN.doc>.

33 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Decision on request for precautionary measures of the detainees at Guantanamo Bay (2002). Available in: <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#MC25902>.; Report on INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Report on admissibility no. 112/10 Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia (2010)*. Available in: <www.cidh.org/annualrep/2010eng/EC-CO.PI-02ADM.EN.doc>.

the State. Despite the increasing relevance of corporations in the global scenario, legal personality as subjects of international law has not been granted to them[34] and the host States remain being responsible for human rights abuses committed, either by action, omission or acquiescence. In other words, in international law, the investor-company and its investment benefit from a consolidated legal bulwark to protect its activities but have, in international law, very few obligations vis-à-vis the host States and their population: there is a power relationship in disequilibrium with a hyper-protected corporate world on one side, and sometimes vulnerable communities on the other.[35]

Nevertheless, the standards developed on the obligation to respect, protect and guarantee rights in relation to the acts of private parties and decisions on extraterritorial liability issued by human rights bodies make it possible to rule out a merely territorial notion of jurisdiction. Some international courts have allowed for exceptions to the rule that private entities are distinct from the State when a government establishes a policy of absolute control over an industry, such as in the arbitral award of *Philips Petroleum Co. Iran v. Islamic Republic of Iran et al.*[36] or when the corporation exercises official powers in conducting the activity for which it has been awarded a concession, such as in the *Case of Ximenes-Lopes v. Brazil.*[37]

The universal human rights system has urged that the States change laws or policies that result conducive to human rights abuses in the territory of third countries, for instance, in the Guiding Principles on Business and Human Rights, stating that *"States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."*[38] The Guiding Principles were favorably received throughout the international community, not only by States, but also regional bodies; the General Assembly of the Organization of American States (OAS) endorsed the principles in June 2014.[39] Similarly, the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights provide in principle 24, with respect to the obligation to regulate, that

> All States must take necessary measures to ensure that non-State actors which they are in a position to regulate . . . such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.[40]

This is the present-day panorama in terms of inter-American standards on responsibility for human rights infringements committed by corporations operating in a third State. That said, on the topic of corporate responsibility for human rights violations, several initiatives have been taken since the 70s. This latter part will be focused on the allusion in arbitral awards to human rights abuses as a new route to make companies assume their responsibility for human rights violations related to the execution of their projects in the host States. This arbitral process practice, that is a result of the meeting of different actors and of the application of different normative sources, allows the internationalization of law or a private transnational regulation.[41] As we depart from the guidelines on international responsibility that up to now exist in the inter-American human rights system, the scope of this idea seeking to reconcile human rights imperatives with trade objectives will be referred to the States Parties of the OAS.[42]

34 A locus standi recognizing certain rights and obligations before the governments has been granted to corporations. This has been understood as a secondary or derived legal personality at the international level.

35 MONEBHURRUN, Nitish. Mapping the duties of private companies in international investment law. *Revista de Direito Internacional*, Brasília, v. 14, n. 2, p. 50-71, 2017. p. 53.

36 PHILIPS PETROLEUM CO. *Iran v. Islamic Republic of Iran et al.* (1989).

37 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Judgement of case Ximenes-Lopes v. Brazil (2006)*. Available in: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf>.

38 OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS. *Guiding principles on business and human rights, 2011*. Available in: <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

39 WOODS, Cindy. Engaging the U.N: guiding principles on business and human rights: the inter-american commission on human rights & the extractive sector, *Revista de Direito Internacional*, v. 12, n. 2, p. 571-588, 2015. p. 572.

40 ETO CONSORTIUM. *Maastricht principles on extraterritorial obligation of States in the area of economic, social and cultural rights*. Available in: < https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23>.

41 MANGE, Flávia Foz. As características do direito transnacional como metodologia: análise sob o enfoque dos aspectos processuais da arbitragem, *Revista de Direito Internacional*, v. 13, n. 3, p. 126-144, 2016. p. 127.

42 Currently, all 35 independent States in the Americas have rati-

Two paths approach companies to the observance of human rights: the corporate social responsibility and the corporate responsibility for human rights violations. The first one is a self-regulation and strategy established by the enterprises in order to improve their image and performance in social and environmental fields, for instance. The concept of responsible corporate conduct demands that companies, during their operations, observe not only national regulations, but also norms foreseen on the international and transnational legal frameworks.[43] The second one refers to the direct prosecution of corporations for human rights violations committed in the execution of their projects, whether in the host country or in the State of origin, through effective judicial remedies enabling victims access to justice and reparation. On this matter, much has been achieved on the first type of responsibility, but few has progressed the second one.

Human rights abuses committed by corporations operating in States affected by social inequality and high poverty could be aggravated by judicial barriers preventing an effective judicial remedy and equal access to justice and redress. In this sense, there is a nascent trend in the civil sphere toward removing jurisdictional barriers to civil proceedings and allowing better access to justice in national courts in territories other than those where the infringement took place. That said, considering that some issues such as the extraterritorial application of human rights standards and the State duty to control activities developed by the companies constituted under its jurisdiction are still pending, some legal scholars propose to work on improving what already exists.

National courts are the first ones called to consider human rights abuses, since conducting investigations and procedures in the territory where human rights violations are committed is more feasible, reliable and simple due to the proximity of the facts and evidence that could support arguments of the parties.[44] Nevertheless, one relevant problem is the impossibility of the States or lack of political will to take legal action against corporations being responsible for human rights abuses, all as a result to remain as an attractive place for foreign investment or due to lack of governance or effective rule of law.[45]

Before this situation, the considerations contained in arbitral awards related to conflicts arising from concessional agreements emerge as a solution in order to reconcile human rights imperatives with trade objectives. Even if the courts of international arbitration have as material jurisdiction interpreting investment agreements, and ruling about human rights impairments would depend on a clause granting jurisdiction, in the future, courts of international arbitration sensitive to corporate responsibility situations involving human rights could be envisaged, this from lending weight within the arbitral awards to arguments brought by the States about commitments to protect human rights, substantiating affectations to the rights of investors based on those reasons.[46]

The above could be possible from courts of arbitration gradually self-considered as actors in the international community, and not just as agents for resolving disputes.[47] The above could also be feasible from courts that include in their arbitral awards the imperative content of Article 36 of the OAS Charter previously mentioned. To conclude, taking into account the current absence of principal legal personality of corporations as subjects of international law and, as a result, the inability of human rights systems to judge them as direct responsible for human rights infringements, also added to the impossibility or lack of political will–in some cases–of national courts to prosecute them, considerations contained within arbitral awards related to human rights disregards by corporations could be a route to reconcile human rights imperatives with trade objectives and ensure compensations for the victims.

fied the OAS Charter.

43 ZIERO, Gabriel Webber. O conceito de conduta empresarial responsável à luz dos ordenamentos jurídicos brasileiro, internacional e transnacional, *Revista de Direito Internacional*, v. 13, n. 3, p. 81-94, 2016. p. 86.

44 RIVERA, Humberto Cantú. Empresas y derechos humanos: ¿hacia una regulación jurídica efectiva, o el mantenimiento del status quo?, *Anuario Mexicano de Derecho Internacional*, v. 13, p. 313-354, 2003. p. 341.

45 RIVERA, Humberto Cantú. Empresas y derechos humanos: ¿hacia una regulación jurídica efectiva, o el mantenimiento del status quo?, *Anuario Mexicano de Derecho Internacional*, v. 13, p. 313-354, 2003. p. 341.

46 RIVERA, Humberto Cantú. Empresas y derechos humanos: ¿hacia una regulación jurídica efectiva, o el mantenimiento del status quo?, *Anuario Mexicano de Derecho Internacional*, v. 13, p. 313-354, 2003. p. 341.

47 RIVERA, Humberto Cantú. Empresas y derechos humanos: ¿hacia una regulación jurídica efectiva, o el mantenimiento del status quo?, *Anuario Mexicano de Derecho Internacional*, v. 13, p. 313-354, 2003. p. 341.

5. Conclusion

In an era in which both the strengthening of the global market and protection of human rights are essential aims, mechanisms to render them compatible when they clash must be implemented. It is not about establishing protectionist barriers against investment agreements, conceiving them as a threat to guarding people from the risks and insecurities markets bring with them, or to reach an economic growth out of proportion without considering peoples well-being over the course. Societies must learn from the past, and past experiences have taught that living in economic isolation or dehumanization threaten the existence of societies. In addition, from the cases of certain Latin American countries, present is teaching us that market and human rights are complements in several aspects.

One could not talk about a weak governance; one could talk about collaboration between public and private sectors to manage global affairs that currently leaves behind human rights. Some point to the corporations; some others point to the North Atlantic system. Anyway, it does not have legal personality to appear before a human rights court to answer why human rights are left behind when negotiating or executing agreements. One can work on improving alternatives that already exist. One mechanism was exposed seeking to prove that human rights imperatives and trade objectives can be reconciled. In this mechanism, political will of governments is essential by making use of human rights exceptions in arbitral proceedings.

In this mechanism, human rights triumph as an exception within the execution of a set of provisions contained in agreements. Global market is a means to improve living standards, and human rights realization defines a great part of what the international community accepts as better living standards. In this sense, as several times stated before the IACHR, companies are vital actors within societies and real development must be achieved through their actions. Regarding human rights and extractive industries in Latin America, we conclude that even if international standards on responsibility of corporations and their States of origin for human rights abuses are still strengthening, positive developments represented in the extraterritorial responsibility developed by human rights bodies as well as human rights exceptions further used in arbitral proceedings, can be arising.

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Multinacionais *fast fashion* e direitos humanos: em busca de novos padrões de responsabilização

Multinational fast fashion firms and human rights: new standards of liability

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Multinacionais *fast fashion* e direitos humanos: em busca de novos padrões de responsabilização*

Multinational fast fashion firms and human rights: new standards of liability

Laura Germano Matos**
João Luis Nogueira Matias***

Resumo

O artigo avalia como a expansão das empresas multinacionais por meio da adoção de cadeias terceirizadas nas indústrias de vestuário *fast fashion* produz uma série de violações a direitos dos trabalhadores, que se apresentam como danos a direitos humanos. As cadeias terceirizadas são muito ramificadas e extensas, o que dificulta o seu mapeamento e a constatação dos atores envolvidos e possíveis violadores. Por meio de revisão bibliográfica, diagnosticou-se que o modelo tradicional de responsabilização civil, baseado no binômio dano e nexo causal, já não atende, de forma eficiente, às necessidades de mitigar e reparar violações. Com base nas diretrizes dos Princípios Orientadores sobre Empresas e Direitos Humanos da Organização das Nações Unidas, novos caminhos para uma atuação ética e sustentável das empresas são estabelecidos, com diferentes visões sobre a empresa multinacional e sua atuação global. A pesquisa é de natureza qualitativa e constitui uma investigação indireta e de método dialético. Constatou-se que a empresa multinacional atua por meio de uma rede articulada de fornecedores, exercendo amplo controle sobre eles, o que demonstra a importância da noção de esfera de influência, a qual ainda precisa de maior detalhamento quanto à sua definição e alcance, mas pode ser uma das soluções para estabelecer novos paradigmas de responsabilização por danos a direitos humanos causados por grandes cadeias terceirizadas, aumentando as expectativas de reparações.

Palavras-chave: Direitos Humanos. Empresas multinacionais. Terceirização. Vestuário *Fast Fashion*. Responsabilidade Civil.

Abstract

This paper analyses how the expansion of multinational firms through the adoption of third-party chains in the *fast fashion* clothing industry spawns a series of violations to workers rights, which are displayed as human rights violations. The third-party chains are intensively ramified and extense, which makes their mapping difficult and the uncovering of the actors and possible perpetrators involved even more difficult. Through bibliohgraphic revision, it was possible to diagnose that the conventional civil liability fra-

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mework, based on the bynom damage-causal link, no longer suits efficiently the nees to mitigate and repair these violations. Beginning in the UN Guiding Principles on Business & Human Rights directives, new paths for an ethical and susteinable operation of the firms are established, with different visions of the multinational firm and its global operation. The metodology used was a qualitative research, by the means of an indirect investigation and the dialetical method, which possibilitates to perceive that the multinational firm operates through an articulated network of suppliers, applying vast control over them, demonstrating teh importance of the notion of sphere of influence, which still lacks a more precise definition, nevertheless can be one of the solutions to establish new paradigms of liability to human rights violations caused by big third-party chains, enhancing the expectations of reparation.

Keywords: Human Rights. Multinational Corporations. Outsorcing. Fast Fashion. Civil Liability.

1. Introdução

A concepção dos direitos humanos na esfera internacional marca a busca por um novo paradigma de cooperação entre os países, com a finalidade de efetivar direitos básicos de todo ser humano e, consequentemente, de resguardar o alcance da dignidade humana, o que é destacado por Flavia Piovesan quando explica que "a abertura do diálogo entre as culturas, com respeito à diversidade e com base no reconhecimento do outro, como ser pleno de dignidade e direitos, é condição para a celebração de uma cultura dos direitos humanos, inspirada pela observância do mínimo ético irredutível, alcançado por um universalismo de confluência."[1]

Isso significa que a internacionalização dos direitos humanos demanda a criação de padrões de proteção mínimos que devem ser efetivamente adotados de maneira global pelos Estados, independentemente do seu âmbito de proteção normativo interno, sendo tema de legítimo interesse internacional, transcendendo os parâmetros estritamente domésticos e questionando a soberania absoluta dos Estados.

Os direitos humanos ligados à esfera trabalhista encontram proteção especial no âmbito internacional, com atuação da Organização das Nações Unidas e da Organização Internacional do Trabalho, que empregam esforços para produzir Convenções que vinculem os Estados às normas de padrão mínimo internacional. Questões como o combate ao trabalho escravo e em condições degradantes, as piores formas de trabalho, o trabalho infantil, as jornadas exaustivas e a segurança no ambiente de trabalho constituem temas que ganharam força na esfera de proteção internacional e buscam estabelecer condições mínimas que os Estados devem adotar em relação a seus trabalhadores.

Por sua vez, a década de 1990 marcou uma época de enorme expansão da globalização corporativa. Surgem inúmeras empresas multinacionais que direcionam sua atividade econômica para diversos países, operando de maneira global e conectada em tempo real. Com isso, nasce um novo modelo de produção, de consumo e, portanto, de relações de trabalho, trazendo novos desafios na proteção dos direitos humanos.

A globalização, sob o ponto de vista econômico, favoreceu a expansão de mercados consumidores e de investimento, e as empresas, também passaram a adquirir novos formatos e dimensões, capazes de aumentar sua área de atuação. Reich explica que foi a partir da década de 1970, as grandes empresas se tornaram muito mais competitivas, globais e inovadoras nos Estados Unidos:

> As mudanças começaram quando as tecnologias desenvolvidas pelo governo para os embates da Guerra Fria se incorporaram em novos produtos e serviços. Daí surgiram oportunidades para novos concorrentes nos transportes, nas comunicações, na manufatura e nas finanças. Tudo isso provocou rupturas no sistema de produção estável e, a partir de fins da década de 1970, em ritmo cada vez mais acelerado, forçou todas as empresas a competir mais intensamente por clientes e investidores.[2]

As empresas multinacionais são produto dessa nova dimensão da globalização e da necessidade de internacionalização mais intensa do comércio. Como atividade organizada, resultado de um feixe de contratos,[3] a empresa contemporânea globalizada atua estabelecendo núcleos em vários países, sujeitos a uma visão estratégica comum, caracterizando-se como verdadeira empresa

1 PIOVESAN, Flávia. *Direitos humanos e o direito constitucional internacional*. 16. ed. São Paulo: Saraiva, 2016. p. 241.

2 REICH, Robert B. *Supercapitalismo:* como o capitalismo tem transformado os negócios, a democracia e o cotidiano. Rio de Janeiro: Elsevier, 2008. p. 5.

3 COASE, Ronald. *A firma, o mercado e o direito*. São Paulo: Forense, 2016.

plurisocietária.[4]

Apesar dos inúmeros benefícios das atividades das empresas multinacionais, como o fornecimento a preços competitivos de bens e serviços que os consumidores queiram comprar, promoção do desenvolvimento do capital humano, a criação de oportunidades de emprego e transferência de tecnologia entre os países, muitos são os impactos negativos que decorrem de seu modelo produtivo.

Notícias de trabalho desumano, de acidentes pela falta de segurança nas fábricas de vestuários, de crianças trabalhando em plantações de empresas de alimentos e bebidas, de imigrantes sendo vítimas do *truck system*[5] e de trabalho degradante na construção de grandes empreendimentos, tornaram-se recorrentes em diversos países do mundo, principalmente nos subdesenvolvidos, que enfrentam graves crises econômicas e políticas.

Alguns problemas de ordem jurídica surgem com a expansão das empresas multinacionais. Como destaca Ruggie, não há uma regulamentação global de empresas multinacionais. Cada uma das entidades que fazem parte da cadeia de empresas terceirizadas se submete à jurisdição específica do país em que está estabelecida[6], com fragilização da proteção de direitos humanos.

Percebe-se que não há um marco legal comum de proteção aos direitos violados. A empresa é submetida às regras de proteção específicas dos lugares onde atua, e, portanto, o interesse na busca de mão de obra mais barata é um dos fatores prioritários na escolha dos locais onde estabelecerá sua produção.

Além disso, muitos países não possuem um adequado sistema legal de proteção trabalhista ou são permissivos para garantir a manutenção do investimento local da empresa. No entanto, mesmo em países em que a legislação é mais protetiva, as leis não são efetivamente implementadas ou a fiscalização não é capaz de conter os abusos em face dos direitos humanos dos trabalhadores.

É esse cenário que procura enfrentar a Organização das Nações Unidas, com os Princípios Orientadores sobre Empresas e Direitos Humanos, encabeçado por John Ruggie. Buscou-se fornecer uma plataforma global comum de padrões normativos e orientações de políticas confiáveis para Estados, empresas e sociedade civil com base em três pilares — proteger, respeitar e remediar — divididos em 31 (trinta e um) princípios.

Aponta-se como uma das necessidades urgentes a construção de um novo modelo jurídico de responsabilidade, social e civil, das empresas multinacionais. O modelo tradicional de responsabilização civil direta, como é o caso do modelo brasileiro, baseado no binômio dano e nexo causal, aponta insuficiências e já não alcança os novos formatos empresariais que terceirizam a maior parte de seus serviços de produção. Tais formatos mantêm em sua rede diversas empresas menores numa cadeia de suprimentos que parece não ter fim. Com isso, o trabalhador fica cada vez mais distante da empresa para a qual produz, e esta cada vez mais distante da responsabilização pelos danos que causa, dificultando os mecanismos de reparação.

O objetivo do presente artigo é analisar os novos parâmetros de reparação que podem ser utilizados, em particular nas cadeias de vestuário *fastfashion*. Para isso, inicialmente, o artigo identifica os maiores danos causados pela terceirização nessa indústria e demonstra seu alto potencial violador de direitos humanos. Em seguida, o artigo apresenta o modelo clássico de responsabilização, expondo as suas deficiências. Na sequência, será exposto como o conceito de esfera de influência, apesar de ainda pouco debatido pela doutrina, pode ser uma ferramenta adequada para os novos paradigmas do direito privado em relação às empresas multinacionais e para a construção de uma política de fortalecimento da cultura de direitos humanos. Ao final serão apresentadas as conclusões. A pesquisa é de natureza qualitativa, por meio de investigação indireta e do método dialético.

2. Terceirização nas cadeias de vestuário:

4 ANTUNES, José Augusto Quelhas Lima Engracia. *Os grupos de sociedades:* estrutura e organização jurídica da empresa plurisocietária. Porto: Almedina, 2002.

5 Termo em inglês que representa as condutas vedadas no ordenamento jurídico brasileiro nos §§ 2º e 3º do art. 462 da CLT, mais conhecido como servidão por dívida. É o caso em que o empregador obriga seus empregados a gastarem seus salários dentro da própria empresa, gerando endividamentos. É mais comum no meio rural, quando o empregador faz com que os empregados comprem os utensílios de subsistência na própria fazenda, com o posterior desconto nos salários.

6 RUGGIE, John Gerald. *Quando negócios não são apenas negócios*. São Paulo: Planeta Sustentável, 2014.

UM MODELO PRODUTIVO POTENCIALMENTE VIOLADOR DE DIREITOS HUMANOS

A terceirização da mão de obra ou *outsourcing*, que também costuma ser denominada no Brasil de desverticalização, subcontratação, focalização, parceria ou ainda colocação de mão de obra, é uma forma de contratação indireta de trabalhadores, mediante outras empresas, suas fornecedoras, chamadas também de interpostas. Na terceirização, há uma empresa que necessita de mão de obra para o desenvolvimento de atividades relacionadas à sua produção, e contrata uma outra empresa para que esta forneça o serviço e lide com os trabalhadores, desvinculando-se, portanto, das obrigações que surgem com as contratações.

Delgado descreve terceirização como

> o fenômeno pelo qual se dissocia a relação econômica de trabalho da relação justrabalhista que lhe seria correspondente. Por tal fenômeno insere-se o trabalhador no processo produtivo do tomador de serviços sem que se estendam a este os laços jus trabalhistas, que se preservam fixados com uma entidade interveniente.[7]

A terceirização da mão de obra é recorrente em quase todos os países, mas assume dimensões exponenciais quando tratamos de empresas multinacionais. Isso porque uma empresa multinacional estabelece conexões com mais de uma fornecedora em diversos países, formando uma cadeia extensa e ramificada.

Segundo Ruggie, para muitas empresas, a globalização significou a adoção de modelos operacionais baseados em redes, envolvendo múltiplas camadas de entidades corporativas e diferentes formas de relacionamentos corporativos espalhados por vários países. Essas redes de terceirização envolvem privação de certo grau de controle, razão pela qual um empreendimento ampliado pode melhorar a sua eficiência econômica, mas também aumentar os desafios que as empresas enfrentam na administração de suas cadeias globais de valor, elevando a vulnerabilidade da empresa como um todo[8].

As cadeias globais de valor são o conjunto de atividades produtivas necessárias até o objetivo final daquela empresa, ou seja, até o produto acabado. Como na terceirização essas etapas são realizadas por várias empresas em diversos países, a cadeia de valor torna-se global, incorporando todas as empresas e fornecedoras que atuam no processo produtivo. Essa noção mais abrangente de cadeia produtiva é uma tendência no mundo corporativo, implicando uma nova forma de enxergar as empresas. Estas fazem parte de um todo maior, tendo sua dimensão medida através de sua esfera de influência.

Em pesquisa realizada pela ONU para o estabelecimento dos princípios orientadores, constatou-se que mais de 40% dos casos de violação a direitos humanos dizem respeito a atos realizados por terceiros aos quais a empresa é vinculada e quase todos os relatos aconteciam em países ainda em desenvolvimento. Além disso, a indústria de varejo e de bens de consumo ocupa o segundo lugar na posição entre os setores que mais violam os direitos humanos, sendo a Ásia, a África e a América Latina as regiões mais afetadas.[9]

A indústria de vestuário, formada em grande parte por empresas multinacionais, é uma das que mais apresenta casos de desrespeito a direitos humanos trabalhistas, exatamente pelo tipo de cadeia produtiva que estabelece. As empresas *fastfashion* são conhecidas mundialmente pelo seu tipo de produção: são peças de vestuário de baixo custo, produzidas em larga escala, com alto nível de descarte, pois se tornam rapidamente obsoletas, e divididas em várias coleções ao longo do ano, permitindo que, praticamente, toda semana as lojas recebam novas peças: é o caso das marcas Zara, H&M, Forever 21, Gap e tantas outras.

Segundo Moro, no sistema *fast fashion*,

> para seguir com este modelo de negócio, as empresas se concentram no seu *core business*, que corresponde ao marketing, gestão de marcas, comercialização, *design* e pesquisas, repassando a terceiros a produção das peças de vestuário, onde é predominante a subcontratação. Com essas ramificações, as empresas buscam o aumento de seu lucro, desvinculando-se dos encargos da mão de obra.[10]

Alguns dados reforçam a expansão da terceirização e sua utilização como modelo produtivo elementar das empresas de vestuário *fast fashion*:

> Em 1990, a multinacional italiana Benetton, possuía

7 DELGADO, Mauricio Godinho. *Curso de direito do trabalho.* 13. ed. São Paulo: LTr, 2014. p. 452.

8 RUGGIE, John Gerald. *Quando negócios não são apenas negócios*. São Paulo: Planeta Sustentável, 2014.

9 RUGGIE, John Gerald. *Quando negócios não são apenas negócios*. São Paulo: Planeta Sustentável, 2014.

10 MORO, R. C. L. *Responsabilidade social na cadeia de fornecedores do varejo de vestuário de moda:* estudo de múltiplos casos. 2016. 165 f. Dissertação (Mestrado em Têxtil e Moda) – Escola de Artes, Ciências e Humanidades, Universidade de São Paulo, São Paulo, 2016.

> um centro nevrálgico que incluía a direção central da empresa, criação e marketing, logística e informática e o controle da qualidade do corte, das cores e do produto acabado. Neste núcleo não trabalhavam mais de mil pessoas ao todo. No entanto, a partir deste centro controlava-se uma rede de vendas a varejo composta por 4.500 lojas franqueadas em 52 países que empregavam cerca de 40.000 pessoas e também uma rede de produção descentralizada de 450 empresas subcontratadas que empregavam aproximadamente 24.000 pessoas.[11]

Como consequência desse modelo veloz de produção, há a necessidade de reduzir os custos das peças em cada etapa de fabricação, sendo certo que a mão de obra costuma ser um dos itens eleitos para a redução. A busca por trabalhadores em países asiáticos e latino-americanos reflete a procura por mão de obra barata, sem proteção ou fiscalização adequada do Estado.

As estratégias empresariais na difusão da terceirização dos contratos de trabalho no âmbito brasileiro têm passado muitas vezes pela intensificação do uso predatório da mão de obra como forma de obtenção forçada de ganhos adicionais de produtividade. Pochmann afirma que essa difusão da terceirização veio a consolidar um modelo de elevada rotatividade no emprego, contida remuneração e longas jornadas de trabalho.[12]

Em face das péssimas condições de trabalho oferecidas, chama a atenção um tipo de mão de obra recorrente utilizada pelas indústrias de vestuário, inclusive em vários casos[13] descobertos no Brasil: os imigrantes em situação irregular.

São trabalhadores que, devido precisamente à sua condição de irregularidade, sentem-se desabrigados pelo Estado, submetendo-se a esse tipo de exploração. Trabalhadores bolivianos e peruanos são os mais citados nos relatórios de flagrantes no estado de São Paulo, principal sítio de produção têxtil do país.[14]

Quando se trata de patamares mínimos de proteção internacional, não há, necessariamente, uma busca de adequação ao modelo de proteção adotado localmente pelo país em questão. Em vez disso, a preocupação gira em torno de estabelecer aquilo que deve ser inserido no âmbito de custódia internacional, independentemente do nível de amparo trabalhista que um país garante via legislação própria.

Dessa forma, dentre as principais violações a direitos humanos gerados pela indústria *fast fashion,* estão a exploração da mão de obra em condições análogas à da escravidão, exigência de jornadas exaustivas, baixo valor da remuneração, uso da mão de obra infantil, e falta de higiene e segurança nos locais de trabalho.

A maior parte desses problemas já é objeto de regulamentação no âmbito das Convenções da Organização Internacional do Trabalho, que serve como parâmetro de adequação. São essas violações inaceitáveis que mobilizam a construção de novas formas mais eficazes de proteção e de reparação coletiva de danos causados a trabalhadores inseridos nesses modelos produtivos globalizados.

Os impactos que as empresas multinacionais são capazes de produzir podem ser geradores de inúmeros tipos de danos. Quando os danos afetam uma coletividade de trabalhadores por meio de um uso sistemático do modelo de terceirização em cadeias ramificadas, não há apenas um dano limitado àqueles trabalhadores envolvidos. A violação de direitos humanos que fere o alcance da dignidade humana por meio de uma conduta omissiva da empresa diante da realidade local é apta a gerar danos patrimoniais, morais, individuais, coletivos e sociais.

Por óbvio, cada trabalhador vítima das condições degradantes faz jus à reparação individualmente considerada por outros tipos de danos, inclusive moral, e às verbas trabalhistas garantidas naquele país.

No presente artigo, busca-se analisar a necessidade de responsabilização da empresa multinacional por danos amplamente considerados, inclusive por danos co-

11 JAKOBSEN, Kjeld Aagaard. *Relações transnacionais e o funcionamento do regime trabalhista internacional*. 2009. Dissertação (Mestrado em Ciência Política) – Faculdade de Filosofia, Letras e Ciências Humanas da Universidade de São Paulo, São Paulo, 2009. p. 49.

12 POCHMANN, Marcio. *A transnacionalização da terceirização da contratação do trabalho*. Disponível em: <http://www.cnts.org.br/public/arquivos/Pesquisa_TG_Pochmann.pdf>. Acesso em: 16 jan. 2018.

13 O site Repórter Brasil realizou pesquisa que aponta diversas empresas de vestuário que foram flagradas em uso de mão de obra de imigrantes irregulares no Brasil. A pesquisa demonstra a situação comum a todas elas: as condições degradantes que os trabalhadores estavam submetidos. Disponível em: <http://reporterbrasil.org.br/2012/07/especial-flagrantes-de-trabalho-escravo-na-industria-textil-no-brasil/>. Acesso em: 28 jan. 2017.

14 Nesse sentido, dispõe a Comissão Parlamentar de Inquérito instaurada pelos vereadores de São Paulo para apuração de trabalho em condições análogas à da escravidão. Disponível em: <http://www1.camara.sp.gov.br/central_de_arquivos/vereadores/CPI-TrabalhoEscravo.pdf> Acesso em: 25 fev. 2017.

letivos e sociais, que afetam a coletividade por meio de comportamentos empresariais socialmente reprováveis.

A necessária responsabilização não será alcançada por meio do modelo clássico de responsabilidade civil, como se passa a demonstrar.

3. A INSUFICIÊNCIA DO MODELO CLÁSSICO DE RESPONSABILIZAÇÃO CIVIL

A principal dificuldade que decorre da terceirização de cadeias tão extensas reside em como fazer uma empresa multinacional assumir a responsabilidade de respeitar os direitos humanos em relação a todas as empresas que compõem a sua cadeia de valor, e não simplesmente repassar essa responsabilidade a cada uma das unidades fornecedoras contratadas.

O modelo predominante de responsabilização civil por danos, inclusive o brasileiro, estabelece uma limitação na medida da responsabilidade da pessoa jurídica, não havendo, como regra geral, comunhão de débitos e eventuais obrigações entre as empresas e suas fornecedoras. A regra é que uma empresa assuma responsabilidade apenas pelo pagamento da mão de obra que contrata diretamente, o mesmo ocorrendo com os danos que gera.

No ordenamento jurídico brasileiro, o artigo 186 do Código Civil determina que "aquele que, por ação ou omissão voluntária, negligência ou imprudência, violar direito e causar dano a outrem, ainda que exclusivamente moral, comete ato ilícito". Além disso, o modelo brasileiro adota, como regra geral a responsabilidade civil baseada na culpa, estabelecendo no art. 927 do Código Civil que aquele que, por ato ilícito, causar dano a outrem, fica obrigado a repará-lo.

Como pressupostos dessa responsabilização, há a necessidade de conjugação da conduta (omissiva ou comissiva), ocorrência de dano e o nexo causal entre ambos. Trata-se de uma fórmula de investigação e atribuição da responsabilidade àquele que efetivamente causou o dano, apurando-se com rigidez o nexo causal entre a conduta praticada e o dano ocorrido.

Dessa forma, percebemos que essa configuração não estabelece maiores possibilidades de condenação no caso das empresas multinacionais, à medida que o nexo causal só seria estabelecido com a empresa que causou o dano diretamente, sendo, no caso das cadeias *fastfashion*, apenas a fornecedora de mão de obra que contratou o trabalhador.

Além disso, apesar de o Código Civil brasileiro também apontar hipóteses de responsabilidade civil objetiva indireta, estas não incluem as empresas em relação às suas fornecedoras de mão de obra, de modo que não há amparo legal expresso para efetivar tais responsabilizações sob essa legislação nacional.

A legislação pátria trabalhista, também, vem se mostrando insuficiente para prestigiar as reparações por danos nas cadeias produtivas, não apresentando soluções completamente viáveis em seus institutos e não enfrentando especificamente as violações causadas a direitos humanos amplamente considerados, tratando mais especificamente de débitos trabalhistas previstos na legislação local. Delgado explica que:

> uma singularidade desse desafio crescente reside no fato de que o fenômeno terceirizante tem se desenvolvido e alargado sem merecer, ao longo dos anos, cuidadoso esforço de normatização pelo legislador pátrio. Isso significa que o fenômeno tem evoluído, em boa medida, à margem da normatividade heterônoma estatal, como um processo informal, situado fora dos traços gerais fixados pelo Direito do Trabalho do país. Trata-se de exemplo marcante de divórcio da ordem jurídica perante os novos fatos sociais, sem que se assista a esforço legiferante consistente para se sanar tal defasagem jurídica.[15]

A Súmula 331 do Tribunal Superior do Trabalho merece destaque, pois, durante anos, foi o único parâmetro de regulação do tema, diante da falta de lei que estabelecesse os caminhos para a normatização da terceirização. A súmula, mesmo diante da aprovação da Lei nº 13.419/17, ainda merece ser objeto de análise, pois não foi cancelada e a Reforma Trabalhista não resolveu inúmeras questões que são alvo de discussão, principalmente em razão de que as maiores alterações ocorreram especificamente em relação ao trabalho temporário.

A súmula estabelece os critérios para que a terceirização seja considerada lícita, bem como o modelo de responsabilidade subsidiária, por meio dos conceitos de atividade-meio e atividade-fim das empresas. De acordo com o seu conteúdo, só há possibilidade de terceirizar a produção referente às atividades intermediárias da empresa, que não constituam sua atividade-fim.

15 DELGADO, Mauricio Godinho. *Curso de direito do trabalho.* 13. ed. São Paulo: LTr, 2014. p. 454.

Há, contudo, uma enorme dificuldade em estabelecer o que pode ser considerado como atividade-meio, haja vista que a terceirização é difundida em praticamente todos os setores da empresa, especialmente quando tratamos de empresas multinacionais. De acordo com esse entendimento, uma empresa multinacional de vestuário estaria praticando terceirização ilícita, pois a produção de suas peças é atividade-fim, própria da sua atividade essencial, e não seria admitida pelo ordenamento jurídico brasileiro.

Uma outra dificuldade enfrentada com a aplicação da súmula é o estabelecimento da responsabilidade subsidiária da empresa tomadora dos serviços. Apenas no caso de inadimplemento por parte da oficina que contrata diretamente se poderia alcançar a tomadora de serviços, depois de esgotadas as tentativas de execução da primeira. Além disso, é necessário que a empresa tomadora tenha participado do processo de conhecimento, não sendo admitida sua mera execução ao final.

A responsabilidade subsidiária encontra obstáculo, pois, quando tratamos de empresas multinacionais, não há uma conexão facilmente perceptível entre a empresa e suas subcontratadas nas cadeias extensas e ramificadas. Estabelecer o elo entre tantas empresas intermediárias no processo de produção e a empresa multinacional torna-se desafio e ônus imposto aos trabalhadores, ou ao titular da ação, nos casos em que o Ministério Público do Trabalho atua, por exemplo.

Com a Lei nº 13.419/2017, houve a tentativa de sistematização do conceito, e a terceirização passou a ser permitida em qualquer aspecto da atividade empresarial, em clara contraposição com a redação da súmula do TST.[16] A abertura consagrada pela reforma legislativa não corresponde às expectativas de facilitar os processos de reparação de violações por direitos humanos, corroborando o entendimento de que não dispomos de uma base normativa interna sólida alinhada com os ditames de proteção internacional.

O problema da extensão da responsabilidade a outras empresas reside no fato de que, na prática, na maioria das vezes, as empresas fornecedoras não são formalmente estabelecidas, com patrimônio constituído ou mesmo com porte econômico para suprir os valores de reparação a danos a direitos humanos. São pequenas fábricas ou oficinas precariamente estabelecidas, de modo que, mesmo que haja efetiva condenação, não há patrimônio suficiente capaz de arcar com tais custos.

Quando chamadas a responder pela situação de seus trabalhadores, segurança no ambiente de trabalho, condições sanitárias, pagamento de encargos trabalhistas e outras condenações de ordem civil, a informalidade e a ausência de patrimônio dessas fábricas e oficinas são os grandes obstáculos na reparação de violações.

No Brasil, o ressarcimento a violações eventualmente causadas não é facilmente obtido. Há tanto a dificuldade em estabelecer o real empregador daquele trabalhador, considerando todas as oficinas, fábricas e empresas intermediárias que compõem a cadeia, como há uma dificuldade em conseguir obter os valores decorrentes das condenações de empresas que atuam informalmente, seja pela falta de capital, seja pela impossibilidade de encontrar os seus responsáveis, já que muitas oficinas simplesmente são fechadas e seus sócios não mais encontrados, quando autuados pelo Ministério Público do Trabalho, por exemplo.

Delgado faz uso de um conceito inovador para estabelecer um vínculo de trabalho entre o tomador dos serviços e o trabalhador, a subordinação estrutural. Para ele, a subordinação estrutural estaria caracterizada pela inserção do trabalhador na dinâmica produtiva, independentemente de o trabalhador receber ou não ordens diretas. Nesses casos de terceirização, o trabalhador acolheria, estruturalmente, a dinâmica e o funcionamento da empresa, sendo suficiente para estabelecer um vínculo de emprego, como exposto pelo autor:

> Na subordinação estrutural, o trabalhador pode realizar tanto atividade-meio como atividade-fim do tomador de serviços; será, porém, subordinado caso se ajuste, estruturalmente, ao sistema organizacional e operativo da entidade tomadora de serviços, absorvendo sua cultura e sua lógica empresariais durante o ciclo de prestação de seu labor, e, na medida dessa aculturação, seu poder direcionador e dirigente.[17]

No entanto, a interpretação da corte trabalhista por meio da Súmula 331 e o conceito de subordinação estrutural buscam estabelecer quem detém o vínculo para

16 A Lei nº 13.467/17, em seu art. 2°, alterou a redação do art. 4º-A da Lei nº 6.019/74, que passou a dispor: Art. 4º-A. Considera-se prestação de serviços a terceiros a transferência feita pela contratante da execução de quaisquer de suas atividades, inclusive sua atividade principal, à pessoa jurídica de direito privado prestadora de serviços que possua capacidade econômica compatível com a sua execução.

17 DELGADO, Mauricio Godinho. *Curso de direito do trabalho.* 13. ed. São Paulo: LTr, 2014. p. 307.

fins de relação empregatícia, de acordo com as normas e conceitos da legislação brasileira, condicionando esse reconhecimento ao alcance da responsabilização. Difere, portanto, ao nosso ver, da intenção almejada nas diretrizes internacionais, que, independentemente do âmbito interno de proteção do país, busca estabelecer melhores mecanismos de responsabilização por danos a direitos humanos, amplamente considerados.

Os objetivos, portanto, são diversos. No presente artigo, consideramos que o estabelecimento de vínculo empregatício direto entre a empresa multinacional e todos os trabalhadores que atuam na produção de vestuário na sua cadeia se torna muitas vezes inviável do ponto de vista prático, e vai de encontro aos objetivos do uso da terceirização pela empresa. Além disso, consideramos que a empresa multinacional pode ser responsabilizada por danos a direitos humanos mesmo que não detenha o vínculo da relação empregatícia, considerando a potencialidade de prejuízo de sua atividade econômica.

Nesse caso, defendemos um modelo mais amplo de responsabilização e reparação pelos danos causados a direitos humanos, e não uma irrestrita vinculação da empresa multinacional a todos os trabalhadores que, de algum modo, fazem parte de seu processo produtivo, sob pena de se inviabilizar o uso de tais mecanismos empresariais. Ampliar a noção de vínculo empregatício não nos parece ser necessariamente o caminho mais viável para alcançar os parâmetros internacionais de proteção a direitos humanos.

A empresa multinacional possui uma esfera de influência muito abrangente, ainda que busque fragmentar alguns aspectos de sua produção. A influência que exerce em torno de suas subsidiárias e consequentemente, das oficinas e fábricas subcontratadas, é uma das premissas para avaliar o compromisso com os impactos de sua atividade.

Rocha define que a responsabilidade civil possui três funções: reparatória para os danos patrimoniais, compensatória para os danos extrapatrimoniais e instrumental para a efetividade de direitos e salvaguarda de valores socialmente relevantes.[18] Assim, o instituto da responsabilização civil tem fins diversos e não se limita à estrita reparação em face de danos já ocorridos. Ele, também, possui uma finalidade preventiva que busca incentivar novos modelos de condutas de agentes sociais, sendo uma forma de tutela inibitória.

Em relação às empresas multinacionais, as diretrizes internacionais possuem um objetivo mais amplo do que garantir o recebimento de verbas trabalhistas aos empregados que fazem parte daquele processo produtivo. Os padrões internacionais, sobretudo os Princípios Orientadores sobre Empresas e Direitos Humanos da Organização das Nações Unidas visam fomentar novas práticas empresariais, gerando mudança no comportamento omisso de grandes empresas em relação aos direitos humanos e aumentando seu âmbito de proteção.

O foco central desse problema, portanto, passa a ser a discussão dos argumentos que ensejam a construção de um novo modelo de responsabilidade civil das empresas multinacionais que operam globalmente pelos danos a direitos humanos dos trabalhadores que toda a sua cadeia produtiva venha a gerar. Na realidade, trata-se de uma nova visão da estrutura da empresa multinacional. São novos paradigmas a serem adotados pelos Estados e pelas próprias empresas, na busca de adequação aos ditames internacionais. Defende-se que a mitigação dos impactos que as multinacionais são capazes de produzir pode ocorrer por meio de um modelo mais eficiente de responsabilidade civil, com base em prevenção e reparação de danos, sugerindo-se a aplicação do conceito de esfera de influência da empresa.

4. A NOÇÃO DE ESFERA DE INFLUÊNCIA COMO NÚCLEO DE UM NOVO PARADIGMA DE RESPONSABILIZAÇÃO CIVIL PARA EMPRESAS

Entre os pilares dispostos nos Princípios Orientadores sobre Empresas e Direitos Humanos, destaca-se o que estabelece que as empresas devem respeitar os direitos humanos, em seu aspecto negativo, no sentido de absterem-se de praticar condutas geradoras de violações, e em seu sentido positivo, atuando no enfrentamento dos impactos negativos sobre os direitos humanos, independente do seu grau de envolvimento.

Além do cumprimento das leis e políticas públicas locais, que pressupõem uma atuação prévia do Estado,

18 ROCHA, Afonso de Paula Pinheiro. *Responsabilidade civil trabalhista contemporânea:* delineamentos atuais e diretivas para o manejo da responsabilidade civil contemporânea no âmbito trabalhista. 2016. Tese (Doutorado) – Centro de Ciências Jurídicas, Universidade de Fortaleza, Fortaleza, 2016.

as empresas devem atuar de maneira diligente e independente de tais normas internas, o que indica seu nível de responsabilidade social. Há uma forte tendência atual para a construção de uma cultura ética empresarial global, amparada no dever compartilhado de proteção de direitos humanos por todos os atores mundiais envolvidos. A eficiência na proteção dos direitos humanos depende de uma atuação convergente de Estados, empresas e sociedade civil na busca por melhores resultados.

As empresas multinacionais podem ser geradoras de violações por meio de suas próprias atividades ou por intermédio de suas relações comerciais com outras partes, o que defendemos ocorrer na terceirização, em que, apesar de nem sempre ser a violadora direta de direitos, estes ocorrem em virtude de suas atividades.

Nesse sentido, os Princípios Orientadores estabelecem como diretriz para as empresas, por meio do Princípio 13, a prevenção ou mitigação dos impactos negativos sobre os direitos humanos diretamente relacionados com operações, produtos ou serviços prestados por suas relações comerciais, inclusive quando não tenham contribuído para gerá-los.

A terceirização já está consolidada como instrumento facilitador da produção, que através da delegação a outras empresas, ramifica as etapas do processo. No entanto, no momento de aferir a responsabilidade de uma empresa por danos gerados a direitos humanos, somente a partir da consideração da empresa de maneira global, incluindo todas as oficinas e fornecedoras que compõem essa rede ramificada é possível condenar a empresa multinacional.

A nova tendência exige que as empresas sejam responsabilizadas não apenas por aqueles danos que causam diretamente em virtude de sua atividade, mas também de maneira objetiva pelos danos causados indiretamente por meio de suas fornecedoras. Tais danos são conexos à atividade que estas empresas realizam, mas somente existem em virtude de sua atuação, diante de seus mecanismos de produção.

Essa tutela dos direitos humanos não é restrita às demandas individuais e não dizem respeito, apenas, ao valor que deve ser recebido por cada trabalhador em relação às verbas trabalhistas. São consideradas proteções coletivas e difusas, oriundas de danos que afetam a comunidade de trabalhadores e a própria coletividade, por meio de comportamentos empresariais socialmente reprováveis.

O aparato normativo de proteção da mão de obra, considerando tanto as normas locais de cada Estado quanto o conjunto de normas internacionais sobre o tema, é um dos grandes eixos definidores do comportamento ético de uma empresa multinacional. Ele é o ponto de partida elementar de uma atividade empresarial que seja considerada comprometida e vinculada a um determinado paradigma de responsabilidade, fomentado pelo documento da ONU.

A partir da visão global de tais cadeias e dos impactos que elas são capazes de gerar, nasce a ideia da esfera de influência das empresas, a partir da ISO 26000, que pode ser utilizado para estabelecer o alcance que as empresas multinacionais possuem:

> Uma organização é responsável pelos impactos de suas decisões e atividades sobre as quais exerça controle formal e/ou de fato (controle de fato – *de facto* – refere-se a situações em que uma organização tem a capacidade de ditar as decisões e atividades de uma outra parte, mesmo quando ela não tiver a autoridade legal ou formal para tanto). Tais impactos podem ser intensos. Além de ser responsável por suas próprias decisões e atividades, a organização pode, em algumas situações, ter a capacidade de afetar o comportamento de organizações/partes com as quais se relaciona. Tais situações são consideradas dentro da esfera de influência de uma organização.[19]

O elemento central na análise da esfera de influência é determinar a capacidade que a empresa multinacional tem de afetar o comportamento dos seus fornecedores subcontratados. No caso das empresas *fastfashion*, parte-se da análise do nível de direcionamento que a empresa multinacional tem em relação às oficinas que produzem para ela.

Em uma cadeia de valor, todas as empresas que a constituem tornam-se indispensáveis para a realização daquela atividade. É uma atuação conjunta: a peça produzida e vendida pela empresa de vestuário só é possível graças à ação da própria empresa e de suas fornecedoras de mão de obra em uma atividade organizada de modo integrado, sob a direção e controle da empresa multinacional, que define todas as diretrizes necessárias.

O controle que a empresa multinacional possui sobre as oficinas nem sempre pode ser percebido formalmente, em virtude da precarização na formação das re-

19 BRASIL. *ISO 26000:* diretrizes sobre responsabilidade social. Disponível em: <http://www.pessoacomdeficiencia.gov.br/app/sites/default/files/arquivos/[field_generico_imagens-filefield-description]_65.pdf> Acesso em: 29 maio 2018.

des terceirizadas. No entanto, o controle de fato existe independentemente de tais formalidades legais e pode ser aferido pelas ordens específicas das peças piloto fornecidas, dos preços e padrões estabelecidos, além do número de peças e prazos exigidos pela empresa multinacional.

Em última análise, os trabalhadores produzem para a empresa multinacional, sob suas exigências e diretrizes, ainda que tais demandas cheguem até eles por meio das oficinas subcontratadas. A intermediação das oficinas é, portanto, superficial. Há uma pulverização da produção das peças de vestuário por diversas fornecedoras — constituídas formalmente ou não — mas que em geral, são controladas em maior ou menor medida pela empresa multinacional.

Além disso, as autuações do Ministério Público indicam que as oficinas que fazem parte de uma cadeia terceirizada em geral produzem em exclusividade para uma única empresa do setor sob essas ordens, o que significa que os trabalhadores atuam, exclusivamente, na produção das peças para a mesma multinacional, reafirmando a noção de uma atividade dependente e interligada o tempo inteiro.

Nesse sentido, existem diversos trabalhadores inseridos no mesmo processo produtivo em cadeia de uma empresa multinacional, mas que recebem tratamento jurídico diferenciado a depender do país em que estejam prestando serviços. A nacionalidade desses trabalhadores se mostra pouco relevante, pois o serviço que realizam incorpora as técnicas e diretrizes estabelecidas pela multinacional e distribuídas por meio de suas subsidiárias.

Além disso, os trabalhadores que merecem proteção não são, apenas, aqueles contratados diretamente pela empresa multinacional, mas aqueles inseridos no seu processo produtivo e membros das cadeias terceirizadas. Se um trabalhador contribui, de alguma forma, para alguma etapa da produção das peças, ele está inserido na atividade daquela empresa. Não haveria justificativa jurídica para que a proteção dada a ele fosse inferior à de um trabalhador que estivesse em posição mais próxima da empresa multinacional na cadeia de produção.

Como já mencionado, ainda que não recebam ordens diretas, os trabalhadores que laboram em oficinas e fábricas subcontratadas recebem diretrizes da empresa multinacional, ainda que intermediadas por terceiros. O produto e sua qualidade, acabamento e técnicas empregadas são as mesmas, não havendo diferença nos resultados.

Nesse sentido, a esfera de influência parece ser um elemento capaz de atrair o nexo causal na análise da responsabilidade civil por eventuais danos. Se, na análise clássica dos elementos ensejadores de reparação civil, a empresa multinacional não pode ser considerada como causadora direta do dano, a análise da esfera de influência da multinacional permite atrair a conduta da empresa multinacional ao dano causado ao trabalhador.

Bilchitz explica que os Princípios da ONU apoiam a posição de que a empresa deve considerar sua contribuição para a violação dos direitos humanos por intermédio do abuso de terceiros. A responsabilidade empresarial implicaria, também, evitar esse envolvimento indireto de empresas em violações de direitos humanos, quando o dano real é cometido por outra parte. Para o autor, esse ponto de vista parece indicar que as empresas têm um dever de proteger os indivíduos contra os abusos de terceiros com os quais elas possuem contato.[20]

A utilização do conceito de esfera de influência, apesar de somente contar com uma definição mais clara no âmbito da ISO 26000, passa a ser argumentativamente indispensável em eventual condenação da empresa multinacional, se considerarmos esse dever da empresa de controlar seus fornecedores e oficinas.

Como condenar uma empresa multinacional por uma violação causada por uma oficina subcontratada? O nexo causal estabelecido como condição pela Teoria Clássica da Responsabilização Civil teria de ser mais elástico, considerando que todo dano ocorrido dentro de uma cadeia global de valor poderia ser imputado à empresa multinacional que controla (legal ou apenas factualmente) suas subsidiárias e fornecedoras.

A mera delegação para as oficinas da contratação da mão de obra não é capaz de isentar a empresa multinacional de toda a responsabilidade pelos trabalhadores que são subordinados à cadeia terceirizada, havendo uma verdadeira solidarização pelos efeitos nefastos que uma atividade produtiva é capaz de gerar. O trabalhador, dessa maneira, está inserido dentro da dinâmica da empresa multinacional, pouco importando quem o con-

20 BILCHITZ, David. O Marco Ruggie: uma proposta adequada para as obrigações de direitos humanos das empresas? *SUR – Revista Internacional de Derechos Humanos*, v. 7, n. 12, p. 209-241, 2010.

tratou diretamente.

O uso da noção de esfera de influência demanda a necessidade de mapeamento da cadeia terceirizada específica. Mapear uma cadeia produtiva significa apontar, de maneira clara, todos os atores envolvidos no processo de produção. É necessário estabelecer o caminho existente entre a empresa multinacional e o trabalhador vítima de violações a direitos humanos. Para isso, é preciso saber quais empresas fazem parte dessa cadeia, estabelecendo as devidas conexões.

Para tanto, sustenta-se a ideia de que é obrigação das empresas manterem um controle de quais fornecedoras se relacionam direta ou indiretamente com sua produção e de que maneira. A maior transparência em tais relações comerciais torna o processo de mapeamento da cadeia mais simples e efetivo, facilitando os mecanismos de reparação e permitindo que as próprias empresas tomem conhecimento da dimensão que sua atividade possui naquele país.

A velocidade e a facilidade nas quais um empreendimento pode reagir a seus potenciais impactos nos direitos humanos podem ser decisivos na eficácia da gestão de tais riscos. Por isso, as companhias precisam formar cadeias de responsabilidade bem conectadas em todos os níveis e funções adequados, além de alocações de orçamento e estruturas de incentivo para reforçar essa rede de responsabilidade.

Sustenta-se que o mapeamento deve fazer parte do mecanismo conhecido como *due diligence*, ou seja, diligências prévias que as empresas devem, sempre, fazer para o devido cuidado e monitoramento dos impactos de sua atividade. Essa ferramenta colabora para uma maior organização da empresa, que deverá fiscalizar as oficinas e fornecedoras que não estão alinhadas com práticas sustentáveis e exigir a adequação para fins de continuidade da parceria entre empresas e fornecedoras.

Além disso, é importante que a multinacional estabeleça ferramentas mais efetivas de controles de suas subsidiárias, buscando fiscalizar sua saúde financeira, seu porte para a realização dos serviços, sua regularidade fiscal e trabalhista antes da formalização da delegação, visando manter uma cadeia de empresas responsáveis. A responsabilidade pela não fiscalização e investigação das reais condições de uma empresa subcontratada pode ser utilizada como uma argumentação para a condenação da empresa multinacional.

Com isso, a empresa poderá se precaver de eventuais futuras condenações ou mesmo se preparar patrimonialmente para arcar com as reparações devidas, podendo, inclusive, gerenciar um fundo especial para tanto. O controle da empresa, por meio da manutenção adequada dos seus contratos civis estabelecidos com fornecedores e da fiscalização intensa das condições da mão de obra subcontratada, pode, inclusive, proteger a empresa multinacional, quando esta provar sua diligência na vigilância de sua cadeia global de valor.

Nesse sentido, o Princípio 14 estabelecido pela ONU indica que a obrigação de empresas respeitarem os direitos humanos aplica-se a todas as empresas independentemente do seu tamanho, setor, contexto operacional, proprietário e estrutura. No entanto, a magnitude e a complexidade dos meios dispostos pelas empresas para assumir essa responsabilidade pode variar em função desses fatores e da gravidade dos impactos negativos das atividades da empresa sobre os direitos humanos, o que aponta para uma tendência de responsabilização de grandes empresas em virtude de sua atividade de risco a direitos humanos.

O conceito de esfera de influência, ainda, não possui grande pesquisa bibliográfica de referência, mas vem demonstrando sinais de utilização tímida pelo Poder Judiciário brasileiro para alcançar grandes empresas multinacionais de vestuário que fazem uso da mão de obra situada no país. O desfecho do caso Zara no Brasil, em 2014, é paradigmático e demonstra na prática os impactos das contratações via empresas terceirizadas no setor, expandindo as possibilidades de responsabilização pelos danos causados.

O Ministério Público do Trabalho, na época, descobriu 51 pessoas, entre elas, 46 bolivianos, trabalhando em condições precárias em uma confecção contratada pela Zara na cidade de Americana, no estado de São Paulo. Os trabalhadores eram submetidos a uma jornada média de 14 horas e recebiam o equivalente a R$ 0,20 por peça de roupa produzida. No mês seguinte, foram encontrados 14 bolivianos em condições semelhantes em outras duas confecções na cidade de São Paulo[21].

Os trabalhadores, que foram encontrados em situação análogas à escravidão, eram contratados por outra empresa, a fornecedora interposta Aha, mas produziam

21 Notícia disponível em: <http://www.migalhas.com.br/Quentes/17,MI146032,21048-Zara+se+recusa+a+assinar+acordo+com+MPT+sobre+trabalho+escravo>. Acesso em: 20 fev. 2017.

peças exclusivamente para a Zara, que foi condenada, e a sentença[22] da 3ª vara do trabalho de São Paulo aponta critérios particulares em uma nova concepção de responsabilidade global baseada na influência da empresa:

> Voltando-se à vertente principal, vê-se que a Aha, ao contrário do que asseveraa demandante, não tinha porte para servir de grande fornecedora, e disto ela estavaperfeitamente ciente, pois, realizando auditorias sistemáticas, sabia do extenso downsizingrealizado, com o número de costureiras da Aha caindo mais de 80%, ao tempo em que aprodução destinada à Zara crescia. A fiscalização verificou, outrossim, que as oficinas ondeforam encontrados trabalhadores em condição análoga à de escravidão labutavamexclusivamente na fabricação de produtos da Zara, atendendo a critérios e especificaçõesapresentados pela empresa, recebendo seu escasso salário de repasse oriundo, tambémexclusivamente, ou quase exclusivamente, da Zara.

Dessa forma, critérios como o porte econômico da empresa, exclusividade em relação à produção das peças, e o controle nas especificações daquilo que era produzido nas oficinas foram utilizados para considerar a cadeia de maneira ampla, direcionando a responsabilidade pelos danos causados aos trabalhadores à empresa multinacional. Ao constatar que a empresa multinacional exerce tamanha influência em toda a atividade, é razoável supor que os danos que advém de sua cadeia produtiva são danos sociais, além dos individualmente considerados.

A sentença, ainda, menciona que o argumento utilizado pela Zara de que não controla o que é pago aos subcontratados revela um posicionamento muito cômodo para a empresa, pois se permite estipular os preços que lhe convierem, não interessando, se, para tanto, faz-se necessário extrair trabalho humano sem a devida contraprestação.

Todos os critérios utilizados na decisão, que apontam implicitamente para o uso da noção de esfera de influência da empresa, partem do pressuposto de constituição de uma atividade empresarial ética e sustentável, afinada com a necessidade de efetivar uma responsabilização social e civil da empresa. O ponto fulcral que define a condenação é a percepção de que a cadeia produtiva somente é completa com a presença de todos os envolvidos no processo de produção, sob o gerenciamento da empresa multinacional.

Dessa forma, os Princípios Orientadores sobre Empresas e Direitos Humanos constituem um possível direcionamento inicial na a construção de novos paradigmas de responsabilização, apresentando uma nova forma de enxergar a abordagem dos direitos humanos pelas empresas, incluindo-as no processo de proteção e demonstrando a abrangência da sua influência nas cadeias globais de valor, responsabilizando-as por danos aos direitos humanos dos trabalhadores, amplamente considerados.

5. Considerações finais

Há um enorme desafio para a supressão de violações a direitos humanos nas cadeias produtivas de vestuário *fast fashion*, principalmente no que se refere à identificação e mapeamento dessas redes, uma vez que é difícil a produção de provas que relacionem uma multinacional que subcontrata a mão de obra à pequena oficina.

Como início de construção de uma solução para esses problemas, deve-se exigir uma atuação empresarial ética e sustentável, pautada na responsabilidade social e na promoção de direitos humanos, diante da insuficiência dos padrões clássicos de responsabilização.[23]

As mudanças na forma como se contrata a mão de obra, ocasionadas pelas práticas de terceirização, demandam uma nova percepção das empresas e de sua cadeia produtiva, de maneira que sejam afastados os subterfúgios à proteção de direitos humanos na área trabalhista.

Nesse sentido, os Princípios Orientadores sobre Direitos Humanos e Empresas fomentam práticas regulatórias globais e uniformes, buscando promover ações conjuntas que ofertem meios viáveis de responsabilização.

O conceito de esfera de influência amplia a visão isolada da empresa, passando a envolver todos os atores que compõem a sua cadeia de valor no âmbito de sua atividade, já que a empresa multinacional exerce um controle formal ou de fato, em maior ou menor medida,

22 Processo nº 0001662-91.2012.502.0003. Disponível em: <http://reporterbrasil.org.br/2014/04/integra-da-sentenca-judicial-em-que-zara-e-responsabilizada-por-escravidao/>. Acesso em: 20 fev. 2017.

23 BAUMAN, Zygmunt. *Modernidade líquida*. Rio de Janeiro: Zahar, 2001.

sob as oficinas e fornecedoras que produzem em exclusividade para ela.

Fazer uso da noção de esfera de influência nada mais é do que adequar uma estratégia empresarial à sua correspondente responsabilidade. Se uma empresa multinacional faz uso da mão de obra local, subcontrata e terceiriza sua atividade através de diversas oficinas e fornecedoras, mas mantém um ostensivo controle sobre todos os aspectos de sua produção, a consequência lógica seria considerá-la de maneira global e conectada com cada um dos atores componentes de sua cadeia.

Assim, por meio das diretrizes internacionais, a noção de esfera de influência pode ser utilizada como argumentação importante para o Poder Judiciário local solucionar problemas constantes sobre a responsabilização de grandes empresas por danos causados a direitos humanos, considerando a existência dos seguintes critérios: a) cadeia terceirizada interligada, em que as fornecedoras e oficinas produzem em exclusividade para a empresa multinacional; b) gerenciamento ou controle da empresa multinacional das cadeias, ao fornecer peças-piloto e demais exigências em relação ao produto final; c) existência de contratos formalizados de acordo com as exigências legais e pesquisa sobre a saúde financeira das oficinas contratadas, considerando, também, sua formalização, regularidade fiscal e trabalhista e d) porte econômico da empresa multinacional como parâmetro para os valores da condenação.

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III. ARTIGOS SOBRE OUTROS TEMAS

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Efficiency and efficacy of public food procurement from family farmers for school feeding in Brazil

Eficiência e eficácia da aquisição pública de alimentos de agricultores familiares para a alimentação escolar no Brasil

Rozane Márcia Triches

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Efficiency and efficacy of public food procurement from family farmers for school feeding in Brazil*

Eficiência e eficácia da aquisição pública de alimentos de agricultores familiares para a alimentação escolar no Brasil

Rozane Márcia Triches** ***

Abstract

An evaluation of efficiency and efficacy of the implementation of article 14 of Law 11947/2009 was carried out in the southern region of Brazil. By performing quali-quantitative research with interviews, provision of accounts and public calls, the results demonstrate that efficiency is greater when there is strategic action of social actors and state permeability. Such purchases are effective, providing income to family farmers and food quality to schoolchildren.

Keywords: school feeding, family farming, food and nutrition security, public policies, public food procurement.

Resumo

Uma avaliação de eficiência e eficácia da implementação do artigo 14 da Lei 11.947/2009 foi realizada na região sul do Brasil. Ao realizar pesquisas quali-quantitativas com entrevistas, prestação de contas e chamadas públicas, os resultados demonstram que a eficiência é maior quando há atuação estratégica dos atores sociais e permeabilidade do estado. Tais compras são eficazes, proporcionando renda aos agricultores familiares e qualidade alimentar aos escolares.

Palavras-chave: alimentação escolar, agricultura familiar, segurança alimentar e nutricional, políticas públicas, compras públicas de alimentos.

1. Introduction

In the last decades, school feeding programs (SFPs) have been one of the privileged spaces for rethinking development on a sustainable basis. Developed and developing countries have taken initiatives to bring food production and consumption closer to school through the purchasing from local family farmers. These actions are focused on shortening the food production chain and aim at promoting sustainability, rural development, local eating habits

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*** In November 2016, the World Food Programme Centre of Excellence against Hunger in Brazil (WFP CoE) completed five years of existence. Since its foundation, the Centre of Excellence has been working to build countries´ capacities to fight hunger and malnutrition through South-South and Triangular Cooperation, further contributing to achieve the Sustainable Development Goals (SDGs). In order to celebrate its anniversary, the WFP CoE, in partnership with the Universitary Centre of Brasilia (UniCEUB), launched a contest for researchers working with food and nutrition security (FNS) and related areas. This paper was the winner of the first place in the anniversary contest. It was considered a valuable contribution to research in FNS and to WFP´s purpose of achieving Zero Hunger worldwide.

appreciation, quality improvement of the meals served and cognitive performance of schoolchildren[1].

This new approach to SFPs has been designated in the international literature as Home-Grown School Feeding (HGSF)[2]. The basic premise behind it is that low productivity, fragile development of local agricultural markets and limited nutritional and educational outcomes are mutually reinforced and determine hunger and poverty. HGSF would work as a synergistic link between development goals and public health goals through SFPs. Accordingly, the State would use public procurement for sustainable development.

For Morgan (2006)[3], sustainable development should be understood as having multiple dimensions, including social, economic, environmental and political ones. For the author, it is a political project to create a "*Green State*", defined in generic terms as a democratic State in which regulatory ideals and procedures are informed by ecological democracy, rather than liberal democracy.

With such actions, the state would cooperate on the concept of sustainable diets, which, according to Burlingame & Dernini (2012)[4], are those with low environmental impact, that contribute to food and nutrition security and healthy living for future generations. Sustainable diets are protective and respectful of biodiversity and ecosystems, culturally acceptable, economically affordable and fair, nutritionally adequate, safe and healthy, while optimising natural and human resources.

Particularly in Brazil, the National School Feeding Program (in Portuguese, *Programa Nacional de Alimentação Escolar* - PNAE) has existed for more than 60 years. Although it was created in 1955, until 2009, PNAE´s purchasing processes benefited, ultimately, retail and wholesale markets - that supplied mostly industrialized and deterritorialized products to the Programme.

From the decentralization of food programmes in 1994, a process of reviewing public food procurement in Brazil began. However, this was only effectively implemented with the establishment of Food and Nutrition Security (FNS) policies in the country. In 2003, the Food Procurement Programme (in Portuguese, *Programa de Aquisição de Alimentos* - PAA) was created, aiming to facilitate the process of food purchases from family farmers in Brazil. This stimulated a discussion about PNAE´s procurement process, and - from the point of view of local/regional development and food security - it was deemed appropriate that PNAE also adopted strategies to encourage purchasing from smallholder farmers. Accordingly, Law 11947 of 2009[5] established the obligation to use at least 30% of PNAE´s financial resources for purchases from family farmers (Article 14). In the wake of these reviews of public food procurement, Decree 8.473 of 2015 stipulated a new modality of purchases: Institutional Purchasing. As in PNAE´s regulation, this decree defines that all public institutions that purchase food (universities, hospitals, prisons, nursing homes, etc.) should invest a minimum of 30% of their resources in buying products from family farmers (FFs).

From the point of view of policies and legislation,

1 See: Sonnino, R., T.L. Bassinello & C. Lozano. 2016. "School Feeding Programmes: addressing the challenges of sustainable development." In Alimentação Escolar: construindo interfaces entre saúde, educação e desenvolvimento, 35-64. Chapecó: Argos; Morgan, K & R. Sonnino. 2008. The school food revolution: public food and the challenge of sustainable development. London: Earthscan; Espejo, F., C. Burbano & E. Galliano. 2009. Home-Grown School Feeding: A framework to link school feeding with local agricultural production. Rome: WFP; Izumi, B.T., D.W.Wright & M.W. Hamm. 2010. "Market diversification and social benefits: motivations of farmers participating in farm to school programs." Journal of Rural Studies, 26:374-382. Accessed 18 August 2016. http://www.sciencedirect.com/science/article/pii/S0743016710000161; Triches, R.M. & S. Schneider. 2010. "Alimentação Escolar e Agricultura Familiar: reconectando o consumo à produção." Saúde e Sociedade, 19(4): 933-945. Accessed 10 January 2016. doi: http://dx.doi.org/10.1590/S0104-12902010000400019; International Policy Centre for Inclusive Growth (IPC - IG). 2013. Structured Demand and Smallholder Farmers in Brazil: the Case of FPP and NSFP. Brasília: IPC-IG; Otsuki, K. 2011. "Sustainable partnerships for a green economy: A case study of public procurement for home-grown school feeding." Natural Resources Forum, 35(3):213–222. Accessed 20 September 2016. doi:10.1111/j.1477-8947.2011.01392.x.

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3 Morgan, K. 2006. "School Food and public domain: the politics of the public plate." The political quarterly, 77:379-387. Accessed 10 November 2016. doi:10.1111/j.1467-923X.2006.00809.x.

4 Burlingame, B. & S. Dernini. 2012. "Sustainable Diets and Biodiversity: Directions and Solutions for Policy, Research and Action." Proceedings of the International Scientific Symposium 'Biodiversity and Sustainable Diets United against Hunger'. FAO Headquarters, Rome: FAO and Bioversity International.

5 Brasil. Lei nº 11947 de 16 de junho de 2009. 2009. Dispõe sobre o atendimento da alimentação escolar e do Programa Dinheiro Direto na Escola aos alunos da educação básica. Diário Oficial da União. Brasília – DF. Accessed 15 October 2016. http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l11947.htm

Brazil has stood out at the global level for providing universal free school meals which are locally produced by FFs[6]. However, although legal support is important as a tool for sustainable development, it must be accompanied by other legal, institutional and action support from social actors to actually take effect. Based on this assumption and considering that there are still few studies that evaluate school meals as a policy, this article intends to evaluate the implementation of article 14 of Law 11947/2009, by identifying how it has been occurring in the country. The objective here is to develop an in-depth study of the southern region of Brazil - composed of the Rio Grande do Sul (RS), Santa Catarina (SC), and Paraná (PR) states -, by analysing the efficiency of their procurement processes (which problems they encounter and how they have been resolved) and whether efficacy in providing quality food and benefiting family farmers is achieved. This region was chosen because it is the most successful in Brazil in terms of purchasing family farming products through PNAE.

This article starts from this introduction and describes the methods of the study. Then, it analyses the Brazilian evolution in relation to compliance with article 14 of the above-mentioned Law. The following two sections evaluate the efficiency of the process of public food procurement for school feeding and identify its progress in achieving sustainable purchasing. The difficulties reported by the actors involved in these purchases in selected municipalities and the ways they manage to overcome them are analysed. After that, the policy efficacy is examined, by taking notice of links established between it and the benefits related to food and nutrition security of schoolchildren and farmers.

2. Methods

This study is of a qualitative and quantitative nature and its analysis is based on secondary and primary data[7]. To identify compliance with Article 14 of Law 11947/2009, we used documents and Provision of Accounts information available on the website of the National Fund for the Educational Development[8] (in Portuguese, *Fundo Nacional de Desenvolvimento da Educação* - FNDE), for the period of 2011 to 2016 .

After analysing the level of compliance with the law at the country level, the three southern states – Paraná, Santa Catarina and Rio Grande do Sul – were further evaluated. Also, Public Calls (PCs) data of 2013 from these states were collected through their municipalities´ websites, departments of education and telephone calls. For that, a sampling of the municipalities of each state was carried out. A sample of approximately 5% of the city offices of the states was considered, by carefully establishing a stratification between them according to the macro regions and population, so that about 10% of the student body was considered. In these PC documents, the following items were analysed: a) products requested, according to degree of processing; B) adequacy of PCs regarding information on periodicity, delivery points and the presence of prices to be paid for the food.

After collecting this information, the quantitative data was tabulated and analysed using simple descriptive statistics on Microsoft Excel. The data was presented in absolute and relative frequencies.

Regarding the qualitative component of this research, eight municipalities from each state were chosen to conduct the interviews with the actors involved in the implementation of Article 14 of Law 11947/2009.

These municipalities were chosen to contemplate the following criteria:

a) Different population sizes, according to the following stratification: Group 1 – very small municipalities (with less than 20,000 inhabitants); Group 2 – small municipalities (from 20,000 to 100,000 inhabitants); Group 3 – medium-sized municipalities (from 100,000 to 500,000 inhabitants); Group 4 – large municipalities (with 500,000 or more inhabitants).

b) The diversity of macro-regions of each state.

Hence, the municipalities presented in Table 1 were selected.

6 See: Sonnino, R., T.L. Bassinello & C. Lozano. 2016. "School Feeding Programmes: addressing the challenges of sustainable development." In Alimentação Escolar: construindo interfaces entre saúde, educação e desenvolvimento, 35-64. Chapecó: Argos; Food and Agriculture Organization (FAO). 2015. Las compras públicas a la agricultura familiar y la seguridad alimentaria y nutricional em America Latina y el Caribe: lecciones aprendidas y experiências. Brasilia: FAO.

7 This study was funded by the Scientific and Technological Research Project developed from the Calls MCTI-CNPq / MDS-SAGI Nº 24/2013 Social Development and Call MCTI / Transversal Action-LEI/ CNPq Nº 82/2013 Food and Nutrition Security in the field of UNASUR and AFRICA.

8 www.fnde.gov.br

Table 1 – Municipalities participating in the research and their respective populations, 2016.

Paraná		Rio Grande do Sul		Santa Catarina	
Municipality	Number of inhabitants	Municipality	Number of inhabitants	Municipality	Number of inhabitants
Curitiba	1,746,896	Porto Alegre	1,409,351	Joinville	515,288
Londrina	506,645	Caxias do Sul	435,564	Chapecó	183,530
Cascavel	286,172	Pelotas	328,275	Lages	156,727
Apucarana	120,884	Carazinho	59,317	São Miguel do Oeste	36,306
Assis Chateaubriand	33,028	São Gabriel	60,425	Maravilha	22,101
Laranjeiras do Sul	30,783	Gramado	32,273	Pinhalzinho	16,332
Urai	11,472	Herval	6,753	Coronel Freitas	10,213
Sulina	3,397	Cerrito	6,402	Cordilheira Alta	3,787

Source: Prepared by the author, 2017.

Representatives of the school feeding services such as managers and/or nutritionists of the municipal school feeding sector, councillors of the city's Council of School Feeding (CSF) (regardless of the segment represented – parents, teachers, civil society), rural extension practitioners, and family farmers participated in the research. Thus, four to five actors were interviewed in each municipality surveyed.

For each group of social actors, differentiated semi-structured interview guides were applied. The interview topics included, among others: the changes in the menu and the functioning of the local school feeding service, the difficulties in implementing Article 14, the level of participation of social actors and their experience with PNAE, as well as their difficulties in integrating the program and the benefits achieved. The qualitative data was analysed and categorised by themes, according to a content analysis technique, using the NVivo 8 software.

3. Evolution of public purchasing from family farmers for school feeding, from 2010 to 2016

According to data from FNDE (2018), since the mandatory implementation of Article 14 by Executing Entities (EEs) in 2010, there has been a growing increase in the resources used by PNAE to purchase products from FFs. In 2016 (most recent data available), the amount used for such purpose at the country level was BRL 858,777,139.55, that is, 22.12% of the total amount invested by the federal government in PNAE (BRL 3,882,673,284.31). This means an increase of BRL 710,205,616.21 compared to 2010, when only 4.9% (BRL 148,571,523.34) of the federal funds for such purchases were used.

Chart 1 shows the growth of resources allocated to family agriculture from 2011 to 2016, relatively to the regions of the country[9]. It is noticeable that, according to FNDE (2018) data, the total percentage of purchases grew upward (but with some fluctuations in the last two years). The exception to this trend was the Central-West region, where the percentage of 2013 appears to be higher than in 2014, decreasing progressively in the following years[10]. When comparing regions, we can see that the South region differs from the others nearly every year, and it is the only one which was able to reach, since 2014, the minimum amount provided by law to be spent on food from family farming. On the other hand, the Central-West region is the one with the lowest growth of these figures in the time evaluated, as it used only 16.36% of the resources in 2016, thus failing to comply with the legislation (considering the total amount received by its EEs).

9 The referred resources are those sent by the FNDE to all EEs – state entities (State Department to the state schools), municipal entities (municipal schools) and even federal entities (federal schools) – that exist within each federated state.

10 We have identified that, according to FNDE spreadsheets (2016), in the year of 2013, the State Department of Education of Goiás appears to have used more than 100% of its funds - received from the federal government – to buy products from family farmers. However, in the provision of accounts, it was verified that, in its Physical-Financial Statement states, the same EE did not reach the minimum of 30% required by law, which suggests a discrepancy of information. Thus, it appears that an error occurred in computing this data in the spreadsheets elaborated by the FNDE. This information is likely to be incorrect, and the important amount it represents in spending (BRL 40,989,364.80) explains the greater volume of resources spent in the Central-West region in 2013, as compared to 2014.

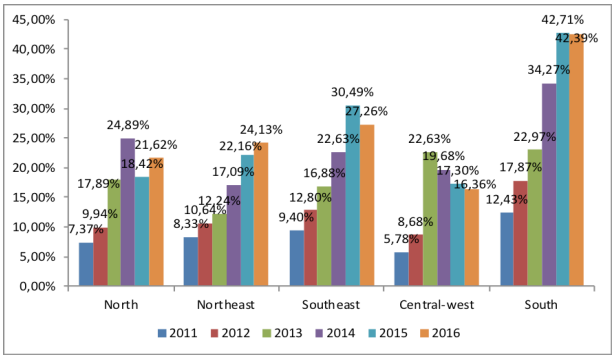

Chart 1: Aggregate percentage of resources used for purchases of family agriculture products for school feeding, coming from the EEs of the states of each region of the country – 2011 to 2016.

In Table 2, the differences between the states of each region can be identified. It is noteworthy that the most successful states in compliance with the Law are in three regions: in the North Region (Acre and Roraima states), in the Southeast (Espírito Santo and Minas Gerais state) and in the South region (Paraná, Santa Catarina and Rio Grande do Sul states).

Table 2: Aggregate percentage of resources used for purchases of family agriculture products for school feeding, coming from the EEs from of each state that composes the regions of the country – 2011 to 2016.

Region	States	2011	2012	2013	2014	2015	2016
North	AM	5,00%	12,40%	20,40%	26,50%	10,20%	17,32%
	AC	6,90%	4,90%	31,10%	35,40%	16,60%	18,66%
	RR	3,60%	9,00%	8,90%	38,70%	16,85%	28,42%
	RO	6,10%	6,90%	22,50%	23,20%	34,45%	32,45%
	PA	7,60%	13,70%	18,40%	22,70%	24,00%	23,04%
	TO	16,40%	18,20%	18,80%	23,40%	16,80%	15,38%
	AP	6,00%	4,50%	5,10%	4,30%	10,02%	16,07%
	Total	7,37%	9,94%	17,89%	24,89%	18,42%	21,62%
Northeast	BA	7,10%	10,60%	12,60%	19,40%	24,32%	24,15%
	CE	9,90%	14,20%	13,10%	20,70%	25,35%	27,08%
	MA	5,20%	6,60%	14,00%	17,00%	24,18%	24,02%
	PI	5,50%	9,30%	7,00%	11,80%	10,98%	11,66%
	RN	14,40%	17,80%	16,20%	20,50%	16,28%	17,37%
	PB	9,40%	8,00%	11,80%	13,00%	23,06%	28,50%
	PE	3,60%	7,30%	12,60%	16,20%	20,77%	20,12%
	AL	4,60%	5,40%	8,60%	14,10%	21,25%	28,35%
	SE	15,30%	16,60%	14,30%	21,10%	33,26%	35,91%
	Total	8,33%	10,64%	12,24%	17,09%	22,16%	24,13%
Southeast	RJ	2,30%	4,60%	8,00%	11,10%	22,00%	25,48%
	SP	6,30%	8,90%	12,00%	16,80%	26,55%	16,04%
	MG	10,30%	14,40%	19,80%	26,20%	31,62%	32,87%
	ES	18,70%	23,30%	27,70%	36,40%	41,81%	34,66%
	Total	9,40%	12,80%	16,88%	22,63%	30,49%	27,26%
Central-West	DF	0,00%	0,00%	0,00%	14,90%	9,08%	4,22%
	GO	8,20%	12,30%	57,30%	19,70%	18,16%	18,73%
	MT	7,70%	11,90%	14,30%	18,60%	19,61%	16,91%
	MS	7,20%	10,50%	18,90%	25,50%	22,36%	25,57%
	Total	5,78%	8,68%	22,63%	19,68%	17,30%	16,36%
South	RS	14,10%	17,50%	26,90%	40,20%	46,53%	42,06%
	SC	13,80%	18,50%	19,70%	26,30%	42,84%	46,36%
	PR	9,40%	17,60%	22,30%	36,30%	38,77%	38,76%
	Total	12,43%	17,87%	22,97%	34,27%	42,71%	42,39%

If we consider the percentage of EEs that have been complying with the legislation, FNDE offers the following data: in 2010 they were only 15%, and in 2016 this number increased to 44%. However, still in 2016, 15% of EEs did not purchase anything from FFs and 41% did not reach the minimum rate of 30%. According to Thies et al (2016)[11], the South region presents the highest percentages in all the years analysed and is above the national proportion in the entire period (2011: 59.1%, 2012: 66.6%, 2013: 64.0%, 2014: 77.0%). The same authors state that, in 2014, 88.6% of the southern municipalities that received PNAE funds purchased from family agriculture for school feeding.

This data demonstrates that the legal requirement is very important for the growing number of EEs that seek to purchase from FFs, but it is not sufficient yet for effective compliance - both in the number of EEs that execute it and in the sum of all amounts used for purchases from FFs in the Brazilian regions or states. Therefore, the question that must be answered is: what are the remaining problems and the factors that help to overcome them? In that sense, the aim of this article is to identify how the food procurement process (Public Calls) has occurred, its obstacles and the role of ins-

11 Thies, V.F., C. Grisa, S. Schneider & W. Belik. 2016. Potencial das compras públicas como mercado para a agricultura familiar – uma análise do NSFP entre 2011-2014. Anais do 54º Congresso da Sociedade Brasileira de Economia, Administração e Sociologia Rural: Maceió, Brazil.

titutions and local actors in these arrangements in the most successful region of the country, by verifying their efficiency.

4. Legal change in the processes of public food procurement for the SFPs in Brazil and its outcomes

When studying the barriers to public procurement becoming sustainable, Morgan (2006)[12] first considers "value for money" (lowest price), rather than "best value" (best quality considering environmental and social benefits). In that sense, for the author, even though purchasing local, seasonal, organic, fresh food may be more expensive than buying industrialized and conventional foods, this modality offers no perceived benefits to health and to the environment in the long term.

The second barrier to sustainable public procurement would be a lack of knowledge and qualification of the teams at the helm of the purchasing programs. Hence, many public-sector institutions would have professionals without qualifications or training to work in the public money management. All the other barriers, according to the author, would come from the lack of active political leadership. Accordingly, top leaders would reflect their lack of accountability regarding sustainable procurement on the organization under their responsibility. These barriers would help explain why sustainable public procurement would continue to be more of an inspiration than a reality in the public organisations.

Concerning Brazil, public procurement processes for the PNAE were associated exclusively with Law 8666 until 2009. This Law established rules for public biddings for purchase and contracts, and was sanctioned in June 1993. According to Herrmann (1998)[13], it brought advancements to the disciplinary matters of the bidding procedures and the control of public agents´ actions. This legal framework refers to the principles governing the acts of Public Administration in the country's Administrative Law – legality, purpose, isonomy, administrative morality and publicity – and postulates, ultimately, privileging offers with the lowest price.

In conjunction with other FNS policies and the action of the National Council on Food and Nutrition Security, strategic government procurement from family farmers began to be targeted in the early 2000´s. Hereafter, the Food Procurement Program (PAA) was instituted in 2003 (Law 10696) and had as its main objective to foster and reinforce family agriculture through a set of actions concerning: the purchase from family agricultural production, the product´s distribution to vulnerable people and the contribution to build strategic food stocks in smallholder production. To do so, the Program used bidding exemption for purchasing from these farmers.

Thus, in an attempt to overcome the bureaucracy of the bidding processes, many municipalities used the PAA to supply the products for school meals of PNAE. With the PAA, a new legal framework was created that would allow a greater presence of the state in supporting the marketing processes of the family farmers' production, contributing to their sustainability and to the distribution to food insecure groups of people. PAA becomes, then, the first mechanism to promote local development based on government procurement, which further highlighted the great potential of PNAE to implement food security policies, by linking consumption and production. In conjunction with PAA, some local experiences have also fostered this discussion, as municipalities began to buy products from family farmers by adapting the current bidding process[14].

These movements not only fostered the idea, but also became a reference for the formulation of Provisional Measure 455, of 28 January 2009, and later, Law 11947 of 16 June 2009, and Resolution 38 of 16 July 2009, which established compulsory public purchases of products from family farmers.[15]

12 Morgan, K. 2006. "School Food and public domain: the politics of the public plate." The political quarterly, 77:379-387. Accessed 10 November 2016. doi:10.1111/j.1467-923X.2006.00809.x.

13 Herrmann, I. 1998. Licitações públicas no Brasil: explorando o conceito de ineficiência por desenho. Anais III SemeAd: USP, São Paulo.

14 See: Triches, R.M. & S. Schneider. 2010. "Alimentação Escolar e Agricultura Familiar: reconectando o consumo à produção." Saúde e Sociedade, 19(4): 933-945. Accessed 10 January 2016. doi: http://dx.doi.org/10.1590/S0104-12902010000400019; Triches, R.M. & S. Schneider. 2012. "Desestruturar para construir: interfaces para a agricultura familiar acessar o programa de alimentação escolar." Estudos Sociedade e Agricultura, 20(1):66-105. Accessed 2 May 2016. http://r1.ufrrj.br/esa/V2/ojs/index.php/esa/article/view/349/345.

15 Currently, the Law is established by Resolutions no. 26/2013

However, even with the use of the bid exemption for family agriculture, the EEs still fail to fulfil the targets for family farming purchases, and create excessively bureaucratic and non-flexible procedures for these farmers. In that sense, EEs do not correctly elaborate these public competitions and insist on subjecting family farmers to the same bidding rules as before. Approaching the reality of the southern states of the country, the municipal PCs were analysed in the year 2013. The total number of calls was 251, out of which 43 were from Paraná (from 26 municipalities), 94 from Santa Catarina (from 46 municipalities), and 114 from Rio Grande do Sul (from 52 municipalities). It was observed that, in many municipalities, the purchases are still carried out through public biddings (Auctions and Bid Invitation Letters, mainly), because they consider that the bid exemption violates Law 8666/1993 for failing to comply with the principle of price competition and isonomy.

According to FNDE Resolution 26/2013, which regulates the national school feeding programme – PNAE, prices of food items must be included in the PCs and they will be those that are actually paid to FFs. Thus, there is no competition for price among producers, and the choice of competitors is based on tie-breaking criteria such as: location (municipality, territory, state and country, in this order), identification (priority for *quilombolas* - escaped slaves and their descendants-, indigenous people or settlers), organization (formal over informal and individual), and type of production (ecological over conventional). However, it was observed that many PCs did not contain this information, a situation that is even more noticeable in Paraná and Santa Catarina (where this occurred in 93.0% and 85.1% of the cases, respectively).

> 'Oh, and another difficulty is that the purchasing sector understands that the public call does not work at the lowest price, but instead, that the criteria are different. And here is a difficulty, a difficulty of understanding, I think, because Law 8666 is the one taken into account, and, therefore, there is a difficulty to adapt to this specific legislation of PNAE for the public call; these are the difficulties.' (Manager, from RS)

In addition to this issue with interpretation of the regulations, it was also observed that the elaboration of Public Calls is not always adequate, leading to obstructions in the execution of purchases. Thus, many farmers complain about receiving orders for dispersed deliveries of a low volume of products per receiving point. Further, since the ordered amount of some products is very low, their financial compensation is not favourable. Sometimes, farmers also have to face strikes in schools (farmers from Paraná).

It was verified that, in most of the evaluated PCs from the PR and the RS states, the deliveries were centralized, that is, they occurred at only one receiving point. However, more than a quarter of the PCs from the municipalities of Rio Grande do Sul requested deliveries in more than 10 points, which encumbers the logistic costs for FFs. Still, what is even more concerning is the omission of this information in those PCs notices, which was evidenced in more than 60% of them in Santa Catarina and almost 30% in Paraná.

Another analysis performed with the PCs addressed the periodicity of delivery of the products. In Rio Grande do Sul, more than 38% of the notices estimated weekly deliveries, followed by fortnightly deliveries (37.7%). However, once again, the lack of information is noteworthy in the notices from SC and PR, with 78.7% and 93% of PCs, respectively, missing such data. This is another problem that, together with the issue of decentralization of deliveries, has an impact on logistic costs, since it is not only necessary to know how many units will be delivered, but also how many times this will be done during the period of validity of the Contract. In a study by Da Silva et al. (2016)[16], it was verified that the cost of transportation is the most substantial of all other logistic costs.

These data show the difficulties still experienced by municipalities in developing a PC. This is detrimental not only to the EEs themselves, but especially to the farmers, who are deprived of information to support their feasibility assessment for their participation or not in PNAE. Information on the price to be paid for products, the number of receiving places and the periodicity of deliveries would facilitate the decision of the farmer to commit to supply certain products, considering the logistics, the frequency, the quantity that should be delivered, the dates and at what price. These issues are

and 04/2015.

16 Da Silva, W.H., F.O. Leitão, M.A. Da Silva & V.S. Brandão. 2016. "Custos logísticos associados ao comércio institucional de alimentos na agricultura familiar: o caso do Programa Nacional de Alimentação Escolar (NSFP)." Anais do 54º Congresso da Sociedade Brasileira de Economia, Administração e Sociologia Rural: Maceió, Alagoas

essential to a good organization of FFs and to the cost benefit analysis, which measures the process´ efficiency.

In Rio Grande do Sul - the state with the highest rates of compliance with article 14 - many managers considered that they were able to change the perceptions of the legal and purchasing sectors with consultation to other city offices, and through a continuous convincing process.

> (...) So a working group of segments was created; who should be in it? Then, we told the department of education, EMATER (Technical Assistance and Rural Extension Company) and involved especially the personnel in the biddings, the finance department; and from there we held meetings every 15 days, and then we grew more and more... Then we realized who hindered the process, what delayed the public call... We involved the city's attorney, who was invited to attend the meetings, and when she understood the law, she changed the whole scenario. She understood that it was **a law of inclusion of people and not a law of prices**'[17]. (Rural Extension, RS).

Therefore, the Brazilian experience reflects that, in places where the actors' and institutions' understanding of the concept of "best value" and sustainable public procurement is clearer, processes are more likely to succeed. Therefore, it is also important to understand which difficulties in this process hinder these changes to purchase products from FFs and how the social actors engage and formulate strategies to overcome them.

5. Given that the Law exists, why is it not obeyed?

As evidenced in the previous section, the change in PNAE´s legislation was based on microstructural changes (local experiences of direct purchases from FFs) and social participation in public policies through Management Councils, such as the Council of Food and Nutrition Security (which culminated in the creation of the PAA). In addition, this change has only been progressing from a perspective of prioritizing "best price" towards considering "best value", because of the dialogue and understanding between the actors. Therefore, it is argued that the actors' actions are fundamental in the change of structures, and without their mobilization, the structure by itself is not modified. In that sense, not only was the legal framework of PNAE modified by social action, but, without this social action, the legislation in force would not be sustainable or effective. In order to give more substance to this point, qualitative data in the form of interviews was analysed in the municipalities of the three states studied. From the data collected, information was organized according to two categories: issues concerning the action of the "demand organization" (represented by EEs) and issues concerning the action of the "supply organization" (represented by FFs). Within those categories, the crucial issues that prevented or harmed the process and the forms that some municipalities found to solve them were investigated.

Regarding the **demand organization**, problems and their respective solutions concerning **planning, financial and personnel** issues were observed.

One aspect considered important in **planning** was the elaboration of the menus. Many farmers reported that the nutritionists planned the menu without discussing it with them and, also, that nutritionists did not understand that family agriculture does not have the same operation dynamics as supply centres (CEASAs) - which make all products available in large quantities, at any time of the year, and with uniform standards. At the same time, nutritionists stressed that it was difficult to know what was produced in the municipality and in the region, who were the supplying FFs and, therefore, it was difficult to map the local production and adjust their menus to it (nutritionists from Paraná).

The proposed solution to this problem was to change the menus according to the local farmers' production, adapting to the supply: 'The first thing was to get to know the reality of the municipality, to see what I had, and then start to think what I could add to the menu' (Nutritionist, from SC). Thus, the managers had to map the supply they had in the municipality and, from the dialogue with the FFs, to think about the menu and the shopping list. This close contact with the FFs also allowed the adaptation of the logistics, so that the deliveries were possible. In this aspect, PCs were reviewed by considering the number and places of delivery and the quantity of products, to avoid losses to the FFs and to foster their interest in participating in sales to PNAE.

Another problem that affected the organization of demand was the limited **financial resources** destined for school feeding by the various State bodies (federal,

17 Passage highlighted by the author

state and municipal governments), the limited number of professionals to work in the sites, and the lack of adequate structure in school kitchens and warehouses of EEs (managers from Paraná). These problems often jeopardize the purchase of family farming products, since it is necessary to ration resources, to purchase products that require less handling and less processing in the kitchens, and require less storage space in the warehouses. Additional municipal resources for investment in the physical structure of kitchens and warehouses have also been mentioned in the interviews as a facilitator in this process. Also, in some cases, the EEs began to pay for transportation (purchase of vehicles to collect food on the properties) and even packaging (managers from SC) so that the products were purchased at a lower price.

A final point that compromised the organization of demand for family farming products concerned **personnel** issues. Thus, there were reports of resistance from nutritionists, cooks and even teachers or principals who considered that purchasing from these suppliers required more dedication, time and work and that their products were not always of 'good quality' (CSF, Farmers and Managers from PR). In addition, the various sectors of the municipality´s administration did not establish a dialogue to carry out the planning, organise public procurement and overcome the problems and challenges that were posed. On the other hand, the CSF was mentioned in all the states as being little engaged and active. Thus, the possibility of it being a suitable place for debates, dialogues, contacts and problem solving, has proved underutilized[18].

Two points stand out as forms of overcoming this issue: investing in educational initiatives for the actors involved, and in intersectoriality - in other words, the dialogue between the sectors. Concerning the first point, many municipalities highlighted the importance of training nutritionists, cooks, counsellors, managers, rural extension practitioners and farmers to know the laws, to be motivated and to work together. Such trainings took place in partnership with several agencies such as Collaborating Centres for School Feeding and Nutrition (CECANES), Universities, Non-Governmental Organizations (NGOs), etc. or from the initiative of the municipalities themselves. Regarding intersectoriality, relationships among departments such as Agriculture, Health, Education, Administration, and others, were established to solve various problems: 'In the development of this proposal, I believe that this engagement and the will to get things done are important; team work makes a difference' (Manager, from PR).

In terms of **organisation of supply,** four thematic categories were considered: **planning**, **administrative/bureaucratic aspects**, **financial** and **personnel** issues.

Regarding the **planning** problems in the organization of supply by FFs, several points were identified in the interviews. Some are difficult to resolve, such as the climatic interferences that can invariably hamper food production, leading to crop failures and irreparable losses to FFs. This influence of nature on agriculture also impacts on other issues that were raised, such as product quality, regularity and the diversity of products available. There were several mentions to these matters by managers, nutritionists, and rural extension practitioners, regardless of the state they were from – 'there is a lack of family farmers with production quantity and diversity to supply school meals.' This report leads to the interviewees' assertions that farmers are not organized among themselves, nor is their own production. Further, they are resistant to adjusting their conditions to the requirements of the institutional market. Many respondents considered FFs to be individualistic and not open to forming associations and cooperatives, which would hinder their insertion in this market, since the planning of production, logistics, commercial transactions, among other issues, would be facilitated within these spaces.

However, in many cases, it was considered that forming cooperatives, informal associations and groups or joining existing ones was the way farmers found to facilitate their participation in institutional sales. Not only were these organizations stimulated by PNAE´s legislation itself and preferred by managers; but they also served to join forces, to increase the diversity and quantity of products supplied, to minimize logistic costs and to delegate the administrative and bureaucratic processes. This last item would be done by relying on the people in charge in the cooperative or association itself, or by outsourcing these administrative and bureaucratic services.

Regarding the **administrative/bureaucratic** aspects, difficulties arose in obtaining the Declaration of

18 It should be noted that a specific study in the state of Paraná (Triches & Kilian 2016) identified that in the majority of municipalities where the purchases of family farming products were larger, the CFSs were more active.

Aptitude to Pronaf [19] (DAP) - which is one of the documents required for the farmer to participate in the PC process - and in elaborating the sales project for school feeding. Another bureaucratic barrier was the different sanitary, environmental and fiscal legislations. Many FFs reveal they do not know the paths they must take to legalize their agroindustries. What is the difference between legalizing a dairy industry and a baking industry, for example? They have different sanitary requirements and different registration bodies. This legal/bureaucratic entanglement is still not well understood and well known and, when it is, FFs may not consider formalization to be advantageous, since the regulations require adjustments that at times are not worthwhile from a financial point of view. The same occurs in the case of organic certification. It was verified in the interviews that some municipalities purchased organic, but they were not always certified. When asked about that, it was observed that the FFs had difficulties, even in participatory certification processes, in obtaining such document.

To overcome the administrative/bureaucratic problems, it was verified that FFs sought external partnerships with Universities, EMBRAPA (Brazilian Agricultural Research Corporation), Rural Extension Companies and Sebrae (Brazilian Service of Support to Micro and Small Businesses). These partnerships contributed with knowledge and information to make documentation feasible for formalizing their products for organic certification, sanitary inspection, and for starting informal groups to access the PNAE, among other actions.

If one of the problems of the organization of demand was the scarcity of **financial resources**, in the organization of supply, these funds were even more limited. As evidence for this argument, the FFs mentioned input prices and logistic costs (transportation, packaging, storage and taxes) as strongly influencing the price of the end products. On the other hand, they considered that the prices paid and the per capita amount they can access per year are often low. When equating costs and gains, they argue that participating in this market is not always attractive, which would partly explain the lacking offer of FFs and products, which managers/nutritionists/CSFs complain about. Even so, many farmers have begun to invest more in logistic processes, mainly to be able to responsibly manage the deliveries and requirements of this market. They have also sought other policies to obtain loans and credit.

> 'The cooperative also had to adapt to be able to supply for school feeding. We had to rent a shed to build the warehouse, buy trucks to deliver the food' (Family farmer, from SC).

Finally, some **personnel** issues such as political conflicts and disagreements, distrust of FFs in the state, precarious rural extension and lack of communication between FFs and managers arise. Therefore, all municipalities feel to a lesser or greater degree these interventions, which may lead to greater success or simply to empty institutional sales to PNAE as a policy.

Hence, it is no coincidence that many FFs are afraid and distrustful when the markets they access are susceptible to political conflicts. Moreover, this distrust is based on the history of FFs´ relations with the state and its unstable policies. Hence, relying on the state can be very risky for their reproduction and their family (selling products without payments and taking losses), which causes FFs to ponder carefully before jeopardizing their family stability. That may also explain, at least in part, their choice to join an association or cooperative. The distrust in the state is increased if they do not know this market. In most cases, FFs know the informal markets or use intermediaries to sell their products, getting scarcely involved with the commercial issues. Therefore, the many rules and requirements of PNAE are not always known by farmers, which makes them not access it. When they do, they get disappointed with the several requirements to be met, which are unrelated to their daily life, and give up applying for it.

Accordingly, it was necessary to make the farmer understand well the operation of the Programme and trust the State. Several municipalities mentioned moments in which FFs were called to participate in activities to involve them, motivate them, and give them support regarding the issues of production, processing and marketing of their products. More than that, efforts were needed to captivate FFs, by assuring them confidence in the process.

> 'Well, this is a long path, a long path of a lot of dialogue, of trust too, because we have to make these farmers - the new ones that we want to call - believe that they are going to be paid, that they can negotiate with the City; anyway, but that's the path' (Manager, from RS).

19 PRONAF is a credit policy for FFs.

To close this section, another unanimity in the several municipalities analysed (with the exception of the ones in Rio Grande do Sul) is the precariousness of rural extension as a facilitator of the organisation of production, but not as a mediator of the process. In many places was widely cited as one of the important actors to enable Article 14, given its role in the articulation between producers and managers. However, it has failed to provide technical assistance to farmers.: 'I would need more incentive with the technical assistance, because we feel quite lacking it' (Farmers, from SC). Several FFs think it is a shame that they do not have such assistance in relation to the production and marketing of their products from the Technical Assistance and Rural Extension entities (ATER). Even the state ATER entities themselves are precarious in terms of personnel and the material conditions for doing so.

Thus, it is verified that in order to overcome the difficulties listed above, several strategies are required from the involved actors, who gather interventions in both the demand and the supply dimensions. Each reality is unique, but the points discussed here are common to many of the experiences analysed, and therefore indicate that, beyond legal frameworks, successful experiences rely on actors with power of agency[20] - who can change structures and institutions through their strategies.

In the meantime, although there have been changes in the legislation of PNAE, and the actors' actions are largely a result of the efficiency of the process, the permeability of the State is essential to the success of the the Programme. As previously seen, policies and legislation on sanitation, taxes, organic certification, financing and rural extension are still necessary, as well as other agrarian and agricultural policies that have not been carried out in a concomitant and adequate manner.

6. Efficacy of the policy in promoting food and nutrition security for the people involved

In addition to the efficiency of the process of purchasing products from family agriculture for PNAE, it is also important to identify the efficacy of this policy regarding the achievement of its objectives. That is, does it provide food and nutrition security for the people involved in it?

Regarding the food and nutritional security of FFs, we sought to identify if access to this market offered financial security. According to the FFs themselves, PNAE provided security and stability in their income. However, the increase was not so substantial, given the limits of sales established by the programme´s legislation (BRL 20,000.00 per year) and prices, which were not always attractive. This information corroborates with other studies[21] that demonstrate the economic advantage that the FFs have in accessing institutional markets. However, there is still a need for quantitative data to verify more accurately what this accounts for.

Regarding the sales limit that the FFs have in relation to PNAE, it must be considered that, when this policy was designed, the opening of the institutional markets for this target group was placed as a gateway to formal markets or as complementary income, intending to cover as many farmers as possible. According to a study by UNDP (2015)[22], the estimated number of FFs that have sold to PNAE in 2013 (considering the amount used for that purpose in that year and the limit amount per capita) is of only 28,216 individuals, or approximately 1,3% of Brazilian FFs. Therefore, the coverage of this policy is still small, which damages the financial security and consequently the FNS of this target group.

Regarding the food and nutritional security of schoolchildren, this study sought to evaluate the type of product that was being purchased from FFs through the analysed PCs. Notably, family farming is characterized by producing, for the most part, *in natura* or mini-

20 Long, N. 2007. Sociología del desarrallo: una perspectiva centrada en el actor. Mexico: COLSAN/CIESAS.

21 See: Triches, R.M. & S. Schneider. 2010. Alimentação Escolar e Agricultura Familiar: reconectando o consumo à produção. Saúde e Sociedade, 19(4): 933-945. Accessed 10 January 2016. doi: http://dx.doi.org/10.1590/S0104-12902010000400019; Bevilaqua, K. & R.M.Triches. 2014. Implicações da venda de gêneros alimentícios para o Programa de Alimentação Escolar nos aspectos de renda e organização dos agricultores familiares. Revista Segurança Alimentar e Nutricional 21:448-460. Accessed 15 August 2016. doi:http://dx.doi.org/10.20396/san.v21i2.8634474; Szinwelski, N.K., C.R.P.A. Teo, L.S. Gallina; F. Grahl & C. Filippi. 2015. Implicações do Programa Nacional de Alimentação Escolar (NSFP) na renda e organização de agricultores familiares. Revista Brasileira de Politicas Publicas, 5:220-239. Accessed 10 March 2016. doi: http://dx.doi.org/10.5102/rbpp.v5i3.3279.

22 Programa das Nações Unidas para o Desenvolvimento (PNUD). 2015. Escala de compras públicas de alimentos no Brasil. Working Paper n.134. Brasília: PNUD.

mally processed products. Hence, the degree of processing of the requested food items was observed in the PCs to verify if they were adequate with regards to the students' health and the production by the FF.

It was verified that, in all the states, more than 80% of the analysed PCs requested *in natura* products, which meets the above-mentioned premise. However, Rio Grande do Sul and Santa Catarina had in 71.9% and 62.8% of their PCs, respectively, products with a high degree of processing.

This information leads to three possible hypotheses. The first one is that FFs of those states have a potentially higher ability and conditions to enable the processing and, consequently, aggregate value to their products - this is positive from the point of view of increased income for these suppliers. This study and others[23] indicate the difficulty of the FFs in adapting to the sanitary, fiscal and environmental standards to formalize their products and to access the institutional markets. Thus, processed and animal products produced by FFs are more difficult to be sold to PNAE, as they need to be adapted to the appropriate legislation. Therefore, it is possible that, in those states where purchase of processed food is higher, FFs are more developed in this aspect.

The second hypothesis is that, instead of being a positive point, this finding is a negative point, since the requests for highly processed products would not be compatible with FF production and, therefore, would only show an inconsistency between the demand by EEs and the FFs' supply. This is a hypothesis to be tested in other studies, since it would require the evaluation of what is produced in each place (municipality), to observe the coherence between what is requested and what FFs have to offer.

A third hypothesis refers to consumption aspects. One of the objectives of family agriculture purchasing is to discourage processed food supply and to improve nutritional quality of school meals, benefiting students' health. In this regard, the purchasing of highly processed products would undermine the efficacy of the process and frustrate these goals. Nonetheless, other studies have been carried out in Rio Grande do Sul and Santa Catarina, to identify the quality of school feeding with the purchasing of family farming products. They have found positive results in terms of: 1. nutrition[24] and 2. purchasing more recommended products than controlled products[25], when compared to the purchases from conventional suppliers through bidding processes.

Therefore, it is evident that the Brazilian HGSF strategy has been providing conditions to assure FNS for both beneficiaries - farmers and schoolchildren. However, some issues still need to be further adjusted and studied, aiming to ensure the Programme´s efficacy in achieving this goal.

7. Closing remarks

The new legal framework of PNAE in Brazil has promoted, since 2009, a growing investment in the marketing of family agriculture products in the country. In 2016, almost BRL 1 billion were aimed at the purchase of such products. However, this number still covers few FFs and could be higher if all EEs were complying with the Law. This article sought to evaluate the efficiency of this process in the most successful region of the country, by finding out how the municipalities of the southern states have been dealing with the difficulties found.

It was verified that the design and formulation of the instrument used for public procurement still have problems, but also that the social actors and their interactions and dialogues are fundamental for the improvement of these new procedures. Thus, the most evident fragilities appear to be related to the communication between FFs (to get organised among themselves), between managers (intersectoriality), and between

23 See: Triches, R.M & J.G. Baccarin. 2016."Interações entre alimentação escolar e agricultura familiar para o desenvolvimento local." Em Alimentação Escolar: construindo interfaces entre saúde, educação e desenvolvimento, 89-109. Chapecó: Argos; Triches, R.M. & S. Schneider. 2012. "Desestruturar para construir: interfaces para a agricultura familiar acessar o programa de alimentação escolar." Estudos Sociedade e Agricultura, 20(1):66-105. Accessed 2 May 2016. http://r1.ufrrj.br/esa/V2/ojs/index.php/esa/article/view/349/345.

24 Fuhr, A. & R.M. Triches. 2016. Avaliação da qualidade nutricional de cardápios escolares a partir da aquisição de alimentos da agricultura familiar. Anais do II Encontro Nacional de Pesquisa em Segurança Alimentar e Nutricional: Fiocruz, Brasília.

25 Soares, P., S.S. Martinelli, L. Melgarejo & S.B. Cavalli. 2013. "Fornecimento de alimentos da agricultura familiar para a alimentação escolar: o exemplo do Programa de Aquisição de Alimentos." Segurança Alimentar e Nutricional, 20(1): 41-51. Accessed 17 February 2016. doi:http://dx.doi.org/10.20396/san.v20i1.8634621.

producers and consumers. Managers are unaware of the farmers' problems and vice versa, and it was identified in several interviews that they blame one another for the lack of legal compliance within the Programme.

In the wake of this argument, in the qualitative study of municipalities of these three southern states, it was verified that a good part of the difficulties listed were overcome because of the strategic action of social actors. However, in addition to this social interaction, it is found that many other issues depend on the intervention of the State to be resolved. Other regulatory frameworks should be reviewed to make the Programme more successful in this regard. For example, the need for ATER to be more structured and more committed to family agriculture, the need for a sanitary legislation that is closer to the reality of the family agroindustry and for greater promotion of organic/agroecological production. The State permeability has a prevailing role for the change in the juridical and political context that is needed to support the legal changes of the Program.

Finally, more research should be conducted to evaluate this policy so that it can have more support and prevalence as a strategy for food security and human rights security, not only in Brazil but also at the global level. Hence, the evidence should be increasingly strengthened so that we have a policy that becomes permanent and consolidated and spreads to other types of public food procurement.

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A relação entre o grau de integração econômica e o sistema de solução de controvérsias: um estudo comparativo entre a União Europeia e o Mercosul

The relationship between the degree of economic integration and the dispute settlement system: a comparison study between the European Union and Mercosur

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A relação entre o grau de integração econômica e o sistema de solução de controvérsias: um estudo comparativo entre a União Europeia e o Mercosul*

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Resumo

A formação de blocos econômicos no cenário internacional é uma resposta ao fenômeno da globalização, fazendo com que Estados atuem, conjuntamente, para fortalecer interesses comuns. A partir da integração regional, que aproxima os Estados signatários do tratado constitutivo, forma-se um novo ordenamento jurídico, que deve estar dotado de um sistema de solução de controvérsias. Na União Europeia, há o Tribunal de Justiça, instituição supranacional, que, além de dirimir conflitos, tem como função uniformizar o Direito da União no território *intra* bloco, por meio da questão prejudicial. Já o MERCOSUL, cujo sistema é intergovernamental, detém um sistema de pacificação de controvérsias de natureza arbitral, cuja instituição máxima é o Tribunal Permanente de Revisão. Por meio do estudo comparativo entre os sistemas de solução de controvérsias de cada um dos blocos, verificou-se a existência de uma relação direta destes com o nível de integração econômica entre os Estados participantes, na medida em que, quanto mais profunda é a integração econômica, mais desenvolvido será o processo de solução de conflitos. A partir da conclusão referida e considerando-se as diferenças históricas, socioeconômicas e políticas que circundam cada bloco, o presente artigo analisou possibilidades para o fortalecimento do Tribunal do MERCOSUL, sobretudo no que diz respeito a sua competência não contenciosa, exercida por meio das opiniões consultivas. Para o desenvolvimento do trabalho, que se destina a fornecer ferramentas para a consolidação do MERCOSUL jurídico, foi utilizado o método normativo descritivo, com pesquisa de cunho qualitativo.

Palavras-chave: Direito da integração. Solução de controvérsias. União Europeia. MERCOSUL. Questão prejudicial. Opinião consultiva.

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Abstract

The development of trade blocs on an international level is a response to the phenomenon of globalization, causing States to act together with the aim of strengthening common interests. With regional integration as a starting point, a new legal system is formed upon the constituent treaty, thus requiring its own dispute resolution mechanism. In the European Union, there is the Court of Justice, a supranational institution with the purpose of not only settling disputes, but also unifying Union's law within its territory, by way of preliminary rulings. In MERCOSUR, where the structure is intergovernmental, the dispute resolution system is arbitral in nature, with the Permanent Revision Court as its highest institution. Through a comparative study of the dispute resolution systems of each bloc, a direct relationship between these and the level of economic integration among the participating States was detected, insofar as the deeper the economic integration, the more effective the conflict resolution process. Based on this conclusion and considering the historical, socioeconomic and political differences that surround each block, this article analyzed possibilities for the strengthening of the MERCOSUR Court, especially with regard to its non-litigious jurisdiction, exercised through the issuance of consultative opinions. For the development of the present work, which is intended to provide tools for the consolidation of the legal MERCOSUR, the normative descriptive method was used, with a qualitative research.

Keywords: Integration law. Dispute settlement. European Union. MERCOSUR. Preliminary ruling. Consultative opinion.

1. Introdução

O cenário internacional em que se relacionam os Estados e organizações internacionais não é uma realidade estática. Ao contrário: à medida em que o fenômeno da globalização se intensifica, avança, também, o fenômeno da regionalização,[1] que se constitui na formação de blocos econômicos entre Estados que desejam atuar em conjunto, movidos por interesses em comum. No interior desses novos *players*, surge um ordenamento jurídico, que se destina a regular as relações entre os próprios Estados, mas que, também, alcança e atua no cotidiano dos indivíduos abarcados pela integração[2].

Partindo-se da premissa de que, no desenvolvimento da integração regional, é natural que surjam eventuais conflitos, é imprescindível contar com um sistema de solução de controvérsias. Desse modo, em que medida as características da supranacionalidade[3] ou da intergovernamentalidade[4], aliadas ao objetivo econômico dos Estados integrados, influenciam na maneira como são solucionadas as controvérsias que surgem em determinado bloco econômico?

Como hipótese central, esperava-se verificar uma relação de causa e efeito entre o aprofundamento da integração econômica e o consequente desenvolvimento de seu sistema de solução de controvérsias, levando em consideração a característica supranacional do Tribunal de Justiça da União Europeia (TJ/UE), em estudo comparativo ao contexto do Mercado Comum do Sul (MERCOSUL), marcado pela intergovernamentalidade.

1 Sobre o tema da globalização e seus efeitos sobre a constituição dos sistemas jurídicos, ver: NASSER, Salem Hikmat. Direito global em pedaços: fragmentação, regimes e pluralismo. *Revista de Direito Internacional UNICEUB*, v. 12, n. 2, p. 98-137, 2015.

2 Esse novo ordenamento jurídico adota um sistema normativo e institucional próprio, cujo processo decisório baseia-se na transferência do exercício de poderes e competências usualmente estatais. DIZ, Jamile Bergamaschine Mata; JAEGER JUNIOR, Augusto. Por uma teoria jurídica da integração regional: a inter-relação direito interno, direito internacional público e direito da integração. *Revista de Direito Internacional UNICEUB*, v. 12, n. 2, p. 138-158, 2015.

3 A supranacionalidade caracteriza toda a configuração e modo de atuação do sistema de integração da União Europeia. Dessa forma, três são os pilares que sustentam os sistemas nela pautados, a saber: a) a transferência de soberania dos Estados para o bloco regional em caráter definitivo; b) a supremacia do Direito produzido em relação aos direitos nacionais; e c) a dimensão teleológica de integração, que é a supranacionalidade para alcançar os fins integracionistas. CICCO FILHO, Alceu José; LAGE, Fernanda Carvalho; ROCHA, Maria Elizabeth Guimarães Teixeira. O Tribunal Permanente de Revisão do MERCOSUL: intergovernamentalidade e desafios à supranacionalidade. *International Studies on Law and Education*, São Paulo, v. 1, p. 55-70, set./dez. 2016.

4 Em um contexto de intergovernamentalidade, "...o interesse predominante é resultado da vontade individual de cada Estado-Membro, não de estrutura institucional independente destes, e as normas jurídicas devem ser submetidas aos processos de internalização previstos nos textos legislativos de cada País, em geral, suas Constituições Federais. Não se fala em aplicabilidade imediata das normas emanadas das instituições e tampouco em primazia frente aos ordenamentos jurídicos nacionais". SALDANHA, Jânia Maria Lopes. *Cooperação Jurisdicional:* reenvio prejudicial: um mecanismo de direito processual a serviço do direito comunitário: perspectiva para sua adoção no MERCOSUL. Porto Alegre: Livraria do Advogado, 2001. p.110.

Nesse contexto, em um primeiro momento, aborda-se a origem da integração regional e as principais características da União Europeia (UE) e do MERCOSUL. Em seguida, são analisados o TJ/UE, bem como a evolução do sistema do MERCOSUL, que conta com o Tribunal Permanente de Revisão (TPR), desde 2005.

Ato contínuo, são analisadas as questões prejudiciais enquanto instrumentos de uniformização do ordenamento jurídico regional, bem como os principais *leading cases* europeus, decididos em sede prejudicial, que contribuíram para a formação das bases do Direito da União. São apontadas as diferenças entre a questão prejudicial do TJ/UE e a opinião consultiva do TPR, bem como entre as próprias instituições. Finalmente, formulam-se sugestões pontuais para o avanço do sistema de solução de controvérsias do MERCOSUL, com base na análise das opiniões consultivas havidas, sem, contudo, olvidar que seu contexto histórico, socioeconômico e político lhe é próprio, sendo impossível e mesmo indesejável transplantar as soluções da integração europeia.

2. A INTEGRAÇÃO REGIONAL POR MEIO DE BLOCOS ECONÔMICOS E SEUS PARADIGMAS JURÍDICOS

A integração entre Estados, sobretudo aquela com objetivos econômicos, não se dá por meio de um processo rápido ou automático, mas sim por meio de uma paulatina evolução da relação jurídica estabelecida entre os signatários do tratado marco, criador do bloco econômico.

Nesse ínterim, a fim de elucidar os objetivos de natureza econômica que deram vazão à criação da UE e do MERCOSUL, apresentam-se esses processos de integração regional, contextualizando-os nas características da supranacionalidade e da intergovernamentalidade, conforme o caso.

2.1. A União Europeia: objetivo econômico e supranacionalidade

A integração iniciou-se no continente europeu ainda em meados da década de 1940, logo após a II Guerra Mundial, tendo nascido da necessidade da reconstrução de uma Europa devastada. Já na década de 1950, coexistiam três iniciativas[5], que, ao evoluírem, formam o que hoje é a UE.

Nesse cenário, o Direito criado pelo bloco, por meio de suas instituições, para reger as relações entre os Estados Membros e os particulares, funda-se na supranacionalidade, característica gerada da cessão de parte da soberania estatal, especialmente em matéria legislativa, a uma organização internacional cuja existência jurídica é própria e separada dos Estados — surge aqui a UE,[6] assim denominada desde a entrada em vigência do Tratado de Maastricht, firmado em 1992.[7]

Aqui, cabe realçar que o conceito de supranacionalidade reside a meio caminho entre o individualismo internacional (que tem a soberania estatal como intangível) e uma federação de Estados (subordinação a um superestado), segundo lecionam Campos e Campos, citando o pensamento de Robert Schuman,[8] um dos precursores da ideia da integração europeia.

Por outro lado, com relação aos objetivos econômicos e como decorrência da supranacionalidade, é de se destacar que, desde 1992, a UE, que já havia transitado pelas etapas econômicas anteriores da zona de livre comércio e união aduaneira, obteve a consolidação do mercado comum, que se caracteriza pela obtenção das quatro liberdades de circulação (de mercadorias, serviços, pessoas e investimento estrangeiro). Atualmente, o bloco encontra-se na etapa da comunidade econômica, tendo estabelecido políticas monetárias e macroeconômicas comuns, estando agora a caminho de uma efeti-

5 Naquela altura, existiam a CECA (Comunidade Europeia do Carvão e do Aço) e a CEE (Comunidade Econômica Europeia), criadas pelo Tratado de Paris de 1951, bem como a EURATOM (Comunidade Europeia de Energia Atômica), criada pelo Tratado de Roma de 1957. Na atualidade, a CECA, após 50 anos de existência, deixou de existir, por determinação expressa do tratado constitutivo e a CEE foi substituída pela UE. A EURATOM continua existindo, nos termos em que concebida, em 1957.

6 Cabe destacar que a UE está formada, atualmente, por 28 Estados Membros, a saber: Alemanha, Áustria, Bélgica, Bulgária, Chipre, Croácia, Dinamarca, Eslováquia, Eslovênia, Espanha, Estônia, Finlândia, França, Grécia, Hungria, Irlanda, Itália, Letônia, Lituânia, Luxemburgo, Malta, Países Baixos, Polônia, Portugal, Reino Unido, República Checa, Romênia, Suécia.

7 A UE tem suas competências, mecanismos, ferramentas e funcionamento elencados nos Tratados constitutivos, a saber: Tratado da União Europeia e Tratado de Funcionamento da União Europeia, em versão atualizada e reorganizada pelo Tratado de Lisboa, em 2009.

8 CAMPOS, João Mota de; CAMPOS, João Luiz Mota de. *Manual de direito europeu*: o sistema institucional, a ordem jurídica e o ordenamento económico da União Europeia. 6. ed. Coimbra: Wolters Kluwer, 2010. p. 259.

va integração monetária, que estará alcançada quando todos os Estados Membros adotem uma moeda única (euro) e se submetam ao Banco Central Europeu.

No que diz respeito à solução de controvérsias, O TJ/UE demonstra-se imprescindível à integração europeia, uma vez que, por meio de sua jurisprudência, consolidaram-se princípios essenciais ao Direito da União, como a própria noção de supranacionalidade, o princípio da primazia do Direito da UE, do efeito direto e da aplicabilidade imediata de suas normas.

2.2. O MERCOSUL: objetivo econômico e intergovernamentalidade

A América Latina, contexto em que, contemporaneamente, se desenvolve o MERCOSUL, foi palco de uma história marcada por profundas desigualdades, pela colonização ibérica e por ditaduras militares. Somente após a redemocratização da região, nas últimas décadas do século XX, se revigorou a vontade política voltada à integração, alinhada às perspectivas de benefícios mútuos e de maior inserção na ordem global.

No ano de 1980, foi criada a Associação Latino-Americana de Integração — ALADI, sucessora da anterior tentativa de integração econômica, da década de 60, denominada ALALC,[9] — organização de grande importância para o MERCOSUL. O Tratado de Assunção[10], documento que marca a gênese do MERCOSUL, em 1991, prevê a possibilidade de adesão ao bloco originalmente formado por Argentina, Brasil, Paraguai e Uruguai, por outros Estados membros da ALADI. Por meio dessa cláusula de adesão, se deu o conturbado ingresso da Venezuela, no ano de 2012, e, mais recentemente, em 2015, o da Bolívia — esse último, ainda, em fase de implementação.

Apesar de seu ambicioso nome – *Mercado Comum do Sul*, não se verifica a presença das quatro liberdades que marcam um mercado comum, ligadas à irrestrita circulação de mercadorias, pessoas, serviços e capitais. Assim, o bloco pode ser caracterizado como uma união aduaneira imperfeita, pois, apesar da existência de uma Tarifa Externa Comum – TEC[11], denominada Nomenclatura Comum do MERCOSUL, que harmoniza a classificação tarifária dos produtos provenientes de terceiros Estados, a conformação dessa etapa aduaneira está prejudicada por Listas de Exceções[12], cuja existência se prolonga no tempo.

Com relação à sua principal característica, que revela um menor compromisso com a integração regional, o MERCOSUL se estrutura por meio da intergovernamentalidade, pois seus Estados Partes conservam intactas suas soberanias, relacionando-se por meio dos mecanismos criados pelo Direito Internacional Público clássico[13].

Nesse caso, inexiste qualquer delegação de competências pelo Estados Partes ao bloco,[14] que se revela pela imprescindibilidade do consenso para a tomada de decisões ou mesmo para a produção normativa, que, posteriormente, deverá submeter-se ao procedimento de internalização em cada Estado Parte. Além disso, não há que falar em efeito direto ou aplicabilidade imediata das normas produzidas no contexto do bloco, uma vez que as mesmas devem, primeiramente, superar os procedimentos comuns de internalização à ordem jurídica interna dos Estados Parte, para somente então surtirem efeito.

No bloco, a instituição responsável pela harmonização da interpretação e aplicação do Direito do MER-

9 A Associação Latino-Americana de Livre Comércio – ALALC, criada pelo Tratado de Montevidéu de 1960, tinha um objetivo econômico mais ambicioso que a ALADI, e este foi apontado como sendo um dos motivos do seu fracasso. Em 12 anos, a contar da sua fundação, os países integrantes deveriam ter consolidado uma zona de livre comércio, que abarcasse somente a circulação de bens, o que finalmente não ocorreu.

10 Internalizado pelo direito brasileiro através do Decreto nº 350, de 21 de novembro de 1991, que Promulga o Tratado para a Constituição de um Mercado Comum entre Argentina, Brasil, Paraguai e Uruguai. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0350.htm>. Acesso em: 20 mar. 2017.

11 A TEC é a "Nomenclatura Comum do MERCOSUL" (NCM), adotada através da Decisão CMC nº 22, de 1994 (e modificações). É uma técnica de classificação fiscal-aduaneira uniformizada dentro do território integrado, que atribui a cada mercadoria um código relacionado às suas características. A partir desta harmonização da classificação fiscal-aduaneira, é possível assegurar que mercadorias da mesma natureza recebam tratamento equivalente dentro do MERCOSUL.

12 Os Estados Partes do MERCOSUL mantêm Listas de Exceções à TEC, contendo um número determinados de itens da NCM, temporariamente excetuados do regime geral, mediante aprovação do CMC. Seu objetivo é atenuar problemas de disparidades econômicas, devendo ser gradualmente eliminadas na medida em que se operacionalize a convergência do bloco econômico.

13 KEGEL, Patrícia Luíza; AMAL, Mohamed. Instituições, direito e soberania: a efetividade jurídica nos processos de integração regional nos exemplos da União Europeia e do MERCOSUL. *Revista Brasileira de Política Internacional*, Brasília, v. 52, n. 1, p. 53-70, 2009.

14 GOMES, Eduardo Biacchi. *Blocos econômicos*: solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 117.

COSUL é o Tribunal Permanente de Revisão, órgão arbitral de convocatória permanente, cuja sede é em Assunção, no Paraguai, estando composto na atualidade por 5 árbitros. O TPR, em que pese tenha uma tímida atuação desde a sua criação pelo Protocolo de Olivos, firmado em 2002, exerce uma função de crucial importância para o aprofundamento da integração e, por esse motivo, merece especial destaque neste artigo.

3. Sistemas de solução de controvérsias dos blocos econômicos

A UE e o MERCOSUL, enquanto ordenamentos jurídicos com existência distinta daqueles de seus respectivos membros, necessitam de mecanismos próprios de solução de controvérsias, uma vez que a harmonização da interpretação e aplicação de seu arcabouço jurídico, além de sua efetividade em todo o território integrado, dependem de uma estrutura capaz de dirimir os conflitos que eventualmente surjam *intra* bloco.

A UE conta com o TJ/UE, já referido, instituição jurisdicional que detém competências delimitadas em seus tratados constitutivos e cujo objetivo precípuo é uniformizar a interpretação do ordenamento jurídico do bloco.[15] O indivíduo tem papel de protagonismo na integração europeia, na medida em que, em determinadas situações, possui legitimidade ativa para acionar diretamente o TJ/UE, na busca da realização de seus direitos individuais decorrentes do processo regional.

Já o MERCOSUL, enquanto bloco de formação mais recente e pautado pela intergovernamentalidade, possui um sistema de solução de controvérsias ainda provisório.[16] Em seu contexto, predomina o caráter arbitral em detrimento de um sistema tradicionalmente jurisdicional, com restrição de acesso aos indivíduos.

O Tratado de Assunção já previa uma forma simplificada e provisória de pacificação de conflitos relacionados à integração: os Estados Partes envolvidos em uma controvérsia deveriam realizar negociações diretas, e, em caso de insucesso, haveria mediação pelo Grupo Mercado Comum (GMC) e, em última instância, atuava o Conselho do Mercado Comum (CMC), órgão com carácter decisório e detentor da personalidade jurídica do bloco.

Já o Protocolo de Brasília sobre solução de controvérsias, firmado ainda em 1991, manteve as negociações diplomáticas diretas e o recurso ao GMC, mas introduziu uma importante alteração no método a ser utilizado pelos Estados, para obter a pacificação do conflito. Nesse sentido, passou a prever a formação de tribunais arbitrais *ad hoc*, compostos por 3 árbitros, utilizados, apenas, em caso de insuficiência da negociação e mediação anteriormente reportadas, inexistido uma instituição arbitral com carácter permanente. Pela norma em comento, foi eliminada a participação do CMC como última instância responsável pela solução do conflito, na medida em que foi substituída pela participação dos tribunais *ad hoc*, cujas decisões, chamadas de laudos arbitrais, passaram a ser obrigatórias e vinculantes.

Em 2002, com a assinatura do Protocolo de Olivos, o sistema de solução de controvérsias avançou por meio da criação de um órgão de caráter não provisório: o Tribunal Permanente de Revisão (TPR), que se instalou na cidade de Assunção, no Paraguai, em 2005. Ainda, o tratado passou a possibilitar às partes litigantes que fossem das negociações diplomáticas diretamente à instância arbitral, seja por meio do recurso aos tribunais arbitrais *ad hoc* ou diretamente ao TPR, obviando, se assim quisessem, a mediação pelo GMC.[17]

Dadas as suas competências e características institucionais, o papel que o TPR desempenha no desenvolvimento da integração, no MERCOSUL, é radicalmente diferente daquele do TJ/UE, conforme será explorado a seguir.

15 Cf. intelecção do art. 19º do TFUE, que trata desta instituição. Disponível em: <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=PT>. Acesso em: 24 abr. 2017.

16 Cf. intelecção do art. 53 do Protocolo de Olivos. Segundo a doutrina: "cumpre observar que o sistema de solução de controvérsias estabelecido pelo Protocolo de Olivos é uma reformulação do sistema anterior e não se trata do sistema definitivo, que deverá ser adotado quando da culminação do processo de convergência da tarifa externa comum, a TEC." GOMES, Eduardo Biacchi. Protocolo de Olivos: alterações no sistema de soluções de controvérsias do MERCOSUL e perspectivas. *Revista da Faculdade de Direito UFPR*, Curitiba, v. 37, p. 163, 2002.

17 Sobre o sistema de solução de controvérsias do MERCOSUL, ver: NEGRO, Sandra C.; VIEIRA, Luciane Klein. Transformaciones en la integración regional: Venezuela y el sistema de solución de diferencias del MERCOSUR. In: ASTRID UZCÁTEGUI, María Inés de Jesús. *Venezuela ante el MERCOSUR*. Caracas: Academia de Ciencias Políticas y Sociales/Universidad de los Andes/Universidad Católica Andrés Bello, 2014. p. 189-206. v. 2.

3.1. O Tribunal de Justiça da União Europeia

Desde a década de 1950, a integração europeia foi dotada de um sistema de solução de controvérsias dedicado à uniformização do Direito produzido pelo bloco. Nessa esteira, já em 1952, foi criado o que hoje é o TJ/UE, uma das instituições mais significativas do bloco. O TJ/UE é composto por um juiz por Estado Membro e 11 advogados gerais. Caracteriza-se como tribunal permanente, com sede em Luxemburgo, cuja jurisdição está acima dos Estados Membros, proferindo decisões vinculantes, que, entre outros objetivos, buscam uniformizar o entendimento e a aplicação do arcabouço jurídico do Direito da União, de forma a garantir sua interpretação e aplicação harmônicas.

Dessa forma, sua competência prejudicial existe desde 1957, mantendo-se em essência a mesma até hoje — o que pode ser verificado por meio da comparação do art. 177 do então Tratado Constitutivo da Comunidade Econômica Europeia (CEE) e o atualmente em vigor art. 267 do Tratado de Funcionamento da União Europeia (TFUE).

O TJ/UE evoluiu juntamente ao aprofundamento da integração entre os Estados Membros e o fortalecimento do bloco econômico. Mais do que isso, o Tribunal participa, contínua e ativamente, desse processo, através de decisões que moldaram o próprio Direito da União (por meio de acórdãos paradigmáticos, como *Van Gend en Loos* e *Costa/ENEL*, analisados a seguir, dentre outros). Assim, o reconhecimento da supranacionalidade, os princípios como o efeito direto e a aplicabilidade imediata do Direito europeu, além da primazia sobre os direitos nacionais, originaram-se justamente na jurisprudência do TJ/UE.

De acordo com os Tratados, o Tribunal é a instituição dotada de jurisdição e competência para dar a última palavra a respeito do Direito da UE, sua validade, interpretação e aplicação, em todo o território *intra* bloco — com o objetivo de assegurar sua plena efetividade, de acordo com os arts. 19º e 267º do Tratado da União Europeia (TUE) e do Tratado de Funcionamento da União Europeia (TFUE), respectivamente.

Dessa forma, verifica-se que o TJ/UE é um órgão verdadeiramente jurisdicional, dadas as características de independência (de outras instituições europeias e dos Estados-Membros), jurisdição própria e competência exclusiva em determinadas matérias.[18]

São relevantes ao objeto desde estudo a competência internacional (cumprimento ou não do direito europeu) e a constitucional, que trata da interpretação, validade e aplicação das normas europeias em função dos Tratados.

Nesse tocante, a jurisdição do TJ/UE desdobra-se em voluntária e contenciosa. A jurisdição contenciosa se relaciona ao descumprimento do Direito da União pelos órgãos e instituições da organização referida e seus Estados Membros, sendo, portanto, obrigatória e suas decisões, vinculantes. Já a jurisdição voluntária diz respeito a questões de interpretação do Direito da União, e de validade e compatibilidade dos atos dos órgãos e instituições em face dos tratados constitutivos[19].

O procedimento consultivo de competência do TJ/UE, denominado *questão prejudicial*, previsto no art. 267º do TFUE, será abordado a seguir. Através desse mecanismo, é possível aos tribunais nacionais formularem consultas sobre o Direito do bloco ao TJ/UE, de modo que, por meio da cooperação horizontal[20] entre as jurisdições, seja privilegiada a uniformização da interpretação e aplicação das normas da União.

Ressalta-se que não existe hierarquia entre o TJ/UE e os tribunais nacionais dos Estados Membros. Desse modo, o que existe são jurisdições com competências distintas: aos tribunais nacionais cabe julgar questões referentes a seu respectivo direito nacional, devendo, também, submeter-se ao Direito europeu e aplicá-lo quando pertinente. Já a jurisdição do TJ/UE é competente para dar a última palavra a respeito do Direito da UE, sendo-lhe vedado imiscuir-se em questões de competência puramente nacional dos Estados Membros.

É interessante destacar, nesse contexto, que o indivíduo tem legitimidade ativa perante o sistema de solução de controvérsias europeu. É possível, por exemplo, que

18 CAMPOS, João Mota de; CAMPOS, João Luiz Mota de. *Manual de direito europeu*: o sistema institucional, a ordem jurídica e o ordenamento económico da União Europeia. 6. ed. Coimbra: Wolters Kluwer, 2010. p. 153.

19 CAMPOS, João Mota de; CAMPOS, João Luiz Mota de. *Manual de direito europeu*: o sistema institucional, a ordem jurídica e o ordenamento económico da União Europeia. 6. ed. Coimbra: Wolters Kluwer, 2010. p. 191.

20 VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 44.

um particular participe ativamente do controle do cumprimento das normas do Direito da União, podendo propor demandas diretamente ao TJ/UE, em determinadas situações previstas nos Tratados.

3.1.1. Ações de competência do TJ/UE e a questão prejudicial

Em um parêntese comparativo entre a jurisdição do TJ/UE e o Supremo Tribunal Federal brasileiro (STF), que visa auxiliar a compreensão do sistema de solução de controvérsias europeu, serão analisadas sucintamente as ações passíveis de submissão à sua jurisdição. Vejamos.

O *Recurso de Anulação*, cujo objetivo é controlar a legalidade de atos das demais instituições europeias, assemelha-se no plano interno brasileiro com a Ação Direta de Inconstitucionalidade, proposta diretamente perante o STF. Já o *Recurso por Omissão* objetiva levar uma instituição europeia a cumprir com uma determinação legal, de forma similar à Ação Direta de Inconstitucionalidade por Omissão brasileira. Existe, ainda, a *Ação por Descumprimento*, que visa compelir um Estado Membro à satisfação de determinação da União, guardando certo grau de similitude com mecanismos constitucionais brasileiros, a exemplo da Intervenção Federal em caso de desrespeito ao pacto federativo.

Como se percebe, apesar das semelhanças em sede de jurisdição constitucional, há uma diferença fundamental entre o sistema europeu e o controle de constitucionalidade do STF: o papel do indivíduo na administração da justiça.

O particular (pessoa individual ou coletiva) possui legitimidade ativa para propor algumas das ações mencionadas anteriormente, diretamente ao TJ/UE[21]. Já na ordem interna brasileira, o indivíduo não possui legitimação ativa para a propositura de ações diretamente ao STF[22], estando adstrito à arguição incidental, de maneira vinculada a seu caso concreto e perante as instâncias inferiores (controle de constitucionalidade difuso).

Encerra-se o parêntese comparativo com o controle de constitucionalidade brasileiro e retoma-se a análise unicamente do sistema de solução de controvérsias europeu.

A questão prejudicial, que se opera de maneira não contenciosa, é essencial à realização da missão do TJ/UE, pois permite que os juízes e tribunais dos Estados Membros — diante de um caso concreto — formulem consultas quanto à interpretação, aplicabilidade e validade das normas europeias.[23] Como resultado, a decisão do TJ/UE, respondendo à consulta formulada, vincula não somente ao órgão jurisdicional consultante, senão a todos os órgãos jurisdicionais nacionais. Em outras palavras, o mecanismo possibilita garantir a segurança jurídica por meio da aplicação uniforme do Direito da UE.

Essa possibilidade de consultar o TJ/UE, antes de decidir o caso concreto, está disposta no art. 267º do TFUE, que estabelece, ainda, a obrigatoriedade da consulta ao juiz nacional, quando a incerteza acerca da interpretação ou da validade do Direito europeu se der em única ou última instância. Sobre o tema, é importante frisar que:

> Somente os juízes nacionais, pertencentes a um dos Estados Membros do bloco, têm competência para empregar este mecanismo processual. Isso significa dizer que tampouco as partes, ainda que possam sugerir ao juiz do litígio principal que proponha ante o Tribunal de Justiça uma questão prejudicial, tampouco o Estado e tampouco as instituições, órgãos ou organismos da União estão autorizados a utilizar este recurso.[24]

Sendo assim, os tribunais de última instância, diante de uma dúvida na interpretação do Direito da União a ser aplicado ao caso concreto ou diante de um caso que discute a validade do Direito referido, são obrigados a oferecer a questão prejudicial ao TJ/UE, estando dispensados dessa obrigatoriedade os juízes ou tribu-

21 Cf. o art. 263º, § 4º e art. 265º, § 3º, ambos do TFUE. Com exceção da Ação por Incumprimento, contexto em que é necessária a representação do indivíduo primeiramente à Comissão Europeia, que, após uma fase administrativa prévia, poderá então levar o caso ao TJ/UE. Disponível em: <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=PT>. Acesso em: 24 abr. 2017.

22 O art. 103 da CF traz o rol taxativo de *legitimados* à provocação do controle de constitucionalidade concentrado perante o STF. Além disso, o tribunal constitucional brasileiro restringiu ainda mais tal rol, por meio de sua jurisprudência, ao consolidar entendimento de que determinados legitimados podem agir em caráter universal, enquanto outros somente podem fazê-lo se demonstrada a pertinência temática. Disponível em: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Acesso em: 24 abr. 2017.

23 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 207.

24 VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 34-35.

nais de inferior instância. Ainda, conforme destaca a doutrina, somente se o Tribunal comunitário já tiver se manifestado em sede prejudicial, em caso semelhante, os tribunais que deverão oferecer a consulta estarão dispensados dessa obrigação. Está-se, pois, ante a Teoria do *Ato Aclarado*.[25]

Dadas as características do sistema jurisdicional de solução de controvérsias da UE, consolidado pela atuação do TJ/UE, ressalta-se que a integração entre os Estados Membros é favorecida na medida em que a uniformização da aplicação do Direito do bloco é assegurada jurisdicionalmente, oferecendo, assim, segurança jurídica e estabilidade ao Direito referido, pois todos os órgãos jurisdicionais aplicarão o Direito da UE do mesmo modo, tal qual o entendimento expedido pelo Tribunal comunitário. Logo, quanto maior a integração entre os Estados, mais complexo será o sistema de solução de conflitos e maior será a necessidade de oferecer estabilidade jurídica aos destinatários do Direito.

3.1.2. O impacto das decisões em sede prejudicial na formação dos princípios do Direito da UE

Conforme mencionado anteriormente, a competência prejudicial do TJ/UE mantém-se essencialmente a mesma desde a ratificação do Tratado da CEE, em 1957, tendo seu exercício colaborado para que o Tribunal consolidasse, ao longo dos anos, os princípios e premissas do ordenamento jurídico da União por meio de sua jurisprudência, em especial o reconhecimento da supranacionalidade, o primado sobre o direito nacional, o efeito direto e a aplicabilidade imediata das normas comunitárias.

Uma decisão paradigmática para o Direito da União refere-se àquela proferida no acórdão *Van Gend & Loos*,[26] de 5 de fevereiro de 1963. O caso envolvia uma empresa holandesa que se insurgiu contra um ato do Estado holandês, por ser violador do Tratado da CEE. Explica-se: ao ratificarem tal Tratado, os Estados comprometeram-se a não criar novos direitos aduaneiros, mas sim, eliminar as barreiras alfandegárias e não alfandegárias, com o objetivo de gradualmente estabelecer o mercado comum. Entretanto, a empresa de importação, ante a jurisdição nacional competente, questionou o fato da autoridade tributária estatal exigir-lhe direitos alfandegários mais gravosos do que aqueles que eram devidos à data de entrada em vigor do Tratado referido.

Naquele período transitório, de implementação do que seria mais tarde o mercado comum europeu, colocava-se em pauta a capacidade do pacto ratificado pelos Estados Membros de criar direitos aplicáveis imediatamente aos particulares, em especial o direito de poder exigir o seu fiel cumprimento. A jurisdição nacional holandesa entendeu que seria necessária a interpretação de disposições do Tratado da CEE para solucionar a questão, e, portanto, formulou uma questão prejudicial ao então denominado Tribunal de Justiça da Comunidade Europeia (TJ/CE), nos termos do art. 177 do Tratado da CEE.

No procedimento prejudicial, outros Estados Membros, como a Bélgica e a Alemanha, apresentaram intervenções por meio da faculdade prevista no Estatuto do TJ/CE, participando, ativamente, da discussão acerca do alcance das normas do bloco.

Em sua decisão, o TJ/CE valorou os objetivos que pautaram a criação do Tratado da CEE, de modo a não o limitar às regras estritas do Direito Internacional Público tradicional, fazendo com que as normas comunitárias surtissem efeito direto sobre os particulares, nacionais residentes ou domiciliados nos Estados Membros.

Assim, o objetivo do Tratado da CEE, que "consiste em instituir um mercado comum cujo funcionamento diz respeito diretamente aos nacionais da Comunidade, implica que esse Tratado seja mais do que um acordo meramente gerador de obrigações recíprocas entre os Estados contratantes"[27]. Dessa forma, o TJ/CE destacou o papel dos particulares no processo de integração, atribuindo-lhes direitos e deveres imediatos a partir das normas dos Tratados constitutivos.

Ainda, nesse acórdão, o TJ/CE deixou claro o tipo de integração que se buscava no bloco europeu, pautada

25 VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 38-40.

26 TRIBUNAL DE JUSTIÇA DA COMUNIDADE EUROPEIA. *Acórdão Van GEND & LOOS c/ Administração Fiscal neerlandesa (Assunto C-26/62)*. Julgado em 05/02/1063. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=PT&mode=req&dir=&occ=first&part=1&cid=105558>. Acesso em: 21 abr. 2018.

27 TRIBUNAL DE JUSTIÇA DA COMUNIDADE EUROPEIA. *Acórdão Van GEND & LOOS c/ Administração Fiscal neerlandesa (Assunto C-26/62), p. 220*. Julgado em 05/02/1963. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=PT&mode=req&dir=&occ=first&part=1&cid=105558>. Acesso em: 21 abr. 2018.

em bases supranacionais, o que exige um maior compromisso entre os Estados e, consequentemente, uma maior eficácia do sistema de solução de controvérsias. Em outras palavras, o TJ/CE esclareceu que "a Comunidade constitui uma nova ordem jurídica de direito internacional, a favor da qual os Estados limitaram, ainda que em domínios restritos, os seus direitos soberanos, e cujos sujeitos são não só os Estados-Membros, mas também os seus nacionais".[28]

Outro caso digno de nota é o denominado *Costa c/ ENEL*,[29] cuja decisão prejudicial foi proferida em 15 de julho de 1964. Nele, o TJ/CE determinou que, para que haja segurança jurídica *intra* bloco, deve haver o primado do Direito comunitário sobre o direito interno dos Estados Membros.

O substrato fático desse caso envolvia o sr. Flamínio Costa, cidadão italiano que se insurgiu contra a nacionalização do setor elétrico intentada pelo governo italiano, em contrariedade ao disposto no Tratado da CEE. No pedido judicial, o particular referido questionou qual seria o ente credor de sua conta de eletricidade — se a companhia de eletricidade que fora nacionalizada ou o "Ente nazionale energia elettrica", órgão governamental que havia encampado tal empresa. Diante de tal questão, o TJ/CE estabeleceu que:

> Efetivamente, ao instituírem uma Comunidade de duração ilimitada, dotada de instituições próprias, de capacidade jurídica, de capacidade de representação internacional e, mais especialmente, de poderes reais resultantes de uma limitação de competências ou de uma transferência de atribuições dos Estados para a Comunidade, estes limitaram, ainda que em domínios restritos, os seus direitos soberanos e criaram, assim, um corpo de normas aplicável aos seus nacionais e a si próprios.
>
> Esta integração, no direito de cada Estado-membro, de disposições provenientes de fonte comunitária e, mais geralmente, os termos e o espírito do Tratado têm por corolário a impossibilidade, para os Estados, de fazerem prevalecer, sobre uma ordem jurídica por eles aceite numa base de reciprocidade, uma medida unilateral posterior que não se lhe pode opor.
>
> Com efeito, a eficácia do direito comunitário não pode variar de um Estado para outro em função de legislação interna posterior, sem colocar em perigo a realização dos objetivos do Tratado [...].[30]

Mais tarde, o TJ/CE consolidou os princípios do efeito direto e do primado do Direito da União no acórdão *Simmenthal*, proferido em 9 de março de 1978, a partir do qual se pode observar um resgate dos *leading cases* anteriormente mencionados. Nessa ocasião, o Tribunal viu-se incumbido de "determinar as consequências decorrentes [...] em caso de contradição entre uma norma de direito comunitário e uma disposição posterior de direito interno"[31], no sentido de auferir se seria necessária alguma medida interna de revogação ou anulação da norma incompatível.

No caso concreto, a incompatibilidade girava ao redor do estabelecimento, pelo direito italiano, de medidas internas de controle sanitário, bem como taxas alfandegárias, na fronteira, para o ingresso da carne para consumo humano proveniente de outro Estado. A empresa *Simmenthal* importava carne da França para a Itália e se insurgiu contra o controle referido e a cobrança de taxas, por considerar que ambos se constituíam em obstáculos à livre circulação de mercadorias, prevista no Tratado constitutivo da CEE, como um dos pilares da união aduaneira.

Sobre o tema, o TJ/CE ressaltou a missão do juiz enquanto protetor dos direitos conferidos aos particulares pelo Direito comunitário, esclarecendo que as normas internas incompatíveis deveriam ser consideradas imediatamente inaplicáveis, para garantir os efeitos da norma comunitária de modo uniforme em todos os Estados Membros.[32]

28 BORCHARDT, Klaus-Dieter. *O ABC do direito da União Europeia*. Luxemburgo: Serviço de Publicações da União Europeia, 2011. p. 32.

29 Sobre o caso, ver: LAUREANO, Abel. O efeito directo do direito da União Europeia: uma visão condensada do enquadramento duma preeminente criação jurisprudencial. *Revista da Faculdade de Direito UFPR*, n. 57, p. 113-143, 2013.

30 TRIBUNAL DE JUSTIÇA DA COMUNIDADE EUROPEIA. *Acórdão Flaminio Costa c/ ENEL (Assunto C-6/64), p. 555*. Julgado em 15/07/1964. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87399&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=220375>. Acesso em: 21 abr. 2018.

31 TRIBUNAL DE JUSTIÇA DA COMUNIDADE EUROPEIA. Acórdão *Administração das Finanças do Estado c/ Sociedade Anónima Simmenthal (Assunto 106/77), p. 246*. Julgado em 09/03/1978. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=89693&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=234005>. Acesso em: 21 abr. 2018.

32 Em 2016, foi decidido, em sede prejudicial, o caso "Puligienica Facility Esco SpA (PFE) c/ Airgest SpA", que se originou de uma disputa acerca da adjudicação de um contrato de exploração de serviços de limpeza e manutenção de um aeroporto civil na Itália. A jurisdição nacional questionou o TJ/UE acerca da interpretação de normas constantes na Diretiva nº 89/665, que já havia sido objeto de análise no acórdão Fastweb (C-100/12). Nesta ocasião, o TJ/UE se pronunciou no sentido de recordar que o acórdão proferido

Já no acórdão *Cassis de Dijon*, datado de 20 de fevereiro de 1979, o TJ/CE deparou-se com a questão das medidas de efeito equivalente às restrições quantitativas impostas à importação de mercadorias entre os Estados Membros, que surgiu da restrição à comercialização, na Alemanha, do licor "cassis de Dijon", produzido na França.

Nessa decisão, o TJ/CE adverte que os obstáculos à circulação intracomunitária decorrentes da disparidade entre legislações nacionais somente deveriam ser tolerados na medida em que fossem estritamente necessários para proteger a saúde pública ou a defesa dos consumidores, por exemplo[33].

Por outro lado, no caso *Francovich e Bonifaci c/ Itália*,[34] decidido em 1991, o Tribunal comunitário deparou-se com a questão da responsabilidade internacional do Estado Membro face ao particular, oriunda do descumprimento da transposição de Diretiva, no prazo de 2 anos, conforme determinado no Tratado constitutivo. Sobre o tema, o TJ/CE se pronunciou no seguinte sentido:

> Compete ao órgão jurisdicional nacional assegurar no âmbito do regime jurídico nacional da responsabilidade, o direito dos trabalhadores a obter reparação pelos prejuízos causados em virtude da não transposição da diretiva. Deve, pois, responder-se ao órgão jurisdicional nacional que um Estado-membro é obrigado a reparar os prejuízos causados aos particulares pela não transposição da Diretiva 80/987.[35]

Dessa feita, por meio da análise das decisões paradigmáticas trazidas à colação, é possível reafirmar a relação intrínseca entre o sistema de solução de controvérsias da UE, o impacto produzido pelas decisões operadas em seu âmago na construção do Direito do bloco[36] e o desenvolvimento econômico do respectivo processo de integração, no sentido de que, quanto mais coesa, densa e uniforme são as respostas oferecidas pelo sistema referido, maior será o grau de integração econômica atingido.

3.2. O sistema de solução de controvérsias do MERCOSUL

O bloco do Cone Sul almejava, em seu princípio, objetivos que se revelariam impraticáveis em tão curto espaço de tempo, como previsto no Tratado de Assunção.[37] Relativamente ao sistema de solução de controvérsias, este é voltado para a negociação, mediação e arbitragem entre os Estados Partes, inexistindo um tribunal com jurisdição obrigatória ou acessível aos particulares.

Como já visto, no MERCOSUL, inexiste uma estrutura supranacional, uma vez que os Estados Partes conservam intactas suas soberanias ao relacionarem-se uns com os outros. Dessa forma, a ausência de tal qualidade no sistema de solução de controvérsias é prejudicial a um esquema de integração mais profundo ou

vincula o juiz nacional quando à interpretação ou à validade dos atos das instituições da União em causa, para a solução do litígio no processo principal. Ademais, "o efeito útil do artigo 267 do TFUE seria diminuído se o juiz nacional estivesse impedido de dar, imediatamente, ao direito da União uma aplicação conforme com a decisão ou com a jurisprudência do Tribunal de Justiça (v., neste sentido, acórdão *Simmenthal*, 106/77, EU:C:1978:49, nº 20)". TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA. *Acórdão Puligienica Facility Esco SpA (PFE) c/ Airgest SpA*. Julgado em 05/04/2016. Disponível em: <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:62013CJ0689>. Acesso em: 26 abr. 2018. p. 10.

33 TRIBUNAL DE JUSTIÇA DA COMUNIDADE EUROPEIA. *Acórdão Rewe-Zentral AG c/ Bundesmonopolverwaltung Für Branntwein (Assunto 120/78), p. 332*. Julgado em 20/02/1979. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90055&pageIndex=0&doclang=pt&mode=lst&dir=&occ=first&part=1&cid=227876>. Acesso em: 21 abr. 2018.

34 Sobre o caso, ver: FONTOURA, Jorge. A construção jurisprudencial do direito comunitário europeu. *Revista de Informação Legislativa*, n. 140, p. 163-170, 1998.

35 TRIBUNAL DE JUSTIÇA DA COMUNIDADE EUROPEIA. *Acórdão Andrea Francovich e Daniela Bonifaci c/ República Italiana (Assunto 6/90 e 9/90), p. I - 5416*. Julgado em 19/11/1991. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97140&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=232164>. Acesso em: 21 abr. 2018.

36 O último *leading case* trazido à colação (*Francovich e Bonifaci)* igualmente vem sendo reiterado nas decisões posteriores do TJ/UE. Nesse sentido, veja-se o caso "TDC A/S c/ Teleklagenaevnet", de 2016, no qual o juízo nacional indaga ao TJ/UE acerca da possibilidade de uma Diretiva produzir efeitos diretos. Em sua resposta, o TJ/UE fez remissão à sua jurisprudência, assinalando que "em todos os casos em que, atento ao seu conteúdo, disposições de uma diretiva sejam incondicionais e suficientemente precisas, os particulares têm o direito de as invocar nos tribunais nacionais contra o Estado, seja quando este não tenha transposto dentro do prazo a diretiva para o direito nacional, seja quando tenha feito uma transposição incorreta desta (acórdãos de 24 de janeiro de 2012, Dominguez, C-282/10, EU:C:2012:33, nº 33 e jurisprudência referida, e de 6 de outubro de 2015, T-Mobile Czech Republic e Vodafone Czech Republic, C-508/14, EU:C:2015:657, nº 52 e jurisprudência referida)". TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA. *Acórdão TDC A/S c/ Teleklagenaevnet*. Julgado em 21/12/2016. Disponível em: <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:62015CJ0327>. Acesso em: 26 abr. 2018. p. 15

37 BARRAL, Welber. *O Protocolo de Olivos e o MERCOSUL*. 2010. Disponível em: <https://periodicos.ufsc.br/index.php/sequencia/article/view/15336>. Acesso em: 20 out. 2017.

mais denso.[38]

O Protocolo de Brasília, firmado em 1991, previsto para vigorar transitoriamente, instituiu um procedimento perante Tribunais Arbitrais *ad hoc*. Em 2002, o Protocolo de Olivos, que derrogou o Protocolo de Brasília, manteve em parte a sistemática adotada, restrita à resolução de conflitos entre os Estados Partes, mas introduziu uma mudança significativa. Por meio desse Protocolo, instituiu-se o Tribunal Permanente de Revisão – TPR, também de natureza arbitral, competente para conhecer controvérsias em grau de Recurso de Revisão[39] ou em única instância, através da competência *per saltum*.

Com a criação do tribunal referido, parte da doutrina passou a entender que, durante o estágio de integração atual do MERCOSUL (que ainda não é um mercado comum), tal estrutura arbitral é, na verdade, benéfica ao desenvolvimento do bloco, por resguardar as vontades políticas dos Estados Partes.[40] Dessa forma, o TPR representa um avanço na busca da harmonização da aplicação do Direito do MERCOSUL, uma vez que lhe foi atribuída a competência de dar a última palavra a respeito da interpretação deste.[41]

3.2.1. O Tribunal Permanente de Revisão e as opiniões consultivas

A criação do TPR e a competência não contenciosa atribuída a esse órgão para emitir opiniões consultivas[42], solicitadas por distintos atores,[43] são passos em direção à uma maior integração entre os Estados do Cone Sul.[44]

Nesse sentido, a harmonização da interpretação e da aplicação das normas do MERCOSUL é, de certa forma, favorecida pela criação do TPR, instituição de caráter permanente. Entretanto, o texto normativo do Protocolo de Olivos não aborda a questão dos efeitos de tais decisões consultivas,[45] o que minimiza sua eficiência no desempenho de sua missão harmonizadora, já que o órgão consultante não tem a obrigatoriedade de adotar a interpretação expedida pelo TPR.

Não obstante isso, as opiniões consultivas têm por objetivo promover maior harmonia e efetividade em relação à interpretação e aplicação do conjunto normativo do bloco, à semelhança da questão prejudicial da UE, que permitiu erigir os princípios basilares, que dão sustento à integração europeia. Porém, como a própria denominação indica, a solicitação da opinião consultiva não é obrigatória às jurisdições nacionais, e a resposta emitida pelo TPR tampouco vincula os juízes e tribunais dos Estados Partes, conforme o art. 11 da Decisão CMC nº 37/2003 (norma regulamentadora do mecanismo processual).

O acórdão proferido pelo TPR em sede de opinião consultiva, por não ser vinculante, acaba por não conseguir cumprir com a missão a qual se destina. Essas características, que prejudicam a efetividade das opiniões consultivas, se relacionam, intrinsecamente, com a intergovernamentalidade existente na organização referida. Nesses termos, resgatamos o entendimento da doutrina, segundo o qual:

> No sistema da intergovernabilidade MERCOSUL, o mecanismo de cooperação utilizado é o das opiniões consultivas que, a exemplo do modelo supranacional do reenvio prejudicial, é aplicado

38 VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 119.

39 BARRAL, Welber. *O Protocolo de Olivos e o MERCOSUL*. 2010. Disponível em: <https://periodicos.ufsc.br/index.php/sequencia/article/view/15336>. Acesso em: 20 out. 2017.

40 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 216.

41 VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 118-119.

42 As opiniões consultivas possibilitam que o juiz nacional solucione dúvidas acerca da normativa do MERCOSUL, visando a sua aplicabilidade no caso concreto. Nesse sentido, ver: FEIJÓ, Camilla de Freitas. O atual sistema de solução de controvérsias do MERCOSUL: rumo à consolidação de um tribunal regional. *Revista de Direito Internacional UNICEUB*, v. 9, n. 1, p. 72, 2012.

43 Aqui, é importante destacar que têm legitimidade ativa para solicitar opinião consultiva ao TPR os seguintes atores: a) os Estados Partes, atuando em conjunto; b) os órgãos com capacidade decisória, a saber, o CMC, GMC e a Comissão de Comércio do MERCOSUL (CCM); c) os Tribunais Superiores dos Estados Partes; e d) o Parlamento do MERCOSUL. No que nos interessa, com relação à legitimidade ativa do Poder Judiciário, podem oferecer a consulta interpretativa ao TPR os seguintes órgãos: a) pela Argentina, a Corte Suprema de Justicia de la Nación (CSJN); b) pelo Brasil, o Supremo Tribunal Federal (STF); c) pelo Paraguai, a Corte Suprema de Justicia (CSJ); d) pelo Uruguai, a Suprema Corte de Justicia (SCJ) e o Tribunal del Contencioso Administrativo (TCA). A Venezuela ainda não indicou o órgão competente para o pedido de opiniões consultivas.

44 VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 118-119.

45 BARRAL, Welber. *O Protocolo de Olivos e o MERCOSUL*. 2010, p. 150. Disponível em: <https://periodicos.ufsc.br/index.php/sequencia/article/view/15336>. Acesso em: 20 out. 2017.

> quando as partes ou o próprio juiz nacional da causa possuem dúvidas quanto à aplicação e à interpretação de uma norma do bloco, no caso em concreto. Todavia, existem determinadas diferenças entre ambas:
>
> a) A decisão da opinião consultiva não é vinculante, isto é, não obriga ao juiz nacional.
>
> b) Na sistemática do Protocolo de Olivos, os particulares não podem, diretamente, suscitar a dúvida, a qual deve tramitar pelos Tribunais Superiores dos Estados e;
>
> c) A instância jurisdicional nacional não é obrigada a aceitar o pedido de opinião consultiva[46].

A intergovernamentalidade do MERCOSUL se revela como característica estruturante de seu sistema de solução de controvérsias, consideradas as limitações impostas pela inexistência de vinculação e obrigatoriedade de adoção da decisão do TPR em sede de opinião consultiva, a impossibilidade de acesso direto[47] pelos particulares afetados pelo Direito da Integração e a reserva do rol de legitimados à solicitação de opinião consultiva — falando-se em Poder Judiciário — a um âmbito consideravelmente mais restrito daquele da questão prejudicial europeia, dentre outros obstáculos. Dessa forma, e levando em conta a etapa atual de integração econômica do MERCOSUL, que revela um menor compromisso entre os Estados, verifica-se que o sistema de solução de conflitos adotado pelo bloco é menos complexo que o europeu, na mesma proporção em que é menos eficiente, pelos motivos já relacionados.

4. A UNIFORMIDADE CONFERIDA AO DIREITO DA INTEGRAÇÃO À LUZ DOS SISTEMAS DE SOLUÇÃO DE CONTROVÉRSIAS

Segundo esclarece a doutrina, um dos elementos que indica o avanço de um processo de integração é justamente o seu sistema de solução de controvérsias, na medida em que este representa uma garantia dos direitos conferidos aos particulares abrangidos pela integração regional.[48]

A UE, que já conta com várias décadas de desenvolvimento, segue sendo o paradigma para o estudo jurídico dos processos de integração regionais, mesmo após momentos de turbulência (a exemplo da recente deflagração do processo de retirada do Reino Unido, apelidado pela imprensa internacional como *Brexit*).

Desde a gênese do bloco europeu, é notável o protagonismo desempenhado pelo então TJ/CE, hoje TJ/UE, no sentido de interpretar, consolidar, harmonizar e, até mesmo, inovar no arcabouço jurídico do Direito da União. Princípios basilares daquele bloco tiveram origem em sua jurisprudência, a exemplo do efeito direto das normas europeias (acórdão *Van Gend & Loos*, de 1963) e da primazia do Direito da União sobre o direito interno dos Estados Membros (acórdão *Costa/ENEL*, de 1964),[49] como já referido. Nesse sentido,

> Podemos observar uma acentuada participação do TJ/UE no fortalecimento da integração daquele bloco. [...] O impacto de sua jurisprudência [...] não deixa dúvida de que essa participação significa mais do que a mera aplicação da legislação em vigor [...]. Para nós, resta claro que o TJ/UE tem dado contribuição importante para o processo de integração regional europeu, mediante sua produção jurisprudencial e a formulação e solidificação de princípios, que, em alguns casos, influenciaram a criação ou a melhoria da legislação em vigor.[50]

A seu turno, a integração regional, no MERCOSUL,

46 GOMES, Eduardo Biacchi. Integração econômica no MERCOSUL: opiniões consultivas e a democratização no acesso ao Tribunal Permanente de Revisão. *Revista de Direito Internacional UNICEUB*, v. 10, n. 1, p. 132, 2013.

47 Há autores que defendem existir acesso direito do particular ao TPR. Nesse sentido, ver: GOMES, Eduardo Biacchi. La democratización del acceso al Tribunal Permanente de Revisión del MERCOSUR a través de las opiniones consultivas. *Revista da Secretaria do Tribunal Permanente de Revisão*, Assunção, n. 4, p. 49-63, ago. 2014. Entretanto, apesar do alargamento da legitimidade ativa para solicitação de opiniões consultivas, trazido pela normatização procedimental interna (no caso brasileiro, pela Emenda Regimental nº 48 de 2012, do STF), o particular permanece com o acesso restrito ao sistema de solução de conflitos do MERCOSUL, voltado essencialmente para os Estados Partes.

48 PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 14.

49 Em processos de integração como a UE, os *leading cases* decididos pelos Tribunais Regionais se deram justamente no marco das questões prejudiciais solicitadas por juízes nacionais. PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 67-68.

50 CORREIA, Emanuella Chagas Jaguar. Efeito vinculante do reenvio prejudicial na União Europeia: um caminho para desenvolver o direito comunitário. *Revista da Secretaria do Tribunal Permanente de Revisão*, Assunção, n. 4, p. 70, ago. 2014.

possui premissas históricas, políticas e socioeconômicas muito diferentes das europeias, de maneira que é impossível transplantar as soluções do bloco europeu para a realidade específica referida, dada sua fragilidade institucional e objetivos econômicos. Dessa forma,

> Não apenas o sistema de solução de controvérsias, mas a ordem jurídica como um todo recebe considerações. A fragilidade institucional e jurídica do MERCOSUL é incontestável. Seguem existentes os mesmos problemas fundamentais: a provisoriedade de parte dos instrumentos vigentes, a ausência de uma instituição uniformizadora das decisões, que busque evitar soluções diferenciadas para situações aproximadas, e o não-estabelecimento de mecanismos pelos quais os particulares possam buscar, diretamente, a solução de seus problemas.[51]

A fragilidade descrita se evidencia, também, pelo decurso de tempo sem o exercício da cooperação entre as jurisdições nacionais e a regional. Desde a instalação do TPR até a presente data, aproximadamente 13 anos mais tarde, foram emitidas somente 3 opiniões consultivas. Ademais, os próprios árbitros do TPR lamentam a ausência de obrigatoriedade e vinculação conferidas ao mecanismo pela regulamentação do CMC[52]. Do mesmo modo, foram poucos os laudos arbitrais emitidos, sendo que o último deles se deu a conhecer no ano de 2012, e tratou da situação da suspensão do Paraguai da participação nos órgãos decisórios do MERCOSUL e do respectivo ingresso da Venezuela ao bloco.

Devido ao longo desenvolvimento da UE, sobretudo com relação à questão prejudicial, esse bloco econômico serve como referência e, porque não, fonte de inspiração à consolidação do direito da integração do MERCOSUL, observadas as diferenças de contexto socioeconômico e político de cada realidade. Tal inspiração pode ser, inclusive, reconhecida na fundamentação da primeira opinião consultiva proferida pelo TPR[53].

Dessa forma, passa-se a explorar de que maneira poderia ocorrer o fortalecimento da atuação do TPR para a consolidação e o aprofundamento da integração, no MERCOSUL, por meio da análise comparativa com o TJ/UE — sem olvidar que um simples "transplante" de soluções consagradas no contexto europeu não é somente impossível, como também indesejável à realidade sul-americana.

4.1. Independência do TJ/UE e questão prejudicial

Para desempenhar sua função de modo imparcial, o TJ/UE conta com garantias para assegurar sua independência, como o caráter supranacional de sua jurisdição e a delimitação de suas competências pelo Direito europeu originário.

Além disso, o TJ/UE, enquanto instituição, dispõe de recursos próprios, oriundos de dotação orçamentária constante da Seção 4 do Orçamento Geral da UE, destinados a custear sua atividade. Ademais, seus juízes são escolhidos entre personalidades que ofereçam todas as garantias de independência e reúnam as condições estabelecidas nos arts. 253º e 254º do TFUE.

Nesse cenário, a questão prejudicial constitui o mecanismo apto para promover a uniformidade da inter-

51 JAEGER JUNIOR, Augusto. Metodologia jurídica europeia e mercosulista: considerações fundamentais. *Revista da Secretaria do Tribunal Permanente de Revisão*, Assunção, n. 3, p. 139, mar. 2014.

52 A primeira opinião consultiva do MERCOSUL foi prolatada em 03/04/2007, a pedido da Magistrada de Primeira Instância Civil e Comercial de Assunção, Paraguai, e versava sobre a aplicação do Protocolo de Buenos Aires sobre Jurisdição Internacional em Matéria Contratual, em caso envolvendo uma empresa argentina e outra paraguaia, que litigavam acerca do foro competente para dirimir suas controvérsias — se aquele determinado pela norma do MERCOSUL ou o indicado pela norma interna paraguaia. O árbitro Wilfrido Fernández de Brix, encarregado da relatoria do parecer consultivo, lamenta a ausência de vinculação das jurisdições nacionais à interpretação fixada pelo TPR ao discorrer acerca do conceito, natureza e objetivo das opiniões consultivas, ao dizer: "por outro lado, no nosso regime atual, lamentavelmente a mal chamada opinião consultiva não é obrigatória nas circunstâncias precedentemente esboçadas, nem muito menos vinculante para o juiz nacional consultante. Em primeiro termo, é característica de todo tribunal sua imperatividade, mas, muito mais que isso, com um sistema não obrigatório, nem vinculante ao magistrado nacional, se desnaturaliza por completo o conceito, a natureza e o objetivo do que deve ser um correto sistema de interpretação prejudicial. Isso confronta principalmente com o objetivo da consulta do juiz nacional no âmbito de um processo de integração que é lograr a interpretação da norma comunitária de maneira uniforme em todo o território integrado [...]". MERCOSUL. Tribunal Permanente de Revisão. *Opinião consultiva nº 01 de 2007*. Disponível em: <http://tprmercosur.org/pt/docum/opin/OpinCon_01_2007_pt.pdf>. Acesso em: 12 mai. 2017.

53 Ainda na redação da OC nº 01/2007, referida na nota anterior, o árbitro, ao tecer argumentação favorável à uma hierarquia diferenciada das normas do bloco em face dos ordenamentos nacionais dos Estados Partes, menciona o seguinte: "recordemos a origem pretoriana da prevalência do direito comunitário na União Europeia: 'a origem do princípio de primazia conforme o mesmo tribunal comunitário, não deve buscar-se em previsões ou reconhecimentos do direito nacional dos Estados que participam do processo da integração, senão na própria natureza do direito da comunidade'". MERCOSUL. Tribunal Permanente de Revisão. *Opinião consultiva nº 01 de 2007*. p. 08. Disponível em: <http://tprmercosur.org/pt/docum/opin/OpinCon_01_2007_pt.pdf>. Acesso em: 12 maio 2017.

pretação do Direito da União, uma vez que vincula a jurisdição nacional que formulou a questão, objeto da consulta, e todas as demais jurisdições abarcadas pelo território integrado. Na medida em que a jurisprudência do próprio TJ/UE admite o afastamento da obrigatoriedade da questão prejudicial à última instância do Poder Judiciário nacional, em caso de já ter decidido questionamento anterior semelhante, conclui-se que o efeito vinculante do acórdão do TJ/UE, em sede prejudicial, extrapola o âmbito subjetivo do contexto em que foi solicitado. Sendo assim, conforme Campos e Campos:

> o TJUE admite, em contrapartida, que a autoridade de seu acórdão pode ultrapassar o quadro do caso concreto, na medida em que dispensa os tribunais supremos dos Estados-Membros da obrigação de reenvio que lhes impõe o art. 267º [do TFUE] sempre que a questão de interpretação perante eles suscitada tenha já sido julgada por acórdão anterior do TJUE.[54]

No que diz respeito à autoridade ou obrigatoriedade do acórdão interpretativo do TJ/UE, sua cogência não advém de disposição normativa expressamente positivada, sendo, ao contrário, oriunda da interpretação sistêmica do Direito da União, construída através da própria jurisprudência da Corte referida. Sobre o tema, a doutrina, referindo-se ao acórdão *Milch, Fett- und Eierkontor*, decidido pelo TJ/CE em 1969, destaca que:

> Lo mismo ocurre en la CE [Comunidade Europeia, hoje União Europeia], donde el Tribunal de Justicia ha interpretado que del espíritu y el sistema del Tratado surge que la sentencia emitida en el marco de una cuestión prejudicial, debe ser obligatoriamente acatada por el órgano jurisdiccional nacional requirente.[55]

Partindo ainda de outra premissa: o TJ/UE é a instituição garantidora do respeito do Direito na interpretação e aplicação dos Tratados, uma vez que lhe foi atribuída a competência precípua de ditar a última palavra relativamente ao Direito da União[56]. Portanto, é patente a vinculação da jurisdição nacional à resposta formulada pelo TJ/UE em sede de questão prejudicial[57]. Inclusive, o não acatamento da interpretação ditada pelo tribunal referido, pelo juiz nacional, pode implicar sanções ao Estado de origem deste, podendo chegar, inclusive, à expulsão do país da organização internacional, por descumprimento do Direito da União.[58]

4.2. O TPR e a competência consultiva: a busca pela uniformidade na interpretação do Direito do MERCOSUL e as suas limitações

O TPR, de natureza intergovernamental e arbitral, integra o ainda provisório sistema de solução de controvérsias do MERCOSUL. Dentre suas fragilidades, diferenciam-se as estruturais daquelas relacionadas às suas competências. Como exemplo, destaca-se o fato de que o Tribunal referido não possui autonomia em termos orçamentários:

> El TPR no tiene un presupuesto asignado para atender a los gastos del órgano propiamente considerado, sino sólo para afrontar los casos de controversias y opiniones consultivas. [...] Se aprobó un pequeño presupuesto para hacer frente a los gastos más urgentes de funcionamiento del TPR, así como al sueldo del Secretario. La falta de un presupuesto constituye una debilidad importante del TPR.[59]

Em relação à fragilidade institucional, é necessário mencionar que certos dispositivos do próprio Protocolo de Olivos, bem como de sua regulamentação (principalmente a Decisão CMC nº 37/2003) atuam restritivamente sobre as competências do TPR, tanto na contenciosa como na consultiva.

Previstas de forma inédita e sucinta no art. 3º do Protocolo de Olivos, o objetivo das opiniões consultivas é a busca pela uniformidade e efetividade na interpretação do Direito do MERCOSUL. Tudo isto de maneira semelhante à questão prejudicial europeia e em

54 CAMPOS, João Mota de; CAMPOS, João Luiz Mota de. *Manual de direito europeu*: o sistema institucional, a ordem jurídica e o ordenamento económico da União Europeia. 6. ed. Coimbra: Wolters Kluwer, 2010. p. 437.

55 PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y estado de derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 80-81.

56 De acordo com o art. 19º do TUE.

57 Faz-se a ressalva de que inexiste relação hierárquica entre o julgador nacional e o TJ/UE, uma vez que na verdade existe o reparto de competências: enquanto ao juiz nacional cabe o deslinde da situação concreta, ao TJ/UE cabe a interpretação e a apreciação da validade das normas do Direito da União pertinentes à solução do caso (que permanece sob a competência exclusiva do juiz solicitante da questão prejudicial).

58 Sobre o tema, ver: VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 67.

59 PEROTTI, Alejandro Daniel. *Elementos básicos para la constitución de un Tribunal de Justicia del MERCOSUR*. La reforma institucional del MERCOSUR, 2008. Disponível em: <http://www.stf.jus.br/arquivo/cms/sextoEncontroConteudoTextual/anexo/Texto_dos_Exposiotres/Elementos_basicos_para_la_constitucion__Alejandro_Perotti.pdf>. Acesso em: 25 fev. 2018.

conformidade com os princípios e anseios veiculados pelo Tratado de Assunção, marco jurídico fundante do bloco referido.

Contudo, as opiniões consultivas sofreram drástica restrição ao serem regulamentadas pelo CMC. A legitimação ativa para a solicitação ficou restrita a um pequeno rol de sujeitos, a saber: os Estados Partes, atuando em conjunto; os órgãos decisórios do MERCOSUL (CMC, o GMC e a CCM); os Tribunais Supremos dos Estados Partes, dotados de jurisdição nacional; e o Parlamento do MERCOSUL. Ainda que, em termos de legitimados ativos para a solicitação da consulta, o rol de atores habilitados seja maior do que o previsto na UE, com relação à participação do Poder Judiciário nacional — que é o que nos interessa —, esta se viu bastante limitada. Ou seja, enquanto no bloco europeu, qualquer juiz, de qualquer instância, pode formular uma consulta prejudicial diretamente ao TJ/UE, no MERCOSUL, o CMC limitou a faculdade para a formulação de consulta ao TPR aos tribunais superiores dos Estados Partes, o que não permite a atuação direta entre os juízes nacionais de primeira instância e o Tribunal da região.

Tendo em vista a cooperação jurídica esperada em um esquema de integração, pode-se afirmar que a regulamentação da opinião consultiva pelo CMC não favoreceu o diálogo entre as jurisdições nacionais e a do MERCOSUL. Isto porque impõe obstáculos ao acesso do juiz nacional de instâncias inferiores, que é, na verdade, o sujeito encarregado de aplicar as normas do bloco econômico ao cotidiano dos particulares por elas afetados.

Com relação à ausência de obrigatoriedade na formulação do pedido de opinião consultiva ao TPR e à não vinculação ao pronunciamento expedido, entende-se que a Decisão CMC nº 37/2003 (art. 11) andou na contramão do aprofundamento da integração regional. Esse regime discrepa do europeu, de modo a prejudicar o alcance da uniformização da interpretação do Direito do MERCOSUL. Assim, segundo Perotti, em caso de verdadeiramente existir interesse em garantir a integração do bloco, a regulamentação restritiva das opiniões consultivas deve ser alterada, para possibilitar o cumprimento de sua finalidade.[60]

Dessa forma, entende-se que o CMC, ao exercer a sua competência legislativa de regulamentação da opinião consultiva, agiu em contrariedade ao disposto pelo próprio preâmbulo do Tratado de Assunção, segundo o qual os Estados Partes "*reafirmam sua vontade política de estabelecer as bases para a união cada vez mais estreita entre seus povos*", pois a ausência de obrigatoriedade e de efeitos vinculantes em muito prejudica a tarefa de harmonizar a interpretação do Direito do MERCOSUL, conforme o entendimento da doutrina especializada e do próprio TPR.[61]

Em nota acerca da competência contenciosa do TPR, igualmente prevista no sistema de solução de controvérsias do MERCOSUL, o Protocolo de Olivos pretendeu mitigar a prática do *forum shopping* e da propositura de demandas em duplicidade pelos Estados Partes em mais de um foro[62], já que, sob o sistema do Protocolo de Brasília, era possível levar uma mesma controvérsia tanto ao sistema do MERCOSUL como também a outro esquema multilateral do qual os litigantes participassem, de forma concomitante. Dessa forma, o Protocolo de Olivos, em seu art. 1º, limitou-se a impor aos Estados Partes a impossibilidade de reapresentar uma demanda, no âmbito do MERCOSUL, se ela já foi proposta em outro foro, e vice-versa, em virtude da denominada *cláusula de opção de foro*. Essa possibilidade de afastamento do sistema regional pode prejudicar a integração, como defende Gomes[63].

Como se pode observar, as limitações impostas ao TPR são muitas.[64] Elas podem ser tanto de caráter ins-

60 PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 75-81.

61 Conforme se depreende da já mencionada redação da OC nº 01/2007, na qual os árbitros do TPR enunciam o enfraquecimento do potencial das opiniões consultivas para brindar uniformidade à interpretação do Direito do MERCOSUL, em face de não serem nem vinculantes, nem obrigatórias.

62 Segundo a doutrina, o incidente que originou esta disposição convencional foi o caso das medidas antidumping aplicadas pela Argentina ao Brasil, com relação à venda de frangos congelados. Ainda sob a égide do Protocolo de Brasília, o Brasil demandou a Argentina perante o sistema de solução de controvérsias do MERCOSUL. Porém, insatisfeito com o resultado prolatado pelo Tribunal Arbitral *Ad Hoc*, o Brasil então propôs a mesma controvérsia perante a Organização Mundial do Comércio (OMC). PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 59-60.

63 GOMES, Eduardo Biacchi. *Blocos econômicos*: solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 164.

64 O sistema de solução de controvérsias do MERCOSUL detém ainda outras limitações, não abordadas aqui, como a escassez dos recursos humanos da Secretaria do TPR; a curta duração do mandato dos árbitros, que é de somente três anos; seu sistema remuneratório, dentre outros. PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y estado de derecho en el MERCOSUR*. Buenos Aires: Marcial

titucional, prejudicando sua autonomia orgânica, como também de natureza jurídica, a exemplo da possibilidade de escolha de foro alheio ao processo de integração. A dependência orçamentária; a fraca ou incipiente cooperação judicial com as jurisdições internas dos Estados Partes, demonstrada pelo baixo número de opiniões consultivas solicitadas e ainda tantos outros fatores acabam por debilitar a função do TPR na consolidação da integração regional.

4.2.1. A construção dos princípios do Direito da Integração, no MERCOSUL, a partir das decisões em sede consultiva

Desde a sua regulamentação pela Decisão CMC nº 37/2003 até a presente data (abril de 2018), somente foram proferidas três opiniões consultivas pelo TPR.

A primeira opinião consultiva, emitida em 2007,[65] originou-se de uma questão formulada pela juíza María Angélica Calvo, de "Primera Instancia en lo Civil y Comercial del Primer Turno" da jurisdição de Assunção, no Paraguai. No caso concreto, a empresa paraguaia (*Norte S/A Imp. Exp.*) demandou, em Assunção, a empresa argentina (*Laboratórios Northia*), pedindo indenização por perdas e danos e lucros cessantes, em razão do descumprimento do contrato internacional de distribuição. A empresa argentina, por sua vez, apresentou exceção de incompetência, alegando a prevalência do Protocolo de Buenos Aires sobre Jurisdição Internacional em Matéria Contratual sobre a lei nacional paraguaia nº 194/1993 e a necessidade de respeito à eleição de foro efetuada no contrato celebrado entre as partes, onde se optou pela jurisdição dos tribunais ordinários da Cidade Autônoma de Buenos Aires. Na defesa, a empresa paraguaia sustentou que era competente a jurisdição do Paraguai, em virtude do seu caráter irrenunciável e que resultaria aplicável, ademais, o Protocolo de Santa Maria sobre Relações de Consumo,[66] por considerar que o contrato de distribuição era matéria de consumo.

Diante dos fatos narrados, o que se debateu na opinião consultiva foi a questão do conflito de fontes, para determinar qual delas seria aplicável (se a norma do MERCOSUL ou a nacional), uma vez que a norma a ser utilizada determinaria, por consequência, se o acordo de eleição de foro, celebrado entre as partes, era válido ou não e qual seria o juiz competente.

Não obstante, antes de adentrar na questão colocada, o TPR dedicou-se à análise da tarefa que lhe incumbia, e de sua importância institucional para o processo de integração do MERCOSUL, inclusive traçando um paralelo com mecanismos similares existentes em outros processos de integração, como nomeadamente, aqueles do Tribunal de Justiça da Comunidade Andina (TJ/CAN) e do próprio TJ/UE.

Por fim, apesar de mencionar como intrínsecos ao Direito da Integração os princípios da aplicação imediata, do efeito direto e da prevalência do direito do bloco sobre o direito interno, a maioria dos árbitros do TPR votou no sentido de que "as normas do MERCOSUL internalizadas prevalecem sobre as normas do direito interno dos Estados Partes. O Protocolo de Buenos Aires se aplica nos países que o internalizaram [...]."[67] Dessa maneira, ao mencionar a necessidade de internalização das normas do MERCOSUL, e a não aplicação do Protocolo de Santa Maria, por não se tratar de uma relação internacional de consumo e pelo fato de este não estar vigente, o TPR reconheceu que os direitos e deveres contidos nestas não são, afinal, diretamente aplicáveis aos particulares, sujeitos da integração, por não se estar diante de um processo de integração com características supranacionais, mas sim ante um processo que depende, sobremaneira, das normas clássicas do Direito Internacional Público.

Como se pode observar, essa decisão se distancia daquela tomada pelo TJ/UE, nos casos *Van Gend & Loos* e *Simmenthal*, o que demonstra, uma vez mais, a rela-

Pons de Argentina, 2008. p. 31-66.

65 TRIBUNAL PERMANENTE DE REVISÃO DO MERCOSUL. "Norte S.A. Imp. Exp. c/ Laboratorios Northia Sociedad Antónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante". (OC nº 01/2007). Emitida em 03/04/2007. Disponível em: <http://www.tprmercosur.org/es/docum/opin/OpinCon_01_2007_es.pdf>. Acesso em: 22 abr. 2018.

66 Sobre a opinião consultiva referida, que contribuiu para a formação da qualificação de "consumidor", no MERCOSUL, posteriormente incorporada à Resolução nº 34/2011, do GMC, sobre "Defesa do Consumidor – Conceitos Básicos", ver: VIEIRA, Luciane Klein. *La hipervulnerabilidad del consumidor transfronterizo y la función material del derecho internacional privado*. Buenos Aires: La Ley, 2017. p. 17-19.

67 TRIBUNAL PERMANENTE DE REVISÃO DO MERCOSUL. "Norte S.A. Imp. Exp. c/ Laboratorios Northia Sociedad Antónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante" (OC nº 01/2007), p. 36. Emitida em 03/04/2007. Disponível em: <http://www.tprmercosur.org/es/docum/opin/OpinCon_01_2007_es.pdf>. Acesso em: 22 abr. 2018.

ção intrínseca entre o grau de compromisso econômico assumido pelos Estados membros de um processo de integração, as características da supranacionalidade e intergovernamentalidade, e a consequente efetividade do seu sistema de solução de controvérsias.

A segunda opinião consultiva, datada de 2008[68], surgiu a partir do caso das empresas uruguaias *Sucesión Schneck S.A., Galisur S.A.* e *CESIM Ltda,* que se insurgiram contra o Estado uruguaio pela cobrança de "taxas consulares" previstas em lei interna que violava o Tratado de Assunção, criador do MERCOSUL, no que tange à eliminação de barreiras alfandegárias para a livre circulação das mercadorias. Mais uma vez, o TPR afirmou a primazia do direito do MERCOSUL por sobre as disposições internas, desde que o tratado tenha sido devidamente ratificado e internalizado pelos Estados Partes.

Entretanto, é válido ressaltar que, nessa opinião consultiva, o TPR afirma que não lhe corresponde pronunciar-se a respeito da aplicabilidade de normas internas em contradição com a normativa do bloco, ficando tal julgamento a cargo do juiz nacional diante do caso concreto. Sobre o tema, é possível estabelecer um contraponto com a jurisprudência do TJ/UE, em especial com o acórdão *Simmenthal*, no qual o tribunal referido colocou como missão do juiz nacional proteger os direitos conferidos aos particulares pelo Direito comunitário, por meio da inaplicabilidade da norma interna que lhe contrarie.

Por fim, a terceira e última opinião consultiva emitida pelo TPR, em 2009[69], teve sua gênese numa controvérsia semelhante àquela referida no pronunciamento anterior, envolvendo a mesma lei interna contrária à normativa do MERCOSUL, de modo que o Tribunal se pronunciou em igual sentido.

Apesar de nenhuma das três opiniões consultivas referidas ter partido do Poder Judiciário brasileiro, de qualquer modo, é interessante trazer à colação a Petição nº 4.383, protocolada em 2008, pela *Renault do Brasil S.A.* perante o STF, solicitando a emissão de opinião consultiva pelo TPR. Tal pedido jamais chegou a ser enviado ao Tribunal referido, uma vez que, quando da regulamentação interna, quatro anos mais tarde, já não havia interesse por parte da solicitante na interpretação requerida.[70] No caso específico, — único pedido de opinião consultiva solicitado no país — é de se destacar o problema do decurso do tempo entre o pedido de envio da consulta ao TPR, formulado em 13 de agosto de 2008 e a decisão do Ministro Joaquim Barbosa, no sentido de consultar a parte requerente da manutenção do interesse no envio desta, que se deu somente em 21 de outubro de 2013. Se o que se quer é efetividade processual, e ao mesmo tempo se necessita da interpretação do Direito para a solução do caso concreto, não há sentido, em um trâmite estritamente administrativo, aguardar 5 anos para a remessa do pedido ao TPR, o que deveria se dar quase que instantaneamente.

Ainda, é de se destacar que o STF modificou o seu Regimento Interno (RISTF) por meio da Emenda Regimental (ER) nº 48, de 2012[71], que viabilizou, procedimentalmente, a solicitação de opinião consultiva por qualquer juiz nacional, de ofício ou a requerimento das partes, sendo a decisão do STF de encaminhamento ao TPR de natureza administrativa e vinculada.[72] Diferen-

68 TRIBUNAL PERMANENTE DE REVISÃO DO MERCOSUL. "Sucesión Carlos Schnek y otros c/Ministerio de Economía y Finanzas y otros. Cobro de pesos" (OC nº 01/2008). Emitida em 24/04/2009. Disponível em: <http://www.tprmercosur.org/es/docum/opin/OpinCon_01_2008_es.pdf>. Acesso em: 22 abr. 2018.

69 TRIBUNAL PERMANENTE DE REVISÃO DO MERCOSUL. "Frigorífico Centenario S.A. c/ Ministerio de Economía y Finanzas y otros. Cobro de pesos. IUE: 2-43923/2007. Exhorto" (OC nº 01/2009). Emitida em 15/06/2009. Disponível em: <http://www.tprmercosur.org/es/docum/opin/OpinCon_01_2009_es.pdf>. Acesso em: 22 abr. 2018.

70 Sobre o tema, ver: ARRUDA, Elisa. As opiniões consultivas do Tribunal Permanente de Revisão do MERCOSUL e o caso Renault do Brasil S.A. *Revista Iberoamericana de Derecho Internacional y de la Integración,* Buenos Aires, n. 7, Dic. 2017. Disponível em: <http://www.ijeditores.com.ar/pop.php?option=articulo&Hash=e7d965040a8a58112249bafc497e21dc>. Acesso em: 25 fev. 2018.

71 A Decisão CMC nº 02/2007 determina, a nível regional, que a solicitação de opiniões consultivas ao TPR deverá regulamentar-se por procedimento interno estabelecido por cada Tribunal Superior de Justiça dos Estados Partes. No Brasil, tal regulamentação foi disciplinada pelo STF mediante a ER nº 48, em 2012, que estabeleceu a tramitação nacional da solicitação até seu encaminhamento ao TPR. Ressalta-se que a competência para decidir sobre o encaminhamento ao TPR cabe ao plenário do STF, e o processo de colheita de votos poderá dar-se através de processo digital, ou, ainda, em sessão administrativa. O STF realiza juízo prévio de admissibilidade, de modo a auferir o preenchimento dos requisitos elencados nos arts. 354-H a 354-J do RISTF, a saber: apresentação por escrito; origem em processo em curso perante o Poder Judiciário brasileiro, mediante requerimento do juiz da causa ou de alguma das partes; questão relativa à vigência ou interpretação jurídica de norma do MERCOSUL, a ser precisamente indicada; exposição fática e do objeto da solicitação e, ainda, descrição das razões que motivaram o questionamento. VIEIRA, Luciane Klein; MARTINS FILHO, Marcos Simões. As opiniões consultivas do MERCOSUL solicitadas pelo Poder Judiciário brasileiro. *Revista dos Tribunais*, São Paulo, v. 931, p. 217-236, maio 2013.

72 VASCONCELOS, Raphael Carvalho; TAVARES, Sergio Maia.

temente da regulamentação interna dos demais Estados do bloco, a brasileira permite, expressamente, a participação do juiz nacional na cooperação referida.[73]

Diante do reduzido número de opiniões consultivas proferido face ao lapso temporal desde sua inserção no ordenamento jurídico do MERCOSUL, aliado a todas as outras restrições e limitações já abordadas, é possível concluir que o papel desse mecanismo, para buscar a uniformidade e a efetividade em relação à interpretação do Direito do MERCOSUL, resta prejudicado, o que não se verifica com relação à atuação do TJ/UE na consolidação da integração regional daquele bloco.

4.3. Possibilidades para o fortalecimento da função do TPR, inspiradas na experiência do TJ/UE

Como já fora mencionado, um simples "transplante" das soluções consagradas no contexto europeu não é possível ou desejável à realidade do MERCOSUL, uma vez que seu contexto é outro. Nesse sentido, a doutrina assinala que a supranacionalidade, que pauta o sistema de solução de controvérsias da UE, está distante da realidade do Cone Sul, na medida em que:

> As noções vertidas no Direito da União ainda não resultam transferíveis ao MERCOSUL, posto que esse não é uma organização supranacional. Ele carece de organismos comunitários com poderes legislativos delegados, pelo que as normas que emanam de seus órgãos carecem de eficácia direta e devem ser incorporadas aos ordenamentos jurídicos de cada Estado conforme os respectivos mecanismos constitucionais vigentes.[74]

Entretanto, a partir da experiência europeia, que se desenvolve já há várias décadas, é possível considerar a implementação de mudanças pontuais ao sistema de solução de controvérsias do MERCOSUL, atualmente pautado pelo Protocolo de Olivos e sua respectiva regulamentação, conforme se sustenta a seguir.

O importante papel desempenhado pelo TJ/UE para a consolidação da integração europeia, que atua de maneira ativa na construção do Direito da União, somente se faz possível em virtude de sua autonomia institucional e robustez jurisdicional, manifestadas por meio da jurisdição obrigatória aos Estados Membros, os quais estão vinculados às decisões emitidas pelo TJ/UE, tanto em sede contenciosa como em relação aos acórdãos interpretativos.

No que tange aos aspectos estruturais do TPR, entende-se necessário alcançar uma efetiva autonomia orçamentária, vinculada à instituição, o que está distante da situação atual[75]. Ao mesmo tempo, advoga-se pela transformação do TPR em órgão de existência verdadeiramente contínua, por meio da superação da mera disponibilidade permanente de seus árbitros.

No que se refere à competência do TPR em sede consultiva, o MERCOSUL em muito se beneficiaria da alteração da regulamentação das opiniões consultivas, em especial no que diz respeito à cooperação com as jurisdições internas de seus Estados Partes. Assim, defende-se que a normativa do MERCOSUL avance no sentido de eliminar a restrição da legitimidade ativa de modo a possibilitar aos juízes nacionais estabelecer um diálogo direto com o TPR, sem complicações burocrático-procedimentais.[76]

Ademais, sugere-se a revogação do já aludido art. 11 da Decisão CMC nº 37/2003, de modo a tornar obrigatória a solicitação de opinião consultiva ao TPR,

A competência consultiva do Tribunal Permanente de Revisão do MERCOSUL: legitimidade e objeto. *Revista da Secretaria do Tribunal Permanente de Revisão*, Assunção, v. 4, p. 117-134, ago. 2014.

73 Para detalhes sobre a regulamentação dispensada pelos demais Estados Partes, ver: VIEIRA, Luciane Klein. *Interpretação e aplicação uniforme do direito da integração*: União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e MERCOSUL. Curitiba: Juruá, 2013. p. 140-144. Tal como destaca a autora, o Uruguai foi o primeiro Estado Parte a regulamentar o procedimento do pedido de opinião consultiva, através da Acordada nº 7.604, da Suprema Corte de Justicia, de agosto de 2007. Já a Argentina o fez através da Acordada nº 13, da Suprema Corte de Justicia de la Nación, em junho de 2008. Por sua vez, o Paraguai disciplinou internamente a matéria, através da Acordada nº 549, em novembro do mesmo ano. O Brasil, conforme já destacado, somente regulamentou a questão em 2012, através da ER nº 48 do STF.

74 JAEGER JUNIOR, Augusto. Metodologia jurídica europeia e mercosulista: considerações fundamentais. *Revista da Secretaria do Tribunal Permanente de Revisão*, Assunção, n. 3, p. 146, mar. 2014.

75 Tal como destacado, "en el MERCOSUR existe — comparativamente — un pequeño fondo presupuestal para las controversias, pero no ocurre lo mismo en cuanto al Tribunal, como órgano propiamente dicho." PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y estado de derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 35.

76 No Uruguai, Argentina, Paraguai e Brasil, a legitimidade foi estendida aos demais órgãos jurisdicionais inferiores, de maneira que podem agir de ofício ou a requerimento das partes, devendo, entretanto, apresentar a solicitação primeiramente à cúpula de seu sistema judiciário – o que, na prática, consiste em obstáculo burocrático à cooperação entre jurisdições regional e nacionais. VASCONCELOS, Raphael Carvalho; TAVARES, Sergio Maia. A competência consultiva do Tribunal Permanente de Revisão do MERCOSUL: legitimidade e objeto. *Revista da Secretaria do Tribunal Permanente de Revisão*, Assunção, v. 4, p. 121, ago. 2014.

quando se tratar de instância judiciária nacional, de cujas decisões não caiba recurso, bem como reconhecer a autoridade[77] do pronunciamento interpretativo do TPR, de modo a privilegiar a segurança jurídica e garantir a uniformização da interpretação e aplicação do Direito pelos ordenamentos jurídicos dos Estados Partes. Em outras palavras,

> como se puede vislumbrar, el sistema adoptado en el MERCOSUR – donde la respuesta del TPR en materia de OC carece de efecto obligatorio – no garantiza de forma efectiva la aplicación e interpretación uniforme del Derecho del bloque, ya que la hermenéutica a la que arribe el Tribunal podrá ser aplicada en un Estado Parte y no en otro.[78]

A partir da adoção das mudanças propostas, vislumbra-se a possibilidade de um avanço paulatino na integração do bloco do Cone Sul, no que diz respeito a seu sistema de solução de controvérsias, mantendo-se por hora sua provisoriedade e natureza arbitral, porém agregando-lhe elementos de maior pujança, uma vez que a implementação de uma jurisdição supranacional, de natureza judicial e definitiva, nos parece improvável em um futuro próximo, dadas as vicissitudes de âmbito socioeconômico e político que circundam o desenvolvimento do MERCOSUL.

5. Coniderações finais

Como se pode observar, de fato, existe uma relação de interdependência entre o aprofundamento da integração regional de determinado bloco econômico e o desenvolvimento e eficiência de seu sistema de solução de controvérsias, sobretudo no que diz respeito à interpretação e aplicação uniformes das normas regionais nos diferentes Estados Partes, por meio da questão prejudicial e da opinião consultiva. Como decorrência do exposto, é possível sustentar que o objetivo econômico buscado pelo bloco, aliado ao nível de aprofundamento da integração, influenciam a maneira como são solucionadas as controvérsias surgidas em seu âmago, uma vez que, quanto mais segurança jurídica e estabilidade se dá ao Direito da Integração, mais compromisso econômico se solidifica entre os Estados Partes.

A partir do estudo do desenvolvimento da UE (paradigma no tema da integração regional, cujas origens remontam à década de 1950), verifica-se que seu sistema jurisdicional de solução de controvérsias, pautado pela característica da supranacionalidade, desempenha um papel de protagonismo no sentido de interpretar, consolidar, uniformizar e até mesmo inovar o Direito da União, por meio da conformação de sua jurisprudência. Principalmente a partir das decisões proferidas em sede prejudicial, o Direito da UE pôde consolidar os princípios da primazia, do efeito direto e da aplicabilidade imediata, aplicados até hoje, surgidos com base na atuação do próprio TJ/UE. Em outras palavras, através da interpretação conferida pelo Tribunal às normas do bloco, puderam ser erigidas as bases jurídicas e econômicas que criaram a união aduaneira, que evoluiu para o mercado comum e que hoje buscam manter e expandir a união econômica e monetária.

Dessa forma, em análise comparativa com o sistema de solução de controvérsias do MERCOSUL, de caráter provisório, intergovernamental e arbitral, detectou-se que este apresenta diversos entraves ao desempenho de função similar, uma vez que traz consigo fragilidades tanto de ordem institucional quanto jurisdicional. Essas restrições acabam refletindo na atuação do TPR, que fica "acorrentado" à intergovernamentalidade, nas suas decisões, mesmo considerando ser primordial ao aprofundamento da integração econômica o reconhecimento dos três princípios antes referidos, criados a partir da atuação do TJ/UE. Em que pese essa limitação, o TPR, em sede consultiva, já se manifestou no sentido da primazia do Direito do MERCOSUL sobre o direito nacional.

Entretanto, sem perder de vista que o MERCOSUL é circundado por condições históricas, socioeconômicas e políticas que lhe são inerentes, de modo que não

77 Nesse sentido, adverte a mais autorizada doutrina: "en el caso de la justicia del MERCOSUR, se apunta a que el órgano que lo represente cuente con plena competencia para resolver los conflictos y controversias relacionados a la interpretación en la aplicación del derecho de la integración. Toda restricción o limitación, tratándose de un órgano destinado a resolver los conflictos y controversias, es de todo punto de vista injustificable, como es el caso de las opiniones consultivas, que podrían perfectamente ser vinculantes, de modo tal que por medio de las resoluciones el TPR contribuya a afirmar el derecho del MERCOSUR." RUIZ DÍAZ LABRANO, Roberto. Evolución institucional del MERCOSUR: un tribunal permanente arbitral o jurisdiccional para el MERCOSUR. In: MOLINA DEL POZO, Carlos Francisco (Dir.) *Evolución histórica y jurídica de los procesos de integración en la Unión Europea y en el MERCOSUR*. Liber Amicorum Miguel Ángel Ciuro Caldani. Buenos Aires: Eudeba, 2011. p. 358-359.

78 PEROTTI, Alejandro Daniel. *Tribunal Permanente de Revisión y estado de derecho en el MERCOSUR*. Buenos Aires: Marcial Pons de Argentina, 2008. p. 81.

é plausível trasladar as soluções da realidade europeia, é pertinente a sugestão de mudanças pontuais na conformação do sistema implementado pelo Protocolo de Olivos, aprovado em 2002.

À vista disso, sugere-se uma superação das vulnerabilidades institucionais impostas ao TPR, por meio da aquisição de autonomia orçamentária. Relativamente à sua jurisdição, recomenda-se a exclusão da possibilidade estendida aos Estados Partes de demandarem em outros foros aspectos que possam estar vinculados ao Direito do MERCOSUL.

No que diz respeito à competência consultiva do TPR, tendo em vista a importância do instituto similar no ordenamento europeu, propõe-se uma aproximação e maior cooperação entre as jurisdições dos Estados Partes e o tribunal referido, por meio da extensão da legitimidade direta para a solicitação de opiniões consultivas aos magistrados nacionais de instâncias inferiores. Ademais, favorecendo a segurança jurídica essencial ao desenvolvimento do bloco econômico, preconiza-se tornar a sua solicitação obrigatória, bem como vincular as jurisdições nacionais ao pronunciamento do TPR em sede consultiva, garantindo-se, assim, a coesão do ordenamento jurídico do MERCOSUL.

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The rights to memory and truth in the inter-american paradigms of transitional justice: the cases of Brazil and Chile

Os direitos à memória e à verdade nos paradigmas interamericanos da justiça de transição: os casos do Brasil e do Chile

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The rights to memory and truth in the inter-american paradigms of transitional justice: the cases of Brazil and Chile*

Os direitos à memória e à verdade nos paradigmas interamericanos da justiça de transição: os casos do Brasil e do Chile

Bruno Galindo**
Juliana Passos de Castro***

Abstract

The paper deals with the rights of society to the truth and the memory regarding serious violations of human rights during authoritarian regimes. To do so, the legal parameters of transitional justice established by the jurisprudence of the Inter-American Court of Human Rights and, from them, the methods of comparative law are used, directing the analysis to a comparison between the experiences of commissions of truth and memory in Brazil and Chile, observing their positive and negative points, based on the established objectives to favour the consolidation of a democratic State with rule of law where the knowledge and memory of the truth can avoid new authoritarian regimes. With this objective, a qualitative research was carried out on the truth commissions established by official initiative in Brazil and Chile, from their official reports. The obtained results relate to the verification of the level at which these countries are in terms of concretization of memory and truth, based on the parameters of the Inter-American System, considering the advances made and the gaps still present.

Keywords: Brazil. Chile. Memory and truth. Transitional justice. Inter-American System.

Resumo

O artigo trata dos direitos da sociedade à verdade e à memória quanto às graves violações dos direitos humanos durante regimes autoritários. Para tanto, utiliza-se os parâmetros legais da justiça de transição estabelecidos pela jurisprudência da Corte Interamericana de Direitos Humanos e, a partir deles, os métodos de direito comparado, direcionando a análise a uma comparação entre as experiências de comissões de verdade e memória no Brasil e no Chile, observando seus pontos positivos e negativos, a partir dos objetivos estabelecidos para favorecer a consolidação de um Estado democrático de direito onde o conhecimento e a memória da verdade possam evitar novos regimes autoritários. Com este objetivo, foi realizada pesquisa qualitativa sobre as comissões da verdade estabelecidas por inciativa estatal

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no Brasil e no Chile a partir de seus relatórios oficiais. Os resultados obtidos dizem respeito à constatação do nível em que se encontram os referidos países em termos de concretização de memória e verdade a partir dos parâmetros do Sistema Interamericano, considerando os avanços obtidos e as lacunas ainda presentes.

Palavras-chave: Brasil. Chile. Memória e Verdade. Justiça de transição. Sistema Interamericano.

1. Introduction

In the democratic political regime that emerges after a dictatorial period, the role that transitional justice plays seems fundamental in building a humanistic legal and social culture and in enhancing the democratic rule of law. The greatest success in reaching the objectives advocated by the theory of transitional justice, namely, material justice, reparation to victims, institutional reforms, clarification of the truth and creation of collective memory regarding the authoritarian period, is usually associated with greater stability of the democracy and the rule of law in those countries and the political refusal to autocratic solutions[1].

For this purpose, what have become known as rights to memory and truth have special relevance from a cultural point of view, since to know and recall the authoritarian past are ways of reflecting on it, which has allowed the historical reduction of possibilities of repetition authoritarianism, and dictatorships when such rights exert themselves more strongly in the post-dictatorial context, as can be seen in a variety of cases such as post-Nazi and post-reunification Germany, post-apartheid South Africa, and several Latin American countries which became democracies again, after the military dictatorships that arose in the 60s and 70s of the last century[2].

The main idea of this essay is to reflect specifically on this transitional justice question, analysing the Chilean and Brazilian experiences with regard to the institution of public policies of truth and memory.

It will be sought not only to verify the presence or absence of measures of truth and memory in the general public policies. If its absence indicates the state's omission as to the duties that derive from these rights, and consequently its non-compliance, the implementation of public policies in this sense does not automatically guarantee their effectiveness.

It is necessary to verify if memory and truth reach their individual and collective dimensions, reaching reparatory and non-repetition goals regarding human rights violations. In terms of methodology, this analysis will be based on the legal paradigms consolidated by the Inter-American Court of Human Rights, using comparative law methods to draw similarities and differences between the two experiences, temporally, spatially and ideologically close to each other. It justifies the epistemological delimitation around them, as will be seen below.

2. Inter-american court of human rights and the construction of paradigms of truth and memory of transitional justice in latin america

The Inter-American Court of Human Rights (IACHR) is the judicial body of the Inter-American System of Human Rights, and its jurisdiction reaches Brazil and Chile, since they are signatories to both the American Convention on Human Rights (ACHR) and the optional clause of compulsory jurisdiction of the IACHR (Article 62).

Regarding the right to the truth, the Inter-American Court has made several decisions that not only confirm the existence of a right that has already been raised on the international scene, but contributes to delimiting the normative provisions that underpin it.

The leading case *Velásquez Rodríguez. Honduras* is the first in which the Court begins to define the contours of the right to the truth. It refers to the arrest of Manfredo Velásquez, a university student, by agents of the Armed Forces of Honduras on September 12, 1981. It was carried out without a court order and Velásquez

1 GALINDO, Bruno. Democracia constitucional, justiça transicional e passado autoritário: entre a superação e o "esquecimento". In: MONTEIRO, Roberta Corrêa Araújo; ROSA, André Vicente Pires (Orgs.). *Direito constitucional*: os desafios contemporâneos (uma homenagem ao Professor Ivo Dantas). Curitiba: Juruá, 2012. p. 197.

2 GALINDO, Bruno. Democracia constitucional, justiça transicional e passado autoritário: entre a superação e o "esquecimento". In: MONTEIRO, Roberta Corrêa Araújo; ROSA, André Vicente Pires (Orgs.). *Direito constitucional*: os desafios contemporâneos (uma homenagem ao Professor Ivo Dantas). Curitiba: Juruá, 2012. p. 104.

became soon after a political disappeared.

The case was analysed from the facts that led to the non-compliance of the ACHR by Honduras. Thus, the Court understood that the kidnapping of the victim had configured an offense against articles 4, 5 and 7 referred to above, insofar as there was an offense against the right to life, integrity and personal liberty.

In this sense, based on articles 1,1 and 2, the Court affirms that all member states are bound to respect and guarantee the rights provided for in the Convention, with an obligation to prevent and investigate all violations of human rights recognized therein, as well as to impose sanctions on those responsible and to promote reparation of victims.

Then, the Court held that non-compliance with the ACHR had occurred inasmuch as Honduras had not taken steps to clarify the whereabouts of the disappeared, nor did they identify or sanction the perpetrators of the crime.

At the same time, the Court recognized the right of the victims' relatives to know their destination, as well as the location of their remains, and this right remains in place as long as the situation of uncertainty involving disappearances persists even in the presence of legal obstacles within the country that prevent the punishment of those responsible for the crime and also when there is a change in the rulers. According to the Court, these rights must be fulfilled by the State through all means at its disposal.

Therefore, the Court recognizes in this judgment the right to the truth in relation to the relatives of disappeared persons, based on articles 1.1 and 2, which enshrine the obligation imposed on the member States of the Inter-American Human Rights System (IAHRS) to respect human rights and promote the necessary measures to ensure their guarantee, which includes investigations in the event of violations[3].

Since then, the Inter-American Court has made several other judgments confirming the understanding already espoused in the aforementioned decision and deepening the scope of the right to the truth[4].

It deserves attention the case of Barrios Altos. Peru, in which the Court addresses in more detail the fundamentals of the right to the truth.

The case involves the execution of fifteen people and the injuries in four others by the Peruvian Army in the Region of Barrios Altos, in the city of Lima.

According to the complaint, on November 3, 1981, six unidentified officers went to the scene, forced the victims to fall to the ground and committed summary execution against them.

After appeals and hearings in the domestic judicial sphere of Peru, the case ends up reaching the Inter--American Court. The Court concluded that the victims and their families were prevented from knowing the facts of the crime and pronounced on the right to the truth, stating that it is subsumed in the right of the victims or relatives to obtain from the competent authorities to clarify the facts and the corresponding responsibility through the investigation and the judgment provided for in articles 8 and 25 of the Convention.

Although the judgment does not explicitly recognize the collective dimension of the right to the truth, it represents an advance in the field of its application, extending the initial conception of that the right to truth would be related to cases of forced disappearance. In this case, it is possible to understand that the Court expresses itself in the sense that it is a right applicable to any serious violation of human rights. It also links the right to truth with other rights, such as the right to information and effective judicial protection. It considers, therefore, that the right to judicial protection is procedural in relation to the right to the truth, since it is through it that the facts and circumstances that have resulted in violation of human rights can be clarified in the judicial process[5].

Another relevant decision was made in case Tibi. Ecuador. This judgment refers to Daniel Tibi, arrested in September 1995 by police officers and taken to a prison where he was subjected to torture in order to provide information on a crime of drug trafficking, which he allegedly was part of.

In that decision, the Court reaffirms the right to the truth and asserts that it understands the knowledge

3 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Velásquez Rodríguez vs. Honduras.* San José, 1988.

4 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Godínez Cruz vs. Honduras.* San José, 1989. IACHR. Inter-American Court of Human Rights. Judgment. *Case of Castillo-Páez v. Peru.* San José, 1997. IACHR. Inter-American Court of Human Rights. Judgment. *Caso Bámaca Velásquez vs. Guatemala.* San José, 2000.

5 IACHR. Inter-American Court of Human Rights. Judgment. *Case of Barrios Altos v. Peru.* San José, 2001.

about the authorship of the crimes. In addition, it states that it has been developed by international human rights law and can be an important means of redress. The Judgment also condemns Ecuador to investigate the facts and make public the results of the investigations, pointing to the collective dimension of the right to the truth[6].

In another case, Myrna Mack vs. Guatemala, the Court refers more directly to the collective dimension of the right to the truth. This is the extrajudicial execution of Myrna Mack, in September 1990, by Guatemalan authorities. At the time, the Court stated that every person, victim, family and society has the right to know about what has happened regarding human rights violations [7].

In the case Goiburú et al. vs. Paraguay, Inter-American Court reaffirms the law as one of the means of ensuring reparation to the relatives of the victims. In this sense, the Court lists the right to the truth as a dimension of reparation for immaterial damage. It also alludes to the historical truth in valuing the creation of a commission of truth and archives. The case involved illegal arrests, torture and forced disappearances promoted by Paraguay against the victims in the case[8].

Related to Brazil, the case Gomes Lund et al. vs. Brazil refers to the disappearance of people in the context of the Araguaia Guerrilla. Brazil was convicted of the arbitrary detention, torture and forced disappearance of 70 people, including members of the Communist Party of Brazil and peasants in the Araguaia region in the south of the State of Pará between 1972 and 1975. On that occasion, the Court reaffirms the importance of establishing a truth commission to investigate and elucidate the facts[9].

Thus, the Inter-American Court is in the sense that the right to the truth applies in any cases of enforced disappearances, whether they result in death or not, and in relation to other violations of human rights. It is also possible to deduce the existence of this right, from a normative point of view, at the local level, depending on the national legal order.

In Brazilian case, due to the material opening clause contained in article 5, paragraph 2, of the Constitution, it is possible to recognize other implicit fundamental rights, in addition to those expressly enshrined in the constitutional text.[10] In this sense, based on principles such as democracy, human dignity and publicity, as well as fundamental rights to information and freedom of expression, it is possible to affirm that the right to the truth is an implicit fundamental right in Brazilian constitutionalism.

In general, truth clarification and memory preservation are considered as important measures capable of preventing the social and historical impunity of agents who violate human rights[11]. Its purpose also concerns the attempt to help prevent the repetition of abuses committed by raising awareness among present and future generations[12]. In addition, knowledge of the truth about crimes of the past helps in the implementation of other measures, such as financial reparation for those who have suffered persecution, the construction of a file that allows eventual judgments, institutional and political reforms and the implementation of measures related to memory of the victims[13].

As stated, the right to know the truth can be considered as an aspect of broad access to justice. It is also considered a dimension of the reparation measure, which is not restricted to financial compensation, insofar as it provides the victims and their families with knowledge about the facts that occurred to them[14].

In this essay, it is also possible to understand it as a necessary right for the realization of the right to memory.

6 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Tibi vs. Ecuador*. San José, 2004.

7 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Myrna Mack Chang vs. Guatemala*. San José, 2003.

8 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Goiburú e outros vs. Paraguai*. San José, 2006.

9 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Gomes Lund e outros ("guerrilha do Araguaia") vs. Brasil*. San José, 2010.

10 "The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and the principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party."

11 LIRA, Elizabeth. Las resistencias de la memoria: olvidos jurídicos y memorias sociales. In: VINYES, Ricard (Org.). *El Estado y la memoria*: gobiernos y ciudadanos frente a los traumas de la historia. Buenos Aires: Del Nuevo Extremo: RBA, 2009. p. 105.

12 JELIN, Elizabeth: Quiéns? Cuándo? Para qué? actores y escenários de las memorias. In: VINYES, Ricard (Org.). *El Estado y la memoria*: gobiernos y ciudadanos frente a los traumas de la historia. Buenos Aires: Del Nuevo Extremo: RBA, 2009. p. 119.

13 HAYNER, Priscilla. *Verdades innombrables*: el reto de las comisiones de la verdad. México: Fondo de Cultura Económica, 2008. p. 226.

14 INSTITUTO Nacional de Derechos Humanos, 2011. p. 269-289.

Analysing the cases involving human rights violations, the Court has referred to the theme in order to determine that countries adopt measures for the preservation of victims' memory as a part of reparation as well as historical memory.

In the understanding of the Court, the right to memory has these two dimensions. The individual dimension refers to the reparation provided to the victims from measures of memory and the collective dimension is verified from the adoption of these measures in order to preserve the historical memory of the human rights violations that occurred. With regard to historical memory, attempts to avoid repetition are included among its purposes.

These distinctions are clear in the Anzualdo Castro. Peru trial, in which the Inter-American Court has ruled that the construction of the Museum of Memory, despite being important for the preservation of historical memory and as a measure of non-repetition, did not meet the objectives of individual memory satisfaction, ordering actions in this regard[15].

Regarding the dimension of memory as reparation, the Court's understanding goes beyond the idea of recovering the suffered losses from financial compensation. This reasoning was gradually consolidated in its jurisprudence.

In Velásquez Rodríguez. Honduras, the Court recognizes the State's duty to compensate victims for violating their rights[16]. In the case Aloeboete, *et al.* Suriname, the Court notes that there are other types of reparation measures that go beyond the pecuniary modality.[17]

In the same sense, in Loyoza Tamyo. Peru, in the opinion of Judge Cançado Trindade, it highlights the fact that human needs reach dimensions that go beyond pecuniary reparations, and even more important that they be shaped in other ways[18]. In Benavides Cevallos. Ecuador, in accepting the agreement made between the State and the families of the victims, the Court protected the adoption of measures of memory as means of reparation. On that occasion, the State assumed the duty to include the name of Benavides Cevalles in streets, squares and schools[19].

In Villagrán Morales, *et al.* Guatemala ("Children on the Street"), Inter-American Court ruled on the international responsibility of Guatemala regarding the detention and murder of several persons. In the decision, the Court provides that the moral damages suffered by the victims must be repaired by carrying out public works and acts that reconstitute the dignity of the victims and preserve their memory. The Judgment determines to Guatemala the designation of an educational centre with a name alluding to the young victims, in order to contribute to awakening the collective conscience and avoiding the repetition of the injurious facts, as well as preserving the memories of the victims[20].

3. Research commissions in Chile and Brazil: analysis from the inter-american paradigms of transitional justice

In relation to the Brazilian and Chilean cases, the temporal gap between the democratic transition and the institution of investigative commissions is a first difference that characterizes the process of searching for truth about the human rights violations that occurred in their dictatorships.

In Chile, investigations into the serious violations of human rights occurred during the exception regime led by General Augusto Pinochet were initiated from a truth commission, the Rettig Commission, a process that continued with the establishment of the Valech I and II Commissions. The National Repair Corporation, although it also had other purposes related to the implementation of remedial measures and assistance to victims, according to recommendations of the Rettig Commission also had attributions under the terms of the National Truth and Reconciliation Commission, continuing its work, producing a report at the end. The Board of Dialogue, in turn, despite having some investigative powers, acted in a more restricted way, in the

15 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Anzualdo Castro vs. Perú.* San José, 2009.

16 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Velásquez Rodríguez vs. Honduras.* San José, 1988.

17 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Aloeboetoe y otros vs. Surinam.* San José, 1993.

18 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Loayza Tamayo vs. Perú.* San José, 1998.

19 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Benavides Cevallos vs. Ecuador.* San José, 1998.

20 IACHR. Inter-American Court of Human Rights. Judgment. *Caso de los "Niños de la Calle" (Villagrán Morales y otros) vs. Guatemala.* San José, 2001.

sense of identifying the destination and remains of the disappeared. In spite of this, the clarification of the truth was still its founding axis.

Another aspect that deserves mention is the dimension of transitional justice, which guided the first initiatives to combat abuses committed during the authoritarian period. In the case of Chile, the chosen axis was truth and reparation for purposes of reconciliation. The Decree creating the first Commission and the reports of the others emphasized the importance of truth as a first step towards adopting other measures[21].

José Zalaquett, a professor at the University of Chile and a member of the Rettig Commission, stresses that the objectives of any transitional policy must be reparation and prevention, and to be legitimate, such policies must be based on the truth about what happened and democratically adopted[22].

The first measures of reparation were derived from the recommendations of the Rettig Commission and implemented through 19,123 Act. They included, among other measures, financial reparations to the victims of the violence practiced during the military dictatorship.

In Brazilian case, transitional justice was initiated from the reparatory axis, and, only secondarily, the first measures of truth and memory were reached. In spite of the invaluable work in the military justice processes carried out by the researchers coordinated by Paulo Evaristo Arns, Cardinal Archbishop of São Paulo, and published in 1985 under the title "Brazil: Never More", only in 1995 did we have the first major initiative in the transitional justice field, which was 9140/1995 Act and the subsequent creation of the Special Committee on the Death and Disappearance of Persons.

That Act recognizes as dead 136 people, ruling the situation of absence and granting compensation to family members. The creation of the Political Deaths and Disappearances Commission, according to the provisions of the same Act, functions as a first commission with investigative characteristics, but cannot be classified as a truth commission in the strict sense.

The Commission had no legal powers in relation to the investigation of facts, nor finding the truth about human rights violations and identifying of those responsible for them. Although the recognition of the disappearance of persons not listed in Annex I to the Act had been conferred to the Commission, it would be possible to make efforts to locate bodies only when there were indications of where they could be found.

Thus, the duty to search for missing persons was first and foremost for victims' relatives, who should instruct the petitioners with all the necessary evidence to clarify that the death or disappearance occurred because of political persecution. This was an aspect of the Act that suffered many critics[23]. It was argued that it was Brazil's duty to locate the disappeared, since it would be responsible for what happened, and should allow, for example, access to the archives of the Armed Forces, in which like relevant information would probably be found.

Both 9140/1995 Act and the Special Commission of the Dead and Disappeared were important in the process of Brazilian redemocratization, in view of coming from the first Brazilian government initiative to assume responsibility for the deaths of political disappeared persons, and also to pay compensation to the victims or to their families. However, such measures were insufficient for the clarification of the truth and the preservation of the memory of the events occurred during the period of exception.

The work of the Special Commission on the Death and Disappearance of Persons in Missing Persons was published in a report identifying the victims and acknowledging the violations they suffered. Therefore, as reported in the document published by the Secretariat of Human Rights, there was no collaboration of the Federal Police or the Armed Forces[24].

The investigations were made only to verify the deaths and disappearances that occurred for reasons of po-

21 HITE, Katherine; COLLINS, Cath. Memorial fragments, monumental silences and reawakenings in 21-st century Chile. *Millenium: Journal of International Studies*, v. 38, n. 2, p. 379-400, 2009.

22 ZALAQUETT, José. Derechos humanos e limitaciones políticas en las transiciones democraticas del Cone Sur. *Colección Estudios Cieplan*, Santiago, n. 33, p. 147-186, 1991. SIKKINK, Kathryn; WALLING, Carrie Booth. The impact of human rights trials in Latin America. *Journal of Peace Research*, v. 44, n. 4, p. 427-445, 2007.

23 SANTOS, Sheila Cristina. *A comissão especial sobre mortos e desaparecidos políticos e a reparação do Estado às vítimas da ditadura militar no Brasil*. 2008. Dissertation (Masters) – Pontifícia Universidade Católica de São Paulo, São Paulo, 2008. p. 146.

24 SECRETARIA ESPECIAL DOS DIREITOS HUMANOS. *Direito à verdade e à memória*: comissão especial sobre mortos e desaparecidos políticos. Brasília, 2007. p. 39.

litical persecution. There was no identification of those responsible and no description of individual acts. Despite the publication of the Report, many cases of state violence continued without clarification. Although there were recognition of the deaths of some disappeared people due to the repression of the period, few bodies were located and identified when the book entitled Right to Memory and Truth was published.

The Amnesty Commission, in turn, was also created from the financial reparation axis. However, in its task of assessing the requests for amnesty and compensation made by the political persecuted people, it also assumed a perspective of clarification of the truth inasmuch as it has constituted a collection on the victims' reports regarding their experiences, as well as the documents brought by them, hitherto unknown. The Commission's analysis of the requests for amnesty and reparations has consolidated itself as a space for the victims' narrative and a collection of documents on the suffered repression, contributing to a record on human rights violations practiced by the State. Through its activities with the Amnesty Caravans and the Brands of Memory Program, it has also contributed to the dimensions of truth and memory, a process that has allowed civil society to participate[25].

However, in addition to the Special Commission of the Dead and Disappeared and the Amnesty Commission, they do not have the legal competence to provide a comprehensive version of the facts and circumstances surrounding crimes committed during the dictatorial period, there is yet another factor that can be seen as a limitation to the effectiveness of the right to memory and truth. It is the recognition of the arbitrariness and suffering inflicted on victims as a form of moral reparation within the framework of the rights to memory and truth.

In addition to the lack of legal competence of the Commissions to investigate extensively and establish more reliable versions regarding the facts, the way in which the Brazilian transition was conducted, prioritizing the reparatory aspect in its financial perspective, ended up contributing to the depreciation of the political persecution to the extent in which the indemnities were not seen as a result of the damages suffered by them, which is evidenced by the press behaviour when referring, albeit pejoratively, to the payments made as a "*bolsa ditadura*"[26] [27].

Roberta Baggio explains that the Amnesty Commission, based on three approaches, has worked to reverse this situation, in an attempt to clarify to society the events experienced during the dictatorship.

The first approach is giving a new meaning to the act of amnesty, differently from forgetfulness. When amnesty is granted to the petitioner, even in cases where no indemnity is paid, political resistance is recognized as an act of courage, and a request for pardon is made to the victim on behalf of the State.

The second one is the oral or written account of the victims as a source of revelation of the story in a future Memorial. It is important to record the contribution of this action to the construction of historical memory, from the perspective of the victims.

Finally, the third approach is, as the author refers, the work carried out by Amnesty's Caravans, which cross the country, carrying out both actions, acquiring an educational function insofar as it involves civil society.

Despite the importance of these actions, both the gravity of human rights violations and the lack of knowledge about violence committed in the authoritarian period, as well as the elapsed time that contributed to the distancing of the facts, required the work of a truth commission with broader powers to clarify what truly occurred in the exception period.

The first commission of truth, which, at least formally, commits itself to this proposal and institutes truth and memory as the central axes of its action, despite referring consistently to national reconciliation, without making explicit the meaning it attributes to the term. It was the National Truth Commission, created by 12528/2011 Act and established in 2012, instituted 27 years after the democratic transition, considering the period post-1985. We will discuss it soon later.

25 BAGGIO, Roberta Camineiro. Marcas da memória: a atuação da comissão de anistia no campo das políticas públicas de transição no Brasil. *Ciências Sociais da Unisinos*, São Leopoldo, v. 48, n. 2, p. 111-118, may/aug. 2012.

26 This expression means something like permanent scholarship for victims of the dictatorship.

27 BAGGIO, Roberta Camineiro. Justiça de transição como reconhecimento: limites e possibilidades do processo brasileiro. *Cadernos IHU Ideias*, São Leopoldo, ano 12, v. 12, n. 208, p. 18, 2014.

4. Official versions: a partial reality in both countries

Although Chile has begun a process of clarification of the truth much earlier than Brazil, even nowadays, there is a lack of specific research on many of its aspects.

In the case of the National Truth and Reconciliation Commission, Emilio Crenzel concluded that three factors indicate the limited notion of human rights that characterized its performance[28].

Firstly, the author refers to the restrictions imposed by the Decree of its creation regarding the reduction of the object of investigation to situations that have resulted in death or disappearance. As a result of this, the Rettig Report focused on addressing the circumstances surrounding disappearances and killings to the detriment of other manifestations of state violence such as torture without the result of death, exile and political imprisonment, as well as the vulnerability of social rights.

Secondly, the author states that there was no link between the political dimension and human rights violations. He argues that the Rettig Report, by practically equate the violence practiced by the state agents with that coming from opponents of the regime, as if both were on an equal footing, privileged the individual character of the violations to the detriment of the relation between social order and violence.

Third, the author points to the historical and political dissociation of violence. For him, the truth was elaborated from the logic of the culprit and the victim, disregarding the relation between political violence, economic factors and social inequality. Political violence was then explained as an effect of the local manifestation of Cold War dissent, which, in a way, justified the intervention of the Armed Forces after the *coup d'état*[29].

It should be noted that, despite this, the Report expressly states that there was no justification for the perpetration of the violations.

Although the creation of this Commission was positive, as a first step taken by President Patricio Aylwin, in keeping with the characteristics of the Chilean transition, the victim organizations and human rights defenders criticized the Chilean Truth Commission for its various limitations.

In addition to the restriction on the crimes to be investigated, the Commission did not have the power to disclose the names of the perpetrators, to investigate human rights violations that did not result in death, and to require the presence or testimony of persons[30]. As it has been happening in Brazil, there was neither the collaboration of the Armed Forces nor the access to military documents of the dictatorial period.

The same criticisms can be attributed to the National Reparations Corporation, since it acted in the same terms as the Rettig Commission, with the difference that it also took on other responsibilities stemming from the recommendations of the first Commission on reparations.

As for the Dialogue Table, which did not really function as a Truth Commission, its objective regarding the location of political disappeared or their mortal remains has not been reached. In 2001, a list was given by the Armed Forces and Order, indicating the location of the bodies of 200 missing persons, 20 of whom were not identified.

Subsequently, it was found that most of the information was untrue, and the results achieved were not very relevant. For the National Institute of Human Rights, an example refers to the case of Juan Lins Riveira Matus. According to the Armed Forces, his mortal remains would have been thrown into the sea. However, through judicial investigations, the body was identified in the grounds of the Fuerte Arteaga[31].

28 CRENZEL, Emilio. Los derechos humanos y las políticas de la memoria: reflexiones a partir de las experiencias de las comisiones de la verdad de Argentina e Chile. In: VINYES, Ricard (Org.). *El Estado y la memoria*: gobiernos y ciudadanos frente a los traumas de la historia. Buenos Aires: Del Nuevo Extremo, 2009. p. 361.

29 CRENZEL, Emilio. Los derechos humanos y las políticas de la memoria: reflexiones a partir de las experiencias de las comisiones de la verdad de Argentina e Chile. In: VINYES, Ricard (Org.). *El Estado y la memoria*: gobiernos y ciudadanos frente a los traumas de la historia. Buenos Aires: Del Nuevo Extremo, 2009. p. 361. ACUÑA, Carlos H. Transitional justice in Argentina and Chile: a never-ending story? In: ELSTER, Jon (Org.). *Retribution and reparation in the transition to democracy*. Cambridge: University Press, 2006. p. 223.

30 CRENZEL, Emilio. Los derechos humanos y las políticas de la memoria: reflexiones a partir de las experiencias de las comisiones de la verdad de Argentina e Chile. In: VINYES, Ricard (Org.). *El Estado y la memoria*: gobiernos y ciudadanos frente a los traumas de la historia. Buenos Aires: Del Nuevo Extremo, 2009. p. 361.

31 INSTITUTO NACIONAL DE DERECHOS HUMANOS. Situación de los derechos humanos en Chile. *Informe Anual*, Santiago, p. 243-260, 2011. Available in: <http://www.indh.cl/informe

The Valech I and II Commissions, set up to clarify cases of political imprisonment and torture and, in the case of the second, disappearances and extrajudicial executions not appreciated by the Rettig Commission and the National Corporation, were also not sufficient to cover all cases of serious violations of human rights. Issues related to gender violence, violations directed against Mapuche children and people (indigenous Chileans), were also not adequately clarified.

In addition to these questions that have not been the subject of specific investigations, there is a common problem, related to both Valech I and II, which means a major obstacle to the realization of the truth. This is article 15 of 19,992 Act, which provides for a 50-year period of secrecy of the testimonies and of all documents that were not published in the reports of the committees. The secret imposed by that Act reaches even the judiciary, which could not have access to the data.

According to information provided by the Museum of Memory and Human Rights, one of the first measures of the courts, when analysing an action involving the violations of the dictatorial period, was the sending of a letter to the institution where the files containing the results of the works, requesting the relevant documents. In the case of the Rettig Commission, the Museum responds to requests, but when it comes to the files of the Valech Commissions, the data were not made available due to legal impediment.[32]

Other cases also indicate the insufficiency of investigation regarding Valech's work. Thirty-four applications involving detentions abroad with the participation of the State were presented. In these situations, the Commission chose not to recognize the victims, since, to that end, it would have to identify Chilean participants in charge of the repressive apparatus, which it was not allowed to do because it could not attribute individual responsibilities. There were also allegations of detention and torture by 102 men serving in the military. The Commission did not recognize the fact that it was a victim because it was not possible to prove the political motivation. Situations involving arrest and torture for abuse of power and common crimes were also not recognized. As regards persons detained for political reasons in private premises, the Commission considered some cases, but with a higher degree of severity than the others. This was also the case for people detained at demonstrations that suffered torture[33].

Although Valech II has accumulated the attributions previously conferred on the previous commissions, it has not brought great contributions beyond the recognition of new victims. In spite of, legally, it could not cover different hypotheses of investigations, it could have shed some light on many points that came to light with Valech I's work, such as gender violence.

As regards the recognition of victims, the relationship between the number of submitted applications and the number of qualified persons is quite different, differently from previous committees. In the case of extrajudicial executions and disappearances, of the 622 cases presented, only 30 were recognized. In the case of political prisons and torture, of the 31,831 requests, only 9,795 had qualified victims, which raised many questions from civil society. Another obstacle is that it would be impossible for applicants to ask for reconsideration if their application was not accepted by the Commission[34].

In the case of Brazil, it has historically been the Amnesty Commission to play this important acknowledging role of political persecution and serious violations of human rights occurred in the military dictatorship, since its operation occurs for an indefinite period and, at least in analysis of individual cases, can recognize what the victims suffered.

There are two types of political persecution covered by 10,559/2002 Act. The first is composed of persecuted politicians who have suffered violations of their public liberties and their physical integrity. The second refers to those who suffered persecutions related to professional activity during the dictatorship regime[35].

Brazil also had an opportunity to advance in matters

2011Inf%20Anual%20INDH12%20WEB.pdf>. Access: 15 aug. 2013.

32 This data was obtained through personal contact of the second author with Maria Ortiz, head of the research sector of the Museum of Memory and Human Rights of Chile, in: nov., 2013.

33 COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA. *Informe*, 2004. p. 84-86.

34 INSTITUTO NACIONAL DE DERECHOS HUMANOS. Situación de los derechos humanos en Chile. *Informe Anual*, Santiago, p. 243-260, 2011. Available in: <http://www.indh.cl/informe 2011Inf%20Anual%20INDH12%20WEB.pdf>. Access: 15 aug. 2013.

35 ABRÃO, Paulo. Justiça de transição no Brasil: o papel da comissão de anistia do Ministério da Justiça. *Revista Anistia Política e Justiça de Transição*, Brasília, p. 15-16, 2009.

of truth and memory for the broad powers conferred on the National Truth Commission, through 12,528 / 2011 Act. This rule allowed human rights violations to be investigated to a previously non-existent extent. Working groups were formed to analyse specific issues, such as gender violence, violence against the military prosecuted by regime, against workers and participants in the trade union movement, against peasants and indigenous people.

According to Marlon Weichert, if, on the one hand, the temporal distance between the political transition and the installation of the National Truth Commission in Brazil has caused problems access to supporting documents and reparation of victims, on the other hand, the distancing of the political disputes that gave rise to the risk of retreat would allow a broader understanding of the conditions that led to the establishment of the authoritarian regime and to human rights violations[36].

In December 2014, the National Truth Commission published its Report after just over two and a half years of work.

It is possible to identify important contributions from the Commission regarding the realization of the right to the truth in Brazil.

The NTC concluded that the serious violations of human rights practiced by Brazil, especially during the period of dictatorship, were a systematic practice, used as a government policy to eliminate opponents of the military regime then in force. State violence, therefore, did not consist of isolated acts. According to the Commission, this pattern of violence continues to be practiced by the security forces, due to the lack of investigation and punishment of the guilty[37].

Some important points have also been clarified. One of them was the confirmation of Brazil's participation, with US support, in Condor Operation, a network of foreign cooperation with countries of the Southern Cone (Argentina, Bolivia, Chile, Paraguay and Uruguay) to support the persecution of political dissidents[38]. Another relevant point was the approach of the judiciary, especially the Supreme Court, during the military dictatorship. The CNV found that the Supreme Court acted based on Institutional Act 5, ignoring allegations of torture and denying *habeas corpus* to opponents of the regime[39]. Also worthy of mention is the identification of 230 sites used for the practice of human rights violations, including military units, clandestine sites and ships[40]. 377 authors of human rights violations have also been identified[41].

The Commission also made important recommendations to be followed by the Brazilian State[42]. It suggested that perpetrators of crimes against humanity should be criminally liable and have exercised the right of compensation from the people who gave cause to the payment of indemnities by the government. Institutional reforms have also been mentioned. Among them, the demilitarization of the police, the increase of organs for the protection of human rights, especially the prevention and combat of torture, extinction of state military justice, repeal of the National Security Act, revelation of the truth, with the monitoring by the State, of the recommendations made by the Commission and continuity in the work of opening the archives, reparation of victims and adoption of measures of memory.

It is necessary, however, to point out some shortcomings in the Commission's activities, which go beyond formal questions and concern the investigations and clarification of the truth and indicate the incompleteness of the investigation of the facts.

There was no indication of the names of alleged perpetrators of torture and illegal arrests that did not result in enforced disappearance or death. Cases of political imprisonment and torture have also not been quantified.

36 WEICH, Marlon Alberto Weichert. A comissão nacional da verdade. In: SILVA FILHO, José Carlos Moreira; TORELLY, Marcelo Dalmás; ABRÃO, Paulo (Orgs.). *Justiça de transição nas Américas*: olhares interdisciplinares, fundamentos e padrões de efetivação. Belo Horizonte: Fórum, 2013. p. 161-180.

37 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 962-964.

38 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 175-250.

39 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 933-958.

40 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 727-823.

41 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 841-932.

42 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 964-975.

As Chilean case, situations such as those of exiles were not faced, nor was there any significant advance in the search for the mortal remains of the political disappeared. Although working groups have been set up to analyse violence against specific social segments, there has been no detailed analysis of these issues. By way of example, vol. 2 of the Report, which brings thematic texts in relation to them, deals with the entire indigenous question in all its complexity in only 60 pages; the issue of homosexuality is dealt with in a 13-page text and there is no specific thematic text on violence against women, despite the numerous reports of rape and torture that are characterized by specifically exploiting the female condition[43].

5. Official truths and public policies of memory

The public policies of memorials reflect the various dilemmas related to the dimension of enlightened truth in Chile.

The Human Rights Program of the Ministry of the Interior, responsible for the projects related to memory spaces has included, in most cases, memorials involving the victims of homicides and political disappearances. In its official publication, only one of them pays homage to the women victims of the dictatorship. This memorial, currently, is in very poor state of conservation. No memorial has been identified in honor of the tortured, although there have been recommendations in this sense by the Valech Commission.

The Program usually operates from the initiative of the family groups, granting financial support for its creation or maintenance. Therefore, there is no structured action plan for the remembrance of all victims.

Another public policy of memory in Chile consists of the Museum of Memory and Human Rights. As already mentioned, this Museum corresponds to an important space of preservation of the historical and individual memory of the victims. Also as a document archive, this institution plays an important role. An example of this is the requests made by the Chilean judiciary to obtain information that is available for the investigation of legal proceedings. Its importance is also reflected in the educational field, especially since there is no official policy in this regard. Many schools, therefore, have conducted guided tours with students and teachers, and there are trainings for teachers on the theme of this Museum.

It is also a space where the victims are remembered, and there are ceremonies in which they are paid homage. The data preserved by the Museum serve as support for research on the subject, through its availability in the documentation centre[44].

Nevertheless, it should be noted that the memory programs developed in the Museum are based on the reports issued by the Rettig and Valech Commissions. On the one hand, the importance of an official narrative recognized by the State, about its past of violence, remains evident. On the other hand, it also means the reflection of the partial elaborations of truth.

Another issue concerns the inexistence of specific memory space for victims of sexual violence, against minors and the Mapuche people. Although the Valech Commission has addressed the issue of sexual violence, and given greater visibility to the subject, there is no specific official truth for each case.

It should be noted that in Brazil, the Amnesty Commission, in addition to the contributions to truth and memory already mentioned, has been a constant space for victims' testimony, which can be publicly provided. This measure is a way of preserving the memory of the violence suffered by them, from their own gaze. A form of symbolic reparation that reaches memory in its individual dimension is then verified, based on the recognition of the suffering of political persecution[45]. There are also contributions to memory in its collective dimension, considering the publicity of testimonies, which can be enhanced through the way they will be narrated in other public spaces or inserted in other public policies of memory.

As for the National Truth Commission's action on the right to memory, it was somewhat economic. In

43 CNV, Report, v. 2.

44 HITE, Katherine; COLLINS, Cath. Memorial fragments, monumental silences and reawakenings in 21-st century Chile. *Millenium: Journal of International Studies*, v. 38, n. 2, p. 398-399, 2009.

45 OLIVEIRA, Roberta Cunha; SILVA FILHO, José Carlos Moreira. Os testemunhos das vítimas e o diálogo transgeracional: o lugar do testemunho na transição pós-ditadura civil-militar brasileira. In: MEYER, Peluso Neder; OLIVEIRA, Marcelo Andrade Cattoni (Orgs.). *Justiça de transição nos 25 anos de Constituição*. 2. ed. Belo Horizonte: Initia, 2014. p. 301-343.

Chapter 18, referring to its recommendations, it addresses the issue only half a page, basically stating that measures should be taken to preserve the memory of the grave human rights violations that occurred during the period, as well as of its victims. To this end, it proposes that Brazil must preserve, restore and promote the *tombamento*[46] or creation of memory marks in urban or rural properties where these violations occurred; to institute and install in Brasilia a Museum of Memory; repeal measures to honour perpetrators of the grave violations of human rights of the period, in particular by removing honoraria granted to them, as well as by promoting the change of the name of public places, buildings, transportation routes and public institutions that refer to public or private agents who have been known to be involved in such violations[47].

6. The seriousness of human rights violations and the fulfilment of the right to memory and truth as a goal of non-repetition

In Chile, since the transition to democracy, clarifying the truth and building a memory of past atrocities have reflected conflicts between opposition groups and those that supported the former military government.

These dilemmas have been observed recently, as a result of some facts that demonstrate the divergent perceptions of society about the past of repression.[48] In 2010, for example, there were requests from the Catholic Church for the Chilean executive to grant pardon to military personnel who committed crimes to a lesser degree and who showed regret, an act widely disputed by human rights defenders, on the grounds that such a measure would not prevent the atrocities of the past[49].

According to the National Institute of Human Rights, in 2011, the National Education Council tried to replace the term military dictatorship by military regime in the program of the sixth basic year, on the grounds that there should be greater clarification as to the reasons that led to the adoption of the political regime[50]. However, due to the criticisms directed against the measure, the Ministry of Education maintained the traditional nomenclature, which is military dictatorship, as well as the expression military regime.

On June 10, 2012, the September 11 Corporation paid tribute to Augusto Pinochet at the Caupolicán Theater in Santiago. These honours of actors who violated human rights contribute to the denial or justification of crimes against humanity, and are confronted with the construction of a memory of repudiation of these events.

Although there are deficits regarding the dimensions of memory and truth, in the case of Chile, the general structure of repression has been known and disseminated by virtue of the work of the Commissions of Truth and memory spaces. Even conservative sectors, such as the Armed Forces, recognised the seriousness of the human rights violations experienced by the country, and the Judiciary broadly adopted the thesis consolidated in the Inter-American Court in the Almonacid Arellano vs. Chile in relation to the criminal responsibility of the perpetrators.[51] [52]

Nevertheless, the above-mentioned facts are examples of manifestations that extol the violence of the

46 Administrative measure provided for in Brazilian law for the preservation of goods of great historical and cultural value.

47 COMISSÃO NACIONAL DA VERDADE. *Relatório*, ano 3, v. 1, 2014. Available in: <www.cnv.gov.br>. Access: 23 sept. 2015. p. 974.

48 Still on the disputes for memory, Steve Stern in his book *Luchando por mentes y corazones: las Batallas de la memoria en el Chile de Pinochet*, analyses that even during the dictatorship there was a dispute of memory in order to consolidate a positive vision of the dictatorship and another in the sense of not accepting the abuses that had been occurring The struggles for memory in the period corresponding to the validity of the dictatorship will not be analysed in the present work (STERN, Steve J. *Luchando por mentes y corazones*: las batallas de la memoria en el Chile de Pinochet. Santiago: Universidad Diego Portales, 2009.).

49 IGREJA Católica do Chile propõe perdoar crimes de militares da ditadura. *Euronews*. Available in: <http://pt.euronews.com/2010/07/22/igreja-catolica-do-chile-prope-perdoar-crimes-de-militares-da-ditadura/>. Access: 21 sept. 2013.

50 INSTITUTO NACIONAL DE DERECHOS HUMANOS. Situación de los derechos humanos en Chile. *Informe Anual*, Santiago, p. 83-121, 2011. Available in: <http://www.indh.cl/informe 2011/Inf%20Anual%20INDH12%20WEB.pdf>. Access: 15 aug. 2013.

51 IACHR. Inter-American Court of Human Rights. Judgment. *Caso Almonacid Arellano e outros vs. Chile*. San José, 2006.

52 FERNÁNDEZ, Karinna Neira. La jurisprudencia de la Corte Suprema Chilena, frente a las graves violaciones contra los derechos humanos cometidos durante la dictadura militar. In: GOMES, Luiz Flávio; MAZZUOLI, Valério de Oliveira (Orgs.). *Crimes da ditadura militar*: uma análise à luz da jurisprudência atual da Corte Interamericana de direitos humanos. São Paulo: Revista dos Tribunais, 2011. p. 289; GALINDO, Bruno. Justiça de transição na América do Sul: possíveis lições da Argentina e do Chile ao processo constitucional de transição no Brasil. In: FEITOSA, Enoque et al. (Orgs.). *O judiciário e o discurso dos direitos humanos*. Recife: UFPE, 2012. p. 225-229.

country's dictatorial past. In Chile, the reconstruction of a democratic coexistence based on the memories of a past of institutional violence still occurs in parallel with a favourable reading by the civil society regarding the type of regime established in the period of authoritarianism.

In Brazil, despite the work of the CNV and the scholars and pro-justice transitional agents that preceded it, there is a great precariousness in the perception of the harms of a dictatorial regime, being, in fact, a practically unique case in Latin America of a country that has never punished any criminal against the humanity of the period in view of the interpretation traditionally given to the so-called Amnesty Law, corroborated by the Supreme Court in 2010, despite frontally contradicting the consolidated jurisprudence of the Inter-American Court, including the Gomes Lund Case in which Brazil was condemned, also in 2010.

This is inevitably reflected in the realization of the rights to truth and memory, with frequent criticisms of the CNV that it would be a "half-truth" commission, which would be practicing "revenge", as well as the exaltation of the dictators of the period as "heroes that saved Brazil from communism" and that the dictatorship would be justified because it was to avoid a greater evil. One of the most emblematic of this recent situation was the pronouncement by Federal Deputy Jair Bolsonaro, in a national network, on the occasion of the impeachment process of former President Dilma Roussef, in April 2016. In justifying his vote in favour of the openness of the process, he paid tribute to the late Colonel Carlos Alberto Brilhante Ustra, the first military recognized in two judicial instances as a torturer in the period of the military dictatorship,[53] being celebrated by the parliamentarian as the "terror of Dilma Roussef", in a probable allusion to the tortures suffered by former President, who was in the custody of the Brazilian State in the period, and was a victim of these acts in sessions led by Colonel Ustra.

7. Conclusions

The representation of narratives of violence with the inclusion of all victims, as well as the preservation of places of violations and resistances, and evidentiary documents are undoubtedly the first steps towards building the rights to truth and memory in the field of transitional justice. The lack of public policies regarding the remembrance of victims or violent acts of repression means the State's failure to its duties of realizing the right to memory. However, if there are public policies in this sense, how can we conclude that they represent human rights violations?

Memorials as a physical expression of a memory-building process are influenced by the political context in which they are involved and by the social actors. In the case of political transitions, the permanence of former influential rulers, the existence of human rights organizations, and the demands of family members influence the process.

In view of the proportions assumed by the violence practiced in Chile and Brazil during the dictatorial periods, as well as the effects of the long duration of military regimes, and in the case of Brazil, given so much time of silence and omission on these facts, it is possible to inquire: at what point will it be possible to consider the right to memory and truth to the point where they reach their goal of non-repetition, even though public policies have been adopted that indicate the fulfilment of their individual and collective dimensions? When you realize that truth and historical memory have reached common subjectivity to the point of producing a culture of human rights that guarantees the non-repetition of violence, as proposed by the Inter-American Court of Human Rights?

If this study does not have the elements to answer these questions, at least it is possible to affirm that, at the moment, these policies need continuity in both countries.

Certainly, it is not up to the law to assess the potential of these policies in relation to the achievement of their purposes. However, it is possible to affirm that if the state has the duty to adopt such policies in order to realize memory and truth in its individual and collective dimensions, with objectives related to reparation of victims and non-repetition, the review of these policies is also included in this duty.

Finally, it must be borne in mind that the objectives of measures of memory and truth lie in the intention of non-repetition of violence. Despite the recognition of the importance of the places of memory existing in

53 BRASIL. Tribunal de Justiça De São Paulo. 1ª Camara de Direito Privado. *Apelação Cível 034771808.2009.8.26.0000*. Relator: Des. Rui Cascaldi. 14 ago. 2012

Chile, the criticisms directed at them in relation to their capacity to contribute to the collective imagination in order to transmit the repudiation of the dictatorship is an opportunity for reflection on the planning of places of memory, so that they better represent the reality of the authoritarian period.

Despite the advances made in terms of memory and truth in Chile, the scope of truth, in its totality, from the individual and collective point of view, has not yet been clarified. This fact is aggravated by the absence of a permanent administrative commission that receives requests from persons who at any moment, for various reasons, were unable or unwilling to present their testimony, and there is therefore no possibility in Chile of those victims being recognized as such by the State, from the individual point of view, except by judicial means.

In the case of Brazil, the completion of the work of the National Truth Commission cannot be considered as an end point. There are still many gaps to be clarified and many measures to be implemented in terms of public memory policies. Issues such as gross violations of human rights against indigenous peoples have been poorly explored, and a specific account of violations of women's rights is lacking in their Report, which in a country with considerable problems of gender inequality and a large number of cases of violence against women, is extremely relevant.

And because of these gaps and the need for permanent remembrance of events for their non-repetition in unstable Brazilian democracy, the work on the realization of the rights to truth and memory needs continuity and deepening.

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A margem nacional de apreciação na Corte Interamericana de Direitos Humanos*

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Resumo

Ao examinar casos de violação de Direitos Humanos, as Cortes Internacionais são confrontadas por peculiaridades sociais e culturais dos Estados-membros, que devem ser levadas em consideração no julgamento. O presente artigo propõe o estudo da Teoria da Margem Nacional de Apreciação no âmbito da Corte Interamericana de Direitos Humanos, à luz da doutrina nacional e internacional e da análise de casos consultivos e contenciosos apreciados por aquela Corte. O problema central versa sobre os limites de aceitação e forma de aplicação dessa teoria à Corte IDH, com a finalidade de trazer novos elementos ao debate sobre o tema. Para tal finalidade, primeiramente são traçadas as bases teóricas necessárias à compreensão da Margem Nacional de Apreciação, abordando seu conceito, seu surgimento no direito administrativo alemão e sua posterior adoção pela Corte Europeia de Direitos Humanos, em que a teoria foi desenvolvida. Em um segundo momento, examinamos a fundamentação apresentada pela Corte Interamericana de Direitos Humanos em casos consultivos — especialmente as Opiniões Consultivas 4/84 e 24/17 — e contenciosos, com a finalidade de traçar os parâmetros de adoção da referida teoria no sistema interamericano de Direitos Humanos. O presente artigo foi elaborado de acordo com o método hipotético-dedutivo para aferição da aplicação da Margem Nacional de Apreciação na CorteIDH a partir da análise dos casos selecionados. O estudo possibilita aferir que, apesar de a Corte IDH em tese aceitar a aplicação desta teoria, tem adotado critérios rígidos em relação à análise de casos contenciosos, objetivando assegurar uma esfera mínima de proteção aos Direitos Humanos.

Palavras-chave: Direito Internacional dos Direitos Humanos. Corte Interamericana de Direitos Humanos. Margem Nacional de Apreciação.

Abstract

When examining cases of human rights violations, International Courts are confronted by social and cultural peculiarities of the Member States, which must be taken into consideration in the judgment. This paper proposes the study of theory of National Margin of Appreciation within the

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framework of the Inter-American Court of Human Rights, in the light of the national and international doctrine and through case law analysis and advisory dispute heard by that Court. The central problem concerns the limits of acceptance and application of the theory on I/A Court, with the purpose of bringing new elements to the debate on the topic. For such a purpose, we trace the theoretical bases necessary for the understanding of the National Margin of Appreciation, addressing your concept, your appearance in the German administrative law and your subsequent adoption by European Court of Human Rights, where the theory was developed. In a second moment, we examine the rationale presented by the I/A Court in advisory cases – especially the 4/84 and 24/17 –and litigation ones, with the purpose to trace the parameters of adoption of the theory in the Inter-American human rights system. This paper was prepared according to hypothetical-deductive to measure the implementation of the National Margin of Appreciation on I/A Court from the analysis of selected cases. The study makes it possible to determine that, although the Inter-American Court sometimes accept the application of this theory, has adopted strict criteria when the analysis of contentious cases, in order to ensure a minimum sphere of human rights protection.

Keywords: International Law on Human Rights. Inter-American Court of Human Rights. National Margin of Appreciation.

1. Introdução

A proteção do indivíduo, dos grupos em situação de vulnerabilidade e dos povos ocupam especial relevância da pauta mundial desde a Declaração Universal dos Direitos do Homem, inclusive sustentado por Bobbio que o próprio debate sobre o fundamento dos Direitos Humanos encontra-se superado desde aquela, remanescendo a especial preocupação com a garantia daqueles[1]. As Cortes Internacionais criadas desde então, nos âmbitos universal e regionais, passaram a tutelar os direitos conferidos ao indivíduo e aos grupos vulneráveis por meio dos pactos internacionais, o que pode gerar conflitos entre o universalismo dos Direitos Humanos e as particularidades locais existentes em cada Estado, tendo em vista a multiplicidade de atores e de poderes envolvidos[2].

A Teoria da Margem Nacional de apreciação busca conjugar as disposições inscritas nos tratados internacionais de direitos humanos com as peculiaridades culturais e sociais de cada Estado-parte, reservando-lhes espaço para atuação discricionária no que se refere a questões tipicamente locais[3], de forma a evitar a aniquilação da diversidade cultural sob a bandeira da universalidade dos Direitos Humanos[4].

Nesse sentido, cumpre indagar em que consiste a margem de apreciação e se esse instituto vem sendo utilizado — e de que forma — pela Corte Interamericana de Direitos Humanos (CorteIDH). O presente estudo tem por objetivo compreender a formação da Teoria da Margem de Apreciação e a sua aplicação no direito internacional dos direitos humanos, apresentando os requisitos de sua incidência, bem como examinar os casos em que ela foi debatida pela Corte Interamericana de Direitos Humanos – CorteIDH, com especial atenção à Opinião Consultiva nº. 04/84.

O trabalho encontra-se dividido em duas partes. Inicialmente, apresentamos uma breve síntese histórica quanto ao surgimento da margem de apreciação e de sua adoção pelas Cortes internacionais, bem como as bases teóricas para a sua aplicação. Em seguida, analisamos os fundamentos invocados pela CorteIDH para sua utilização na Opinião Consultiva nº. 04/84 e no julgamento de três casos contenciosos (Herrera Ulloa vs. Costa Rica, Chaparro Álvarez y Lapo Íñiguez vs. Ecuador e Barreto Leiva vs. Venezuela), buscando verificar a efetiva adoção dessa teoria no sistema interamericano de proteção aos Direitos Humanos.

O estudo foi elaborado por meio da revisão da bibliografia nacional e estrangeira sobre a matéria e da análise de julgamentos proferidos pela Corte Europeia de Direitos Humanos (CorteEDH) e pela própria CorteIDH. Utilizou-se, essencialmente, o método hipotéti-

1 BOBBIO, Norberto. *A era dos direitos*. Rio de Janeiro: Elsevier, 2004. p. 17.

2 CÁRCOVA, Carlos Maria. *As teorias jurídicas pós-positivas*. Belo Horizonte: Letramento, 2016. p. 285.

3 DINIZ, Geilza Fátima Cavalcanti. Cultura e internacionalização dos direitos: da margem nacional de apreciação ao transcivilizacionismo. *Revista de Informação Legislativa,* Brasília, v. 49, n. 196, p. 133-147, out./dez. 2012. p. 134.

4 MELO JUNIOR, José Ricardo Custódio de. O conflito entre o universalismo dos direitos humanos e o multiculturalismo: reflexos na aplicação da doutrina da margem de apreciação. *Publicações da Escola da AGU,* Brasília, v. 7, n. 39, p. 7-21, pt. 2, out./dez. 2015. p. 9.

co-dedutivo, buscando confirmar a hipótese lançada a partir das sentenças exaradas pela Corte Interamericana.

Os resultados obtidos apontam que a CorteIDH vem reconhecendo, em casos especiais, que os Estados que se submetem à sua jurisdição gozam de um certo espaço de atuação discricionária na proteção dos direitos humanos, desde que isso não implique violação às prerrogativas convencionalmente conferidas aos indivíduos e grupos em situação de vulnerabilidade.

2. A MARGEM NACIONAL DE APRECIAÇÃO

Segundo Cárcova[5], em razão da barreira opaca que divide o direito de seus destinatários, os atos normativos deixam de ser conhecidos pelos atores sociais, que apenas realizam as condutas descritas sem perceber seus significados e alcances, como se realizassem rituais. Essa opacidade crescente implica, igualmente, o incremento da complexidade dos sistemas jurídicos[6].

A margem nacional de apreciação, entendida como o reconhecimento de uma reserva de atuação do Estado de acordo com suas peculiaridades em relação às s normas internacionais, apresenta-se como uma das ferramentas de conciliação entre a noção tradicional de soberania estatal — com as inúmeras escolhas no âmbito interno — e as disposições inscritas nos tratados internacionais de Direitos Humanos, muitas vezes redigidas com um alto grau de abstração.

Dessa forma, mostra-se necessária a apresentação das noções gerais sobre a margem nacional.

2.1. O surgimento da margem de apreciação nacional

O estudo da Teoria da Margem de Apreciação (*Beurteitungsspielraum*) exige que sejam, inicialmente, traçados os contornos históricos de seu surgimento e adoção pela Corte Europeia de Direitos Humanos (CorteEDH).

O instituto tem sua origem no direito administrativo alemão, na década de 1950, influenciada pela Teoria da Discricionariedade Administrativa. A doutrina aponta que ele foi aplicado, pela primeira vez, pelo Tribunal Administrativo alemão, em 1971, no julgamento do *Jugendgefährdungsurteil*, no qual aquela Corte recusou-se a analisar se uma determinada revista ofereceria risco à juventude, pois, supostamente, pornográfica, reconhecendo que tal análise integrava margem de apreciação do administrador[7].

No âmbito da CorteEDH, a adoção da margem de apreciação possibilitou que fosse reconhecido aos Estados um espaço de atuação discricionária, apesar de encontrarem-se vinculados à Convenção Europeia de Direitos Humanos (CEDH).

Essa margem foi adotada, inicialmente, de forma implícita, no julgamento do caso *Lawless vs. Irlanda*. Gerard Richard Lawless foi preso, em 11 de julho de 1957 quando estava embarcando da Irlanda para a Inglaterra como suspeito de ser membro do IRA. Ele foi mantido por 24 (vinte e quatro) horas na estação de polícia de Bridewell, e a detenção foi prorrogada por igual período. Encerrado tal prazo, houve sua transferência para outras prisões, conforme a Lei nº 02/1940 — que alterou a Lei de Segurança do Estado, de 1939 — sendo posto em liberdade em 11 de dezembro de 1957, após processamento de representação perante a Comissão Europeia de Direitos Humanos[8].

O caso foi levado à apreciação da CorteEDH que, dentre outros fundamentos, afirmou que os Estados gozam de liberdade para suprimir certas garantias individuais em circunstâncias excepcionais, afastando-se da orientação estabelecida no artigo 15º da CEDH:

> ARTIGO 15°
>
> Derrogação em caso de estado de necessidade
>
> 1. Em caso de guerra ou de outro perigo público que ameace a vida da nação, qualquer Alta Parte Contratante pode tomar providências que derroguem as obrigações previstas na presente Convenção, na estrita medida em que o exigir a situação, e em que tais providências não estejam em contradição com as outras obrigações decorrentes

5 CÁRCOVA, Carlos Maria. *A opacidade do direito.* São Paulo: LTR, 1998. p. 14.

6 CÁRCOVA, Carlos Maria. Complejidad y derecho. *Doxa,* Universidad de Alicante, Valência, v. 2, n. 21, p. 65-78, 1998. p. 78. Disponível em: <https://www.echr.coe.int/Documents/Convention_POR.pdf.>. Acesso em: 18 out. 2017.

7 SOUZA, Antônio Francisco de. Margem de apreciação e Estado de direito. *POLIS – Revista de Estudos Jurídico-Políticos,* Lisboa, n. 2, p. 7-28, jan./mar. 1995. p. 8. Disponível em: <http://revistas.lis.ulusiada.pt/index.php/polis/article/viewFile/1744/1850>. Acesso em: 23 ago. 2017.

8 CORTE EUROPEIA DE DIREITOS HUMANOS. *Caso Lawless vs. Irlanda.* Sentença de 01 de julho de 1961. Disponível em: <http://hudoc.echr.coe.int/eng?i=001-165129>. Acesso em: 24 ago. 2017.

do direito internacional. (Grifo nosso).

Outra situação em que a CorteEDH também aplicou a margem de apreciação diz respeito ao *Caso Linguístico Belga*[9]. Na ocasião, houve impugnação ao sistema educacional da Bélgica, que divida o país em quatro regiões de línguas distintas. Diversos pais que falavam o idioma francês pretendiam que seus filhos fossem instruídos nessa língua, mas pertenciam à região legalmente considerada "de fala holandesa". A CorteEDH entendeu que o Estado dispunha de discricionariedade para estruturar o sistema educacional local, de acordo com os recursos disponíveis e de forma a atender as necessidades das diversas comunidades[10].

Apenas, no caso *Handyside vs Reino Unido*[11], a doutrina identificou a utilização da margem de apreciação, como teoria própria no âmbito da CorteEDH[12]. Em sentido contrário, Diniz[13] afirma que a CorteEDH elaborou a Teoria da Margem de Apreciação no julgamento do caso *Irlanda vs. Reino Unido*.

O Estado britânico foi demandado em razão de alegada violação ao direto de liberdade de expressão, na forma do art. 10.1 da CEDH[14], por ter apreendido e destruído cópias de livros sob a alegação de conteúdo obsceno e inapropriado, consoante a *Obscene Publications Acts 1959/1964*. Ao apreciar o caso, a CorteEDH reforçou que "*el mecanismo de salvaguarda instaurado por el Convenio reviste un carácter subsidiario en relación a los sistemas nacionales de garantía de los derechos del hombre*". Acrescentou que caberia analisar se a conduta do Estado ultrapassou os limites da margem de apreciação, violando os parâmetros de proteção estabelecidos no artigo 10.2 da Convenção Européia[15].

Importa observar que o reconhecimento das diversidades dos Estados-membros constitui um dos fundamentos para a aplicação da margem de apreciação, diante do caráter subsidiário do direito internacional dos direitos humanos e porque as autoridades locais encontram-se melhor aparelhadas para verificar a ocorrência de eventuais violações.

2.2. Delimitando o conceito

A margem nacional de apreciação pode ser entendida[16] como a prerrogativa ou o privilégio conferido ao Estado — no âmbito da proteção ao indivíduo e aos grupos em situação de vulnerabilidade — na aplicação de disposições convencionais com conceitos indeterminados[17] e na presença de lacunas (de direito e de previsão) nos tratados internacionais[18].

9 CORTE EUROPEIA DE DIREITOS HUMANOS. *Caso lingüístico belga.* Sentença de 23 de julho de 1968. Disponível em: <https://madalen.files.wordpress.com/2008/03/tedh_caso_lingc3bcc3adstico_belga.pdf>. Acesso em: 24 ago. 2017.

10 SALDANHA, Jânia Maria Lopes; SILVA, Maria Beatriz Oliveira da; MELLO, Rafaela da Cruz. Novas geometrias jurídicas e a construção de um direito comum pluralista: uma análise da aplicação da margem nacional de apreciação pelo tribunal europeu dos direitos do homem. *Revista Culturas Jurídicas,* v. 2, n. 3, p. 157-181, 2015. p. 164. Disponível em: <http://www.culturasjuridicas.uff.br/index.php/rcj/issue/view/3/showToc>. Acesso em: 23 ago. 2017.

11 CORTE EUROPEIA DE DIREITOS HUMANOS. *Caso Handyside vs. Reino Unido.* Sentença de 08 de setembro de 1976. Disponível em: <http://hudoc.echr.coe.int/eng?i=001-165143>. Acesso em: 16 out. 2017.

12 SALDANHA, Jânia Maria Lopes; BRUM, Márcio Morais. A margem nacional de apreciação e sua (in)aplicação pela Corte Interamericana de Direitos Humanos em matéria de anistia: uma figura hermenêutica a serviço do pluralismo ordenado? *Anuario Mexicano de Derecho Internacional,* jan. 2015. p. 204. Disponível em: <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/489>. Acesso em: 16 out. 2017.

13 DINIZ, Geilza Fátima Cavalcanti. Cultura e internacionalização dos direitos: da margem nacional de apreciação ao transcivilizacionismo. *Revista de Informação Legislativa,* Brasília, v. 49, n. 196, p. 133-147, out./dez. 2012.

14 Artigo 10 – Liberdade de expressão – 1. Qualquer pessoa tem direito à liberdade de expressão. Esse direito compreende a liberdade de opinião e a liberdade de receber ou de transmitir informações ou ideias sem que possa haver ingerência de quaisquer autoridades públicas e sem considerações de fronteiras. O presente artigo não impede que os Estados submetam as empresas de radiodifusão, de cinematografia ou de televisão a um regime de autorização prévia.

15 ARTIGO 10° […] 2. O exercício dessas liberdades, porquanto implica deveres e responsabilidades, pode ser submetido a certas formalidades, condições, restrições ou sanções, previstas pela lei, que constituam providências necessárias, numa sociedade democrática, para a segurança nacional, a integridade territorial ou a segurança pública, a defesa da ordem e a prevenção do crime, a proteção da saúde ou da moral, a proteção da honra ou dos direitos de outrem, para impedir a divulgação de informações confidenciais, ou para garantir a autoridade e a imparcialidade do poder judicial.

16 Vale observar que a margem nacional de apreciação já apresenta divergência quanto a sua própria definição como teoria, como doutrina ou mesmo como expressões sinônimas. Como já observado desde o início deste estudo, sem aprofundar o debate, é adotada a expressão teoria, acompanhando o posicionamento majoritariamente acolhido pela doutrina nacional.

17 SOUZA, Antônio Francisco de. Margem de apreciação e Estado de direito. *POLIS – Revista de Estudos Jurídico-Políticos,* Lisboa, n. 2, p. 7-28, jan./mar. 1995. p. 7. Disponível em: <http://revistas.lis.ulusiada.pt/index.php/polis/article/viewFile/1744/1850>. Acesso em: 23 ago. 2017.

18 DINIZ, Geilza Fátima Cavalcanti. Soberania e margem nacional de apreciação. *Revista Eletrônica Direito e Política,* Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, Itajaí, v. 6, n. 2, p. 392-418, 2º quadrimestre de 2011. Disponível em: <https://siaiap32.univali.br/seer/index.php/rdp/article/

Essa discricionariedade está relacionada com o que Saldanha e Brum[19] chamam de "limites decisórios dos sistemas de justiça internacional" de direitos humanos, e implicam uma forma de autorrestrição (*self-constraint*) na atuação das Cortes Internacionais em benefício dos sistemas judiciários internos[20].

Em relação a esse contexto, a doutrina reconhece três elementos que justificam a aplicação da Teoria da Margem de Apreciação: (1) a natureza subsidiária da proteção internacional dos direitos humanos em relação à proteção nacional; (2) o contato direto dos Estados-membros com as suas forças vivas, de acordo com o cabedal cultural de cada um e (3) a ausência de parâmetros comuns em matéria de direitos humanos[21].

O primeiro justificador da aplicação da teoria leva em consideração a existência de dois sistemas de proteção de direitos humanos, o interno e o internacional[22]. O segundo não tem por finalidade substituir os tribunais internos ou funcionar como Cortes revisoras ordinárias[23]. Ou seja, ao aderir aos tratados internacionais, o Estado "[...] passa a aceitar o monitoramento internacional sobre o respeito dos direitos humanos em seu território, com responsabilidade de tutela originária, sendo a ação internacional suplementar, adicional e subsidiária"[24].

Assim, ainda que não esteja expressamente prevista em dispositivo convencional, a margem de apreciação decorre logicamente do Princípio da Subsidiariedade do direito internacional[25], especialmente da atuação das esferas internacionais.

No que diz respeito ao segundo elemento, a margem de apreciação busca exatamente estabelecer o equilíbrio entre a universalização dos direitos humanos e as características culturais de cada povo[26], necessário em razão da constatação de que os diferentes povos, apesar de partilharem valores comuns, buscam também o reconhecimento das particularidades que lhes são próprias[27].

Nesse sentido, Diniz[28] assevera que a CorteEDH admitiu a utilização da margem nacional de apreciação em decorrência de os Estados (e atores nacionais) estarem, em regra, em contato direto com as tradições e peculiaridades locais, encontrando-se em situação privilegiada para aferir a regularidade de disposições jurídicas que implicam restrições a direitos fundamentais, de forma a respeitar o pluralismo cultural e fortalecer a coexistência

view/6058/3328>. Acesso em: 19 out. 2017.

19 SALDANHA, Jânia Maria Lopes; BRUM, Márcio Morais. A margem nacional de apreciação e sua (in)aplicação pela Corte Interamericana de Direitos Humanos em matéria de anistia: uma figura hermenêutica a serviço do pluralismo ordenado?. *Anuario Mexicano de Derecho Internacional,* jan. 2015. p. 203. Disponível em: <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/489>. Acesso em: 16 out. 2017.

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21 SEFERJAN, Tatiana Robles. Proteção internacional dos direitos humanos: a teoria da quarta instância e da margem de apreciação nacional. *Revista de Direito Constitucional e Internacional,* São Paulo, v. 23, n. 92, p. 389-416, jul./set. 2015; DINIZ, Geilza Fátima Cavalcanti. Soberania e margem nacional de apreciação. *Revista Eletrônica Direito e Política,* Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, Itajaí, v. 6, n. 2, p. 392-418, 2º quadrimestre de 2011. p. 404. Disponível em: <https://siaiap32.univali.br/seer/index.php/rdp/article/view/6058/3328>. Acesso em: 19 out. 2017.

22 MENDONÇA, Fernanda Graebin; NASCIMENTO, Valéria Ribas do. Os desafios para a proteção dos direitos humanos na era da interconstitucionalidade: a margem nacional de apreciação como instrumento de proteção no contexto do sistema interamericano. *Revista de Direito Constitucional e Internacional,* São Paulo, v. 24, n. 94, p. 221-246, jan./mar. 2016. p. 84.

23 NASPOLINI, Samyra Haydêe Dal Farra; SILVEIRA, Vladmir Oliveira da. O direito internacional dos direitos humanos e a margem nacional de apreciação: tendências da Corte Europeia. *Cadernos do Programa de Pós-Graduação em Direito – PPGDir./UFRGS*, Porto Alegre, v. 11, n. 1, ago. 2016. p. 84. Disponível em: <http://seer.ufrgs.br/index.php/ppgdir/article/view/62292>. Acesso em: 23 ago. 2017.

24 SCHÄFER, Gilberto; MACHADO, Carlos Eduardo Martins. A reparação do dano ao projeto de vida na Corte Interamericana de Direitos Humanos. *Revista de Direitos Fundamentais e Democracia,* Curitiba, v. 13, n. 13, p. 179-197, jan./jun. 2013. p. 181. Disponível em <http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/340/315>. Acesso em: 24 out. 2017.

25 ROCA, Javier García. La muy discrecional doctrina del margen de apreciación nacional según el Tribunal Europeo de Derechos Humanos: soberanía e integración. *Teoria y Realidad Constitucional,* n. 20, p. 117-143. 2007. Disponível em: <http://revistas.uned.es/index.php/TRC/article/view/6778/6476>. Acesso em: 19 out. 2017.

26 DINIZ, Geilza Fátima Cavalcanti. Cultura e internacionalização dos direitos: da margem nacional de apreciação ao transcivilizacionismo. *Revista de Informação Legislativa,* Brasília, v. 49, n. 196, p. 133-147, out./dez. 2012. p. 140.

27 SALDANHA, Jânia Maria Lopes; BRUM, Márcio Morais. A margem nacional de apreciação e sua (in)aplicação pela Corte Interamericana de Direitos Humanos em matéria de anistia: uma figura hermenêutica a serviço do pluralismo ordenado?. *Anuario Mexicano de Derecho Internacional,* jan. 2015. p. 201. Disponível em: <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/489>. Acesso em: 16 out. 2017.

28 DINIZ, Geilza Fátima Cavalcanti. Soberania e margem nacional de apreciação. *Revista Eletrônica Direito e Política,* Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, Itajaí, v. 6, n. 2, p. 392-418, 2º quadrimestre de 2011. p. 404. Disponível em: <https://siaiap32.univali.br/seer/index.php/rdp/article/view/6058/3328>. Acesso em: 19 out. 2017.

das ordens jurídicas, interna e externa[29].

No entanto, o atendimento a peculiaridades culturais locais não se presta para justificar situações de violação às obrigações assumidas no plano internacional. Com efeito, uma vez celebrado um tratado internacional, o Estado encontra-se vinculado ao seu cumprimento, devendo realizá-lo de boa-fé[30] e sem invocar disposições de seu ordenamento interno para justificar atuações em desconformidade com as disposições internacionais[31].

Nesse sentido, mostra-se válida a crítica feita por Silva[32] à manifestação da República Islâmica do Irã ao Comitê de Direitos Civis da ONU quanto ao suposto descumprimento do artigo 7º do Pacto Internacional dos Direitos Civis e Políticos. Na ocasião, o Estado afirmou estar promovendo alterações na sua legislação interna para atender à disposição convencional, inclusive limitando em 74 chicotadas a punição a ser imposta àquele que maltratar, de forma intencional, outra pessoa.

Ainda, deve ser levado em consideração que, segundo o artigo 31.1 da Convenção de Viena sobre o Direito dos Tratado a interpretação dos tratados internacionais, deve-se levar em consideração o "[...] sentido comum atribuível aos termos do tratado em seu contexto e à luz de seu objetivo e finalidade".

Por derradeiro, a ausência de parâmetros comuns decorre da diversidade cultural verificada entre os diversos Estados e da possibilidade de conferirem-se diferentes interpretações aos dispositivos inscritos nos pactos internacionais[33], as quais podem ser consideradas legítimas justamente em razão do pluralismo de culturas e pela indeterminação dos textos convencionais.

Nesse caso, o trabalho do intérprete deve ser mais acurado, de forma a evitar que a invocação de peculiaridades locais — que devem ser preservadas — sirva de justificativa para o descumprimento das obrigações convencionais, o que poderia levar à responsabilização do Estado no plano internacional. Deve-se lembrar que, ao firmar tratados internacionais, o Estado assume, de forma solene, o dever de respeitar e efetivar as disposições nele inscritas. É seu o dever de cumprir as obrigações convencionais. Apenas em caso de descumprimento é que os órgãos internacionais poderiam buscar sua responsabilização[34].

A inexistência de modelos reflete-se na própria amplitude da margem de apreciação conferida aos Estados, de acordo com a matéria enfrentada, ou ainda, a falta de consenso sobre determinada matéria politicamente sensível, o que é objeto de preocupação dos ativistas de DDHH. Veja-se que a CorteEDH confere maior discricionariedade aos Estados que se submetem à sua jurisdição para regularem as questões relativas à imigração, restringindo a atuação nacional no que se refere a expulsão e deportação ou criminalização de homossexuais[35]. Aliás, aquelas demandas em que há direta relação da situação jurídica com a religião ou cultura são terreno fértil à margem de apreciação[36].

Quanto à forma de aplicação da margem de apreciação, quando da denúncia de violação, as Cortes Internacionais devem aferir se houve ou não restrição às prerrogativas convencionalmente conferidas aos indivíduos ou aos grupos em situação de vulnerabilidade. No caso

29 SALDANHA, Jânia Maria Lopes; BRUM, Márcio Morais. A margem nacional de apreciação e sua (in)aplicação pela Corte Interamericana de Direitos Humanos em matéria de anistia: uma figura hermenêutica a serviço do pluralismo ordenado?. *Anuario Mexicano de Derecho Internacional,* jan. 2015. p. 204. Disponível em: <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/489>. Acesso em: 16 out. 2017.

30 Na forma do artigo 26 da Convenção de Viena sobre o Direito dos Tratados, internalizada no Brasil por meio do Decreto. 7.030/2009, "todo tratado em vigor obriga as partes e deve ser cumprido por elas de boa fé".

31 O artigo 27 da mesma Convenção de Viena prevê que "uma parte não pode invocar as disposições de seu direito interno para justificar o inadimplemento de um tratado. Essa regra não prejudica o artigo 46".

32 SILVA, Guilherme Amorim Campos da. A internacionalização dos direitos humanos na fundação de um novo direito constitucional material. In: PAGLIARINI, Alexandre Coutinho; DIMOULIS, Dimitri (Org.). *Direito constitucional internacional dos direitos humanos.* Belo Horizonte: Fórum, 2012. p. 73-118.

33 MENDONÇA, Fernanda Graebin; NASCIMENTO, Valéria Ribas do. Os desafios para a proteção dos direitos humanos na era da interconstitucionalidade: a margem nacional de apreciação como instrumento de proteção no contexto do sistema interamericano. *Revista de Direito Constitucional e Internacional,* São Paulo, v. 24, n. 94, p. 221-246, jan./mar. 2016. p. 236.

34 DULITZKY, Ariel E. An inter-american constitutional court? The invention of the conventionality control by the Inter-American Court of Human Rights. *Texas International Law Journal,* v. 50, n. 1, p. 45-93, 2015. Disponível em: <https://law.utexas.edu/faculty/adulitzky/69-inter-amer-constitutional-court.pdf>. Acesso em: 08 jan. 2017.

35 SEFERJAN, Tatiana Robles. Proteção internacional dos direitos humanos: a teoria da quarta instância e da margem de apreciação nacional. *Revista de Direito Constitucional e Internacional,* São Paulo, v. 23, n. 92, p. 389-416, jul./set. 2015. p. 408.

36 DINIZ, Geilza Fátima Cavalcanti. Cultura e internacionalização dos direitos: da margem nacional de apreciação ao transcivilizacionismo. *Revista de Informação Legislativa,* Brasília, v. 49, n. 196, p. 133-147, out./dez. 2012. p. 141.

de resposta positiva, analisa-se a proporcionalidade da conduta Estatal, ou seja, se a interferência (a) é legítima e hábil à finalidade almejada; (b) o fim pretendido poderia ser alcançado com medida menos restritiva e (c) se o prejuízo resultante da restrição não excede o benefício que deu azo à medida[37].

Estabelecidos os limites da margem nacional de apreciação, passamos ao exame de sua aceitação pela Corte Interamericana de Direitos Humanos (CorteIDH).

3. A margem nacional de apreciação na Corte Interamericana de Direitos Humanos

A margem de apreciação nacional é amplamente aceita no sistema europeu de proteção aos direitos humanos e vem sendo reiteradamente aplicada pela CorteEDH. A questão é saber como o sistema interamericano lida com esse instituto na América [38].

3.1. A CorteIDH e a opinião consultiva nº. 04/84

A primeira oportunidade em que a CorteIDH se manifestou sobre a margem nacional de apreciação, inclusive com seu acolhimento, referiu-se à manifestação na Opinião Consultiva nº. 04, de 19 de janeiro de 1984, tida como a porta de entrada dessa teoria no sistema interamericano de proteção dos Direitos Humanos[39].

O governo da Costa Rica apresentou à CorteIDH a reforma do disposto nos artigos 14 e 15 da Constituição nacional, relativos às regras de nacionalização. A redação do texto constitucional, grifadas as alterações, era a seguinte:

> Artigo 14. São costa-riquenhos por naturalização:
>
> 1) Aqueles que adquiriram esse status em virtude de leis anteriores;
>
> 2) Nacionais de outros países da América Central, de boa conduta, que tenham residido ao menos um ano no país e que declarem perante o registro civil sua intenção de ser costa-riquenhos;
>
> 3) Hispânicos e ibero-americanos natos, que obtenham o certificado apropriado do registro civil, desde que tenham tido domicílio no país durante os anos anteriores ao requerimento;
>
> **Proposta de alteração:** *3) Nacionais nativos de outros países da América Central, hispânicos e ibero-americanos com cinco anos de residência oficial no país e que preencham os demais requisitos da lei;*
>
> 4) Centro-americanos, hispânicos e ibero-americanos que não sejam natos e outros estrangeiros que tenham tido domicílio na Costa Rica por um período mínimo de cinco anos imediatamente anteriores ao requerimento de naturalização, de acordo com os requisitos legais;
>
> **Proposta de alteração:** *4) Centro-americanos, hispânicos e ibero-americanos que não sejam natos e outros estrangeiros que tenham mantido residência oficial por um período mínimo de sete anos e que preencham os demais requisitos da lei;*5) Mulher estrangeira que mediante casamento com um costa-riquenho perca sua nacionalidade e que indique seu desejo de se tornar costa-riquenha;
>
> **Proposta de alteração:** *5) Mulher estrangeira que mediante casamento com um costariquenho perca sua nacionalidade ou que após dois anos de casamento com costa-riquenhoe após o mesmo período de residência no país, indique seu desejo de assumir nossa nacionalidade;*
>
> **Proposta de alteração:** *6) Qualquer um que receba nacionalidade honorária da Assembleia Legislativa;*
>
> Artigo 15. Qualquer um que requeira naturalização deve previamente demonstrar evidências de boa conduta, deve demonstrar que possui uma ocupação conhecida e ou formas de subsistência e deve comprometer-se a residir regularmente na República.
>
> Para fins de naturalização, domicílio implica residência e estável e efetiva conexão com a comunidade nacional, de acordo com as regulações estabelecidas por direito.
>
> **Proposta de alteração:** Artigo 15. *Qualquer um que requeira naturalização deve previamente demonstrar evidências de boa conduta, deve demonstrar que possui uma ocupação conhecida e ou formas de subsistência, e deve saber falar, escrever e ler em espanhol. O requerente deve submeter-se a um exame compreensivo da história do país e seus valores bem como deve, ao mesmo tempo, comprometer-se a residir dentro do território nacional regularmente e jurar respeito à ordem constitucional da República.*
>
> *Os requerimentos e procedimentos de naturalização deverão ser estabelecidos por lei.* (Grifo nosso).

A CorteIDH foi provocada a manifestar-se quanto à compatibilidade das aludidas alterações constitucionais

37 NASPOLINI, Samyra Haydêe Dal Farra; SILVEIRA, Vladmir Oliveira da. O direito internacional dos direitos humanos e a margem nacional de apreciação: tendências da Corte Europeia. *Cadernos do Programa de Pós-Graduação em Direito – PPGDir./UFRGS,* Porto Alegre, v. 11, n. 1, ago. 2016. p. 87. Disponível em: <http://seer.ufrgs.br/index.php/ppgdir/article/view/62292>. Acesso em: 23 ago. 2017.

38 No Brasil, Ramos (2012) afirma expressamente que a CorteIDH não admite a aplicação da margem de apreciação nacional. No entanto, o tema já foi objeto de exame e de acolhimento pela Corte, tanto em Opinião Consultiva quanto em julgamentos contenciosos.

39 Decisão disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_04_esp.pdf>.

com o disposto nos artigos 17 (Proteção da família)[40], 20 (Direito da nacionalidade)[41] e 24 (Igualdade perante a lei)[42] da Convenção Americana de Direitos Humanos.

Na resposta à consulta, a Corte Interamericana considerou que foram apresentadas duas questões jurídicas distintas: a primeira matéria relacionada ao direito de nacionalidade e a segunda vinculada à proibição da discriminação, ambas sob os ditames da Convenção Americana de Direitos Humanos[43].

Em relação à primeira delas, vinculada à nacionalidade, a Corte reconheceu que cumpre a cada Estado, de forma discricionária, estabelecer os critérios para a naturalização de estrangeiros, desde que cumpridos certos parâmetros estabelecidos pelo direito internacional (parágrafo 32), considerando essa questão, por um lado, como um atributo outorgado pelo Estado e, por outro, como um direito humano com base no artigo 19 da Declaração Americana de Direitos Humanos[44] e no artigo 15 da declaração Universal dos Direitos Humanos[45] (parágrafo 33)[46].

Prosseguindo nessa seara, a CorteIDH afirmou que

> siendo el Estado el que establece la posibilidad de adquirir la nacionalidad a quien originariamente era extranjero, es natural que las condiciones y procedimientos para esa adquisición sean materia que dependa predominantemente del derecho interno

(parágrafo 36), ainda que essas disposições de direito interno possam, e devam, sofrer limitações pelo direito internacional em razão da necessidade de proteção dos Direitos Humanos (parágrafo 38).

Além disso, a Corte considerou que algumas das questões da consulta sequer deveriam ser consideradas no mérito da análise, pois dizem respeito a questões que devem ser resolvidas, com exclusividade, no âmbito interno (parágrafo 38). Sobre a aplicação da margem de apreciação nacional, assim manifestou-se a CorteIDH[47]:

> Si bien no puede desconocerse que las circunstancias de hecho pueden hacer más o menos difícil apreciar si se está o no en presencia de una situación como la descrita en el párrafo anterior [discriminação], es también cierto que, partiendo de la base de la esencial unidad de la dignidad del ser humano, es posible apreciar circunstancias en que los imperativos del bien común puedan justificar un mayor o menor grado de distinciones que no se aparten de las consideraciones precedentes. **Se trata de valores que adquieren dimensiones concretas a la luz de la realidad en que están llamados a materializarse y que dejan un cierto margen de apreciación para la expresión que deben asumir en cada caso**. (GRIFO NOSSO).

De igual sorte, no parágrafo 62, foi afastada a tese de que o estabelecimento de regras mais rígidas para a obtenção da nacionalidade costarriquense implicaria discriminação aos estrangeiros, sob o fundamento de que o Estado goza de certa discricionariedade para estabelecer quem são ou não seus nacionais.

Em recente análise da Opinião Consultiva nº. 24, de 24 de novembro de 2017 — versando sobre questões "*obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo*"[48] — a Corte Interamericana de Direitos Hu-

40 Artigo 17. Proteção da família. 1. A família é o elemento natural e fundamental da sociedade e deve ser protegida pela sociedade e pelo Estado. 2. É reconhecido o direito do homem e da mulher de contraírem casamento e de fundarem uma família, se tiverem a idade e as condições para isso exigidas pelas leis internas, na medida em que não afetem estas o princípio da não-discriminação estabelecido nesta Convenção. 3. O casamento não pode ser celebrado sem o livre e pleno consentimento dos contraentes. 4. Os Estados Partes devem tomar medidas apropriadas no sentido de assegurar a igualdade de direitos e a adequada equivalência de responsabilidades dos cônjuges quanto ao casamento, durante o casamento e em caso de dissolução do mesmo. Em caso de dissolução, serão adotadas disposições que assegurem a proteção necessária aos filhos, com base unicamente no interesse e conveniência dos mesmos. 5. A lei deve reconhecer iguais direitos tanto aos filhos nascidos fora do casamento como aos nascidos dentro do casamento.

41 Artigo 20. Direito à nacionalidade. 1. Toda pessoa tem direito a uma nacionalidade. 2. Toda pessoa tem direito à nacionalidade do Estado em cujo território houver nascido, se não tiver direito a outra. 3. A ninguém se deve privar arbitrariamente de sua nacionalidade nem do direito de mudá-la.

42 Artigo 24. Igualdade perante a lei. Todas as pessoas são iguais perante a lei. Por conseguinte, têm direito, sem discriminação, a igual proteção da lei.

43 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Opinião Consultiva OC-4/84 de 19 de janeiro de 1984*. Disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_04_esp.pdf>. Acesso em: 17 out. 2017.

44 Artigo XIX. Toda pessoa tem direito à nacionalidade que legalmente lhe corresponda, podendo mudá-la, se assim o desejar, pela de qualquer outro país que estiver disposto a concedê-la.

45 Artigo 15°: 1.Todo o indivíduo tem direito a ter uma nacionalidade. 2.Ninguém pode ser arbitrariamente privado da sua nacionalidade nem do direito de mudar de nacionalidade.

46 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Opinião Consultiva OC-4/84 de 19 de janeiro de 1984*. Disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_04_esp.pdf>. Acesso em: 17 out. 2017.

47 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Opinião Consultiva OC-4/84 de 19 de janeiro de 1984*. p. 16. Disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_04_esp.pdf>. Acesso em: 17 out. 2017.

48 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Opinião Consultiva OC-24/17 de 24 de novembro de 2014*. p. 1. Disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf>. Acesso em: 10 maio 2018.

manos novamente reconheceu a existência de uma margem nacional de apreciação com base na jurisprudência da própria Corte, que decorre do artigo 2.7 da Carta das Nações Unidas[49]; artigo 1.2 da Carta da Organização dos Estados Americanos[50] e segundo parágrafo do preâmbulo da Convenção Americana de Direitos Humanos[51].

Nesse panorama, fixando os limites de sua atuação na seara consultiva, a Corte assim se manifestou[52]:

> 6. La jurisdicción interna, doméstica o exclusiva del Estado implica, por una parte, que el Derecho Internacional, incluyendo al Derecho Internacional de los Derechos Humanos, no abarca a todas las actividades de los sujetos de derecho internacional y, particularmente, de los Estados14, y por la otra, que en cuanto a las que no regula o los aspectos que no comprende de las acciones u omisiones estatales, el respectivo Estado goza de la competencia y autonomía para hacerlo15. De allí se desprende que, en el referido ejercicio, la Corte debe considerar dicha institución jurídica como aun real en la estructura jurídica internacional, aunque no con la misma amplitud e intensidad que antaño.

Além disso, ao apresentar o conceito do controle de convencionalidade, não deixou de ressalvar a sua limitação em relação à margem de apreciação do próprio Estado, na seguinte forma[53]:

> Visto lo precedentemente transcrito, el tema atingente al control de convencionalidad ciertamente se inserta, entonces, en la relación entre el Derecho Interno o Nacional y el Derecho Internacional y ello considerando, por una parte, que este último no regula todas las materias e incluso en cuanto a algunas, cuando lo hace, no lo es en su totalidad y por la otra, consecuentemente, aún subsiste, como elemento central de la estructura jurídica internacional, aunque no en la misma intensidad y amplitud de antaño, la institución denominada dominio reservado o jurisdicción interna, doméstica o exclusiva del Estado o, como se le conoce en otras latitudes, margen de apreciación. Esta realidad implica que un asunto deja de ser de dicha jurisdicción en la medida que es regido por el Derecho Internacional y es precisamente por ello que la mencionada relación tiene distinta respuesta según si el asunto se resuelve a nivel interno o en el ámbito internacional, en particular, en lo atingente a sus efectos.

Em suma, observa-se, portanto, que houve uso da Teoria da Margem de Apreciação pela CorteIDH na Opinião Consultiva nº. 04/84, de forma a atribuir ao Estado certo espaço de discricionariedade no que se refere à restrição a direitos fundamentais, desde que não impliquem violação ao parâmetro mínimo de proteção estabelecido nas disposições convencionais. Já na Opinião Consultiva nº. 24/17, a Corte Interamericana traçou, de forma mais clara, a base nos documentos internacionais para o reconhecimento da Margem Nacional de Apreciação, inclusive, traçando seu paralelo com o controle de convencionalidade na relação entre os ordenamentos interno e internacional.

Porém, pode-se falar em aplicação da margem de apreciação no âmbito dos julgamentos contenciosos? É o que examinamos no próximo item.

3.2. A margem de apreciação nacional e os julgamentos contenciosos da CorteIDH

Sabe-se que a função jurisdicional da CorteIDH não se limita à solução de consultas que lhe são submetidas pelos Estados que se submetem à sua jurisdição: a cada ano, cresce a importância dos julgamentos exarados na solução de casos contenciosos.

No âmbito da jurisdição contenciosa, podem-se citar três julgamentos em que, exemplificativamente, houve expressa referência à margem de apreciação nacional: são eles os casos *Herrera Ulloa vs. Costa Rica*, *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador* e *Barreto Leiva vs. Venezuela*,

Inicialmente, no *Caso Herrera Ulloa vs. Costa Rica*, a

49 Artigo 2. A Organização e seus Membros, para a realização dos propósitos mencionados no Artigo 1, agirão de acordo com os seguintes Princípios: […]. Nenhum dispositivo da presente Carta autorizará as Nações Unidas a intervirem em assuntos que dependam essencialmente da jurisdição de qualquer Estado ou obrigará os Membros a submeterem tais assuntos a uma solução, nos termos da presente Carta; esse princípio, porém, não prejudicará a aplicação das medidas coercitivas constantes do Capitulo VII.

50 A Organização dos Estados Americanos não tem mais faculdades que aquelas expressamente conferidas por esta Carta, nenhuma de cujas disposições a autoriza a intervir em assuntos da jurisdição interna dos Estados membros.

51 Reconhecendo que os direitos essenciais do homem não derivam do fato de ser ele nacional de determinado Estado, mas sim do fato de ter como fundamento os atributos da pessoa humana, razão por que justificam uma proteção internacional, de natureza convencional, coadjuvante ou complementar da que oferece o direito interno dos Estados americanos

52 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Opinião Consultiva OC-24/17 de 24 de novembro de 2014*. p. 92. Disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf>. Acesso em: 10 maio 2018.

53 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Opinião Consultiva OC-24/17 de 24 de novembro de 2014*. p. 116. Disponível em: <http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf>. Acesso em: 10 maio 2018.

Corte Interamericana de Direitos Humanos[54] analisou imputação de violação dos artigos 8º (garantias judiciais) e 13 (direito à liberdade de pensamento e de expressão), ambos da Convenção Americana de Direitos Humanos, em razão de condenação em único grau de jurisdição do jornalista Mauricio Herrera Ulloa ao pagamento de indenização, bem como o lançamento de seu nome no registro judicial de delinqüentes, por suas publicações alegadamente terem ofendido a honra do diplomata Félix Prezedborski.

Nesse julgamento, a CorteIDH fez, pela primeira vez, expressa menção à margem nacional de apreciação em um caso contencioso, em que observou o cabimento daquela em matéria de recursos processuais, ainda que esta não possa ser tão ampla a ponto de suprimir o direito ao duplo grau de jurisdição, conforme exposto no parágrafo 161[55].

Cumpre destacar, no entanto, que a Corte reconheceu ter havido violação ao artigo 8.2.h da CADH[56], sob o fundamento de que as restrições impostas aos recursos colocados à disposição da vítima não permitiram aos tribunais locais o exame compreensivo e integral das questões suscitadas, caracterizando situação de violação às prerrogativas conferidas no âmbito internacional[57].

O *Caso Chaparro Álvarez e Lapo Íñiguez vs. Equador*, por sua vez, diz respeito à detenção dos Senhores Juan Carlos Chaparro Álvarez e Freddy Hernán Lapo Íñiguez, respectivamente dono e gerente da fábrica *Aislantes Plumavit Compañía Limitada*, sem que tenham sido informados sobre as razões de sua prisão, dentre outros fatores[58].

Nessa situação, ainda que sem referir expressamente à margem nacional de apreciação, a CorteIDH afirmou, no parágrafo 107 da sentença, que cumpre às autoridades judiciais nacionais verificar se há ou não necessidade de manter as medidas cautelares por elas proferidas, atendendo às especificidades de seu próprio ordenamento.

Apesar disso, foi reconhecida a irregularidade da prisão das vítimas, mostrando-se inviável a segregação cautelar sem qualquer informação a respeito das suas causas, com consequente violação às garantias de liberdade pessoal previstas na CADH.

Para completar os exemplos de aplicação da margem de apreciação pela Corte Interamericana de Direitos Humanos, em razão da precursora decisão em análise no presente estudo, importa observar o *Caso Barreto Leiva vs. Venezuela*, de 17 de novembro de 2009[59].

Em suma, o senhor Oscar Enrique Barreto Leiva, intimado a prestar depoimento como testemunha em um processo criminal instaurado contra o Presidente da República, um Senador e um Deputado, foi preso sem ter sido informado sobre as razões de sua prisão, não lhe tendo sido oportunizada a defesa por advogado em razão do caráter inquisitorial do processo, restando condenado a um ano e dois meses de prisão. Além disso, não houve possibilidade de recorrer da sentença condenatória.

A Corte expressamente apontou, no parágrafo 90 da sentença, que "embora os Estados tenham uma margem de apreciação para regular o exercício desse recurso, não podem estabelecer restrições ou requisitos que infrinjam a própria essência do direito a recorrer da decisão" [60].

54 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Herrera Ulloa Vs. Costa Rica.* Sentença de 02 de julho de 2004. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_esp.pdf>. Acesso em: 17 out. 2017.

55 Com a seguinte redação: "De acuerdo al objeto y fin de la Convención Americana, cual es la eficaz protección de los derechos humanos, se debe entender que el recurso que contempla el artículo 8.2.h. de dicho tratado debe ser un recurso ordinario eficaz mediante el cual un juez o tribunal superior procure la corrección de decisiones jurisdiccionales contrarias al derecho. Si bien los Estados tienen un margen de apreciación para regular el ejercicio de ese recurso, no pueden establecer restricciones o requisitos que infrinjan la esencia misma del derecho de recurrir del fallo. Al respecto, la Corte ha establecido que "no basta con la existencia formal de los recursos sino que éstos deben ser eficaces", es decir, deben dar resultados o respuestas al fin para el cual fueron concebidos".

56 Artigo 8. Garantias judiciais [...] 2. Toda pessoa acusada de delito tem direito a que se presuma sua inocência enquanto não se comprove legalmente sua culpa. Durante o processo, toda pessoa tem direito, em plena igualdade, às seguintes garantias mínimas: […] h. direito de recorrer da sentença para juiz ou tribunal superior.

57 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Herrera Ulloa Vs. Costa Rica.* Sentença de 02 de julho de 2004. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_esp.pdf>. Acesso em: 17 out. 2017.

58 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Chaparro Álvarez e Lapo Íñiguez vs. Equador.* Sentença 21 de novembro de 2007. Disponível em: <http://www.cnj.jus.br/files/conteudo/arquivo/2016/04/594b477644fd82c796a49c0e0d49d240.pdf>. Acesso em: 17 out. 2017.

59 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Barreto Leiva vs. Venezuela.* Sentença de 17 de novembro de 2009. Disponível em: <http://www.cnj.jus.br/files/conteudo/arquivo/2016/04/5523cf3ae7f45bc966b18b150e1378d8.pdf>. Acesso em: 17 out. 2017.

60 CORTE INTERAMERICANA DE DIREITOS HU-

Também, nesse caso, foi reconhecida a irregularidade da conduta do Estado ao não possibilitar o acesso da vítima a recurso contra a sentença penal condenatória, com consequente violação à garantia prevista no artigo 8.2.h da CADH.

Assim, verifica-se que, apesar de aceitar, em tese, a aplicação da margem de apreciação nacional, a CorteIDH tem adotado critérios rígidos quando da análise de casos contenciosos. Nas três situações examinadas, apesar de fazer referência à existência de um certo espaço de discricionariedade ao Estado, a Corte Interamericana reconheceu ter havido violação aos parâmetros mínimos de proteção concedidos pela CADH às vítimas.

4. Considerações Finais

O sistema internacional de proteção dos Direitos Humanos às vezes encontra-se diante do dilema da aplicação dos pactos internacionais em confronto com posicionamento adotado pelos Estados membros, quer pelo grau de abstração das normas constantes dos primeiros, quer pelas peculiaridades culturais dos segundos.

A partir de tal constatação e com a finalidade de averiguar a forma de aplicação da Teoria da Margem Nacional de Apreciação pela Corte Interamericana de Direitos Humanos como forma de compatibilização dos sistemas internacional e nacional, elaborou-se este artigo, partindo-se das noções históricas relativas ao surgimento da teoria no âmbito interno, com a sua posterior adoção pelas Cortes Internacionais, para, posteriormente, apresentar noções conceituais da margem de apreciação, suas justificativas e formas de aplicação.

Superada tal elaboração teórica, foi possível analisar a aplicação da Teoria da Margem Nacional de apreciação pela Corte Interamericana com base nas manifestações em opiniões consultivas, como a OC nº 04/84, de 19 de janeiro de 1984 e decisões contenciosas, como no *caso Barreto Leiva vs. Venezuela*, de 17 de novembro de 2009.

Em relação à leitura de tal manifestação foi possível aferir — ao menos no aludido caso concreto — que a Corte Interamericana de Direitos Humanos reconhece, em determinadas situações concretas, a regular margem de discricionariedade dos Estados na regulamentação interna de determinadas matérias, inclusive na hipótese de resultar em restrições a Direitos Humanos, desde que de forma proporcional e compatível com um benefício maior (proporcionalidade), sem que importe em afastamento das garantias reconhecidas nos pactos internacionais.

Todavia, impera ressalvar a necessidade do profundo estudo da teoria apresentada, com a finalidade da construção de parâmetros seguros e gerais para a utilização da margem nacional de apreciação, para evitar que a sua aplicação casuística não represente, antes de um mecanismo de integração dos DDHH e o multiculturalismo, uma fragilização dos sistemas de proteção aos Direitos Humanos.

Enfim, a relevância da conjugação da proteção aos Direitos Humanos perante a Corte IDH e da observância das peculiaridades culturais, é fundamento hábil para a utilização da teoria da margem nacional de apreciação, conforme se vislumbra no caso em tela. E esse fundamento adotado no âmbito internacional acaba permeando os ordenamentos internos quando do diálogo entre as fontes, ampliando a estrutura de proteção aos Direitos Humanos.

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Novos direitos fundamentais no âmbito da UNASUL: análise das agendas de Brasil e Venezuela à luz do direito à paz

New Fundamental Rights within the scope of UNASUR: Analysis of the Brazil and Venezuela Agendas in the light of the Right to Peace

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Novos direitos fundamentais no âmbito da UNASUL: análise das agendas de Brasil e Venezuela à luz do direito à paz*

New Fundamental Rights within the scope of UNASUR: Analysis of the Brazil and Venezuela Agendas in the light of the Right to Peace

Pedro Pulzatto Peruzzo**
Arthur Ciciliati Spada***

Resumo

O presente artigo apresenta uma análise acerca do direito fundamental à paz no âmbito da União das Nações Sul-Americanas (UNASUL). Por meio de um estudo interdisciplinar realizado entre o Direito e as Relações Internacionais, este trabalho tem como objetivo avaliar a aplicabilidade desse direito no processo de construção política e normativa da UNASUL e de seu Conselho de Defesa Sul americano (CDS) com base nas agendas do Brasil e da Venezuela. Consideramos como hipótese que a paz, ainda, é um objetivo de difícil alcance na região, mais em razão da grave situação de violência interna do que em razão de eventuais conflitos externos, visto que o continente não possui nenhum conflito bélico declarado. Essa situação exige o enraizamento de diretrizes políticas comuns que, com substrato nos novos movimentos de globalização e transnacionalidade, buscamos considerar na análise de como essas diferenças possuem relação com o papel de liderança regional e se refletem sobre o conjunto normativo da organização.

Palavras-chave: UNASUL. Brasil. Venezuela. Cooperação jurídica internacional. Direito fundamental à paz.

Abstract

The present article introduces an analysis of the fundamental right to peace within the Union of South American Nations (UNASUR) Through an interdisciplinary study conducted between Law and International Relations, the objective of this study was to evaluate the applicability of this right in the political and normative construction process of UNASUR and its South American Defense Council (CDS) from the agendas of Brazil and Venezuela. We consider as a hypothesis that peace is still an objective of difficult reach in the region, more due to the serious situation of internal violence than due to possible external conflicts since the continent has no declared warlike conflict. This situation requires the establishment of common political guidelines that, based on the new movements of globalization and transnationality, seek to consider in the analysis of how these differen-

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ces are related to the regional leadership role and reflect on the normative set of the organization.

Keywords: UNASUR. Brazil. Venezuela. International legal cooperation. Fundamental right to peace.

1. Introdução[1]

A compreensão dos direitos fundamentais nos permite averiguar diversos fenômenos sociais que nos circundam. Os ideais de justiça, solidariedade, igualdade, paz, entre outros, estão presentes em todas as relações globais — seja de indivíduo para indivíduo, seja de indivíduo para com o Estado — e, também, nas relações externas.

As Relações Internacionais e o Direito são ciências com abordagens diferentes, porém, possuem elementos comuns em suas análises e aplicações. A temática dos direitos fundamentais é propícia para a realização de uma análise interdisciplinar entre elas, visto que sua origem e desenvolvimento possuem vários elementos de contato, seja por meio da análise da globalização e da transnacionalidade, seja em sua aplicação em acordos internacionais.Nesse sentido, o presente trabalho busca analisar a aplicabilidade do direito fundamental à paz sob a ótica das agendas políticas de Brasil e Venezuela dentro da UNASUL, organização que possui maior fito de proteção aos povos na América do Sul.[2]

A UNASUL é uma organização intergovernamental formada pelos doze Estados da América do Sul. Seu tratado constitutivo foi assinado em maio de 2008 em Brasília, porém, somente em março de 2011 passou a gozar de personalidade jurídica internacional por meio de suas nove primeiras ratificações (Argentina, Bolívia, Chile, Colômbia, Equador, Guiana, Peru, Suriname, Venezuela). O Brasil, por sua vez, ratificou-o em julho de 2011 e a promulgação, que assegura a executoriedade interna do acordo, ocorreu pelo Decreto 7.667 de 11 de janeiro de 2012.

O organismo representa um novo instrumento de cooperação internacional na região, pois passou a abranger áreas mais difusas, tais como infraestrutura, cultura, meio ambiente, políticas públicas e defesa. Esse novo padrão de regionalismo vai além da estruturação econômica e financeira obtidas até então em outros processos de integração, como o Mercado Comum do Sul (MERCOSUL) e a Comunidade Andina de Nações (CAN). Um resultado importante desse processo de cooperação que pode ser citado é a divisão das demandas em Conselhos temáticos, tais como o Conselho Sul-Americano de Desenvolvimento Social, Conselho Energético Sul-Americano, o próprio Conselho de Defesa Sul-Americano, assegurando especialidade técnica nas políticas adotadas.

Com substrato no contexto pós 11 de setembro e na mudança, em geral, da ordem global, a organização buscou alcançar uma posição de autonomia em relação às demais potências, propondo medidas próprias no tocante à paz e à defesa comum. No entanto, o maior desafio reside em sua própria disposição normativa, visto que são diretrizes programáticas e estas, em muitos pontos, não condizem com a realidade política da região. Como exemplo, podemos citar o objetivo pela manutenção da paz e da democracia na região, dispostos nos artigos 3º, B e C e 4º, A do Estatuto do Conselho de Defesa Sul americano. Essas declarações são apenas enunciativas de um direito e, isoladas, não conseguem sujeitar a organização, tampouco seus Estados para o seu efetivo cumprimento.

No caso específico do objeto deste trabalho, podemos afirmar que essas normativas possuem, em seu bojo, as próprias contradições existentes entre os interesses de Brasil e Venezuela. Outro exemplo disso é o objetivo de construção de uma identidade regional em matéria de defesa, contido no artigo 4º, letra B do mesmo Estatuto, haja vista que a percepção brasileira é baseada no bom relacionamento com os Estados Unidos da América (EUA) e na busca pela solução consensual de conflitos, enquanto a Venezuela se pauta na forte oposição aos norte-americanos e na luta pela militarização da região.

Isso posto, nos parece que a paz, ainda, é um objetivo de difícil alcance na região, pois exige o enraizamento de diretrizes políticas comuns, desafio, ainda, bastan-

1 Aproveitamos a oportunidade para agradecer cada um dos avaliadores que nos auxiliaram a lapidar este trabalho com relevantes e pertinentes sugestões.

2 Com base na análise comparativa entre a UNASUL e demais movimentos de integração regional como o MERCOSUL, Associação Latino-Americana de Integração (ALADI) e CAN, é factível afirmarmos que a UNASUL possui maior fito de proteção à população latino-americana, visto que possui órgãos e comissões especializadas na área social, cultural e de políticas públicas, ao contrário dos demais movimentos que estão focados na formação de acordos na área econômica majoritariamente.

te complexo. Esse movimento diz mais respeito à grave situação de violência interna do que a eventuais conflitos externos, visto que o continente não possui nenhum conflito bélico declarado. O alto nível de violência interna e a relativa paz no ambiente externo geram um cenário paradoxal e confuso, em que as demandas do organismo se interpenetram e convivem com as disparidades de seus membros.[3]

Nesse sentido, para averiguar tal situação, o trabalho está fragmentado em três partes, em que se buscou alinhar um conhecimento paralelo entre as Relações Internacionais e o Direito.

Na primeira, será exposto o contexto internacional em que se apresenta a temática da pesquisa, principalmente em relação à mudança na ordem global, a visão política pós-guerra Fria e a inserção dos novos direitos fundamentais, como a paz. Na segunda parte, será introduzido o referencial do direito à paz e a inclusão dele na agenda da UNASUL. Por fim, na terceira parte, busca-se analisar como as diferenças entre Brasil e Venezuela representam um problema para o objetivo de garantia da paz na região.

2. Multilateralismo, globalização e novos direitos fundamentais

A compreensão da nova ordem internacional, refletida principalmente por meio da disputa de poder entre os Estados e da globalização, é primordial para observarmos o alcance dos direitos fundamentais na vida prática de cada indivíduo. Apesar de ser muito evidente, tal análise é ainda pouco visitada, tendo em vista que não há uma integração engajada entre os estudos das Relações Internacionais e do Direito. O importante é ressaltar que as relações de poder na história mundial moldaram e induziram a criação de diversos direitos, cada qual em seu respectivo momento histórico.

De forma sucinta, podemos definir a ordem mundial como uma configuração política das relações de poder no mundo. Tal ordem é fruto de uma evolução gradual da política desenhada pelas sociedades cuja complexidade vai aumentando de acordo com as realidades internas de cada Estado ou ente global envolvido.[4]

O desenho dessas relações é verificável de acordo com as políticas internas e intervenções externas de cada Estado e dos organismos internacionais. Esse dado é o elemento que proporciona o aumento da complexidade da ordem global, pois um Estado pode tanto intervir de maneira positiva sobre os demais entes no intuito de fortalecer o comércio, por exemplo, como também influenciar ou ensejar conflitos armados, apenas, para evidenciar seu poderio hegemônico, o que pode colocar toda a sociedade em alerta de segurança.

Nesse sentido, para os fins pretendidos neste trabalho, que consistem na abordagem das relações latino-americanas sob a ótica da defesa e da paz regional, o *turning point* a ser observado na ordem global é o período final da Guerra Fria e seu momento posterior, com a queda da antiga União Soviética (URSS).

O período histórico em comento não apenas caracterizou o triunfo do sistema capitalista sobre o comunismo, como também representou a superação da lógica da Paz de Westfália ao verificarmos a ampliação das relações multilaterais dos Estados e demais entes globais que foram surgindo[5], com novas configurações institucionais, inclusive da própria noção de soberania. Dentre esses entes, podemos citar as Organizações Internacionais (OI's), Organizações não governamentais (ONG's) e a própria sociedade civil, que passaram a atuar de forma relativamente independente da soberania dos Estados, contribuindo com debates em escala global, como meio ambiente, direitos humanos etc.

Com o rompimento da ordem bipolar presente na Guerra Fria, as relações nas periferias do globo passaram a ficar mais fluidas e novas potências regionais como Japão e outros países da Europa começaram a figurar na ordem internacional.[6] Esse é o marco da atual ordem multipolar, evidenciada com o surgimento de novas potências regionais e aumento de acordos multilaterais entre os países, visto que a cooperação entre eles seria uma forma mais benéfica e estabilizante dentro do novo sistema que, ademais, pretendia não mais regula-

3 MEDEIROS FILHO, Oscar. Conselho de defesa Sulamericano: origens, demandas e propósitos. In: ENCONTRO DA ABED, 3., 2009. *Defesa, segurança internacional e forças armadas*. Disponível em: <http://www.abedef.org/conteudo/view?ID_CONTEUDO=72>. Acesso em: 24 jan. 2018.

4 SANTOS, Victor Marques dos. *Ordem Mundial e relações internacionais*. Lisboa: Instituto de Defesa Nacional, 1993. p. 38.

5 LAFER, Celso. *Paradoxos e possibilidades*. Rio de Janeiro: Nova Fronteira, 1982. p. 96.

6 LAFER, Celso. *Paradoxos e possibilidades*. Rio de Janeiro: Nova Fronteira, 1982. p. 100.

mentar a guerra, mas colocá-la fora da legalidade, dando lugar a um cenário internacional propício à cooperação e à governança global.

A respeito do multilateralismo, Celso Lafer realiza a seguinte observação:

> algo novo, no entanto, está ocorrendo. Este algo novo é a erosão da lógica de Westfália, que vem exigindo sistemas coletivos de tomada de decisão entre os Estados como complemento indispensável da ação individual e bilateral dos Estados. Com efeito, o multilateralismo [...] explica-se porque a escala nacional, por maior que seja, é, por si só, inadequada para responder às necessidades econômicas e de segurança da população de qualquer Estado.[7]

Sob esse prisma, podemos inferir que o multilateralismo se tornou uma ordem natural, visto que a cooperação entre diversos Estados revelou ser uma das chaves para o desenvolvimento. No caso, também é importante salientar que a cooperação pleiteada foi a regional, pois tais entes passaram a agir com maior flexibilidade perante seus pares e a estabelecer normativas comuns para adequar suas realidades.

Nesse sentido, Buzan e Waever[8]afirmam, ainda, que, sem as constantes interferências dos EUA e da antiga URSS, em todas as regiões, as potências regionais tiveram maiores condições de manobra e influência diante de suas estruturas locais, envolvendo, especialmente, a área da segurança. Outro fator apontado pelos autores é que as dificuldades e ameaças atuais circulam mais facilmente por meio de curtas distâncias, ou seja, regionalmente.

Além dos fatores políticos já citados, podemos afirmar que a nova ordem internacional possui, também, relação íntima com a globalização e a transnacionalidade. Ambos os conceitos podem ser confundidos, porém, na verdade, são complementares, visto que caminham, juntamente, para explicar a nova realidade de poderes, relativização das soberanias e novos desafios globais.

Cabe frisar, preliminarmente, que a globalização, apesar de ser um conceito empregado a partir dos anos 80, é um fenômeno histórico que possui seus primeiros sinais atrelados ao ambiente das grandes navegações e das primeiras transações comerciais marítimas do século XV, visto que tais fluxos mercantis já demonstravam o transpasse entre as divisas internacionais.[9]

No entanto, o conceito de globalização com o qual usualmente nos deparamos advém da noção atual de expansão e interligação dos capitais, produtos, tecnologias e pessoas entre as fronteiras ao redor do mundo. Sob esse viés econômico, a globalização representou um elemento importante para o aumento da integração entre os entes internacionais, a interdependência da produção e do consumo, o surgimento de organizações econômicas internacionais, além dos intensos avanços tecnológicos e científicos.

Nesse sentido, Habermas[10]sustenta que a globalização é um fenômeno novo e que atua, principalmente, na modificação das estruturas econômicas internacionais. Para o autor, no entanto, seus principais reflexos residem no campo social e cultural dos próprios Estados nacionais.

No plano social, Habermas avalia que a concorrência gerada no mercado globalizado é prejudicial à estrutura interna de bem-estar social do Estado. Isso implica dizer que, com o pretexto de uma maior competitividade internacional, os Estados passam a autolimitar suas responsabilidades sociais, de tal sorte que suas instituições já não conseguem mais enfrentar os seus próprios problemas internos. Em suma, o custo social é irrelevante em meio ao mercado globalizado.

Em relação ao contexto cultural, é notório que a tecnologia desenvolvida com a globalização acaba por reduzir a "distância" entre os Estados e a sociedade de forma geral, resultando na constituição de nações cada vez mais heterogêneas e pluriculturais. Nesse sentido, Habermas[11] defende que a limitação do próprio Esta-

7 LAFER, Celso. *Paradoxos e possibilidades*. Rio de Janeiro: Nova Fronteira, 1982. p. 96.

8 BUZAN, Barry; WAEVER, Ole. *Regions and powers*. Cambridge: Cambridge University Press, 2003. p. 10-12.

9 A globalização apresenta contornos históricos anteriores ao conceito desenvolvido pelas Escolas de Administração nos Estados Unidos nos anos 80. Em sua obra O Mundo Globalizado: Política, Sociedade e Economia, o economista Alexandre de Freitas Barbosa considera esse fenômeno como um processo gradual da história humana, que se iniciou a partir do ambiente econômico originado pela descoberta da América e pela chegada dos portugueses ao Oriente por via marítima no século XV. Esse novo movimento estava alicerçado sobre a busca de soluções para a navegação marítima, o que acabou por resultar na circulação de informações, populações e mercadorias entre as fronteiras do mundo. Cf. BARBOSA, Alexandre de Freitas. *O mundo globalizado:* política, sociedade e economia. 2. ed. São Paulo: Contexto, 2003.

10 HABERMAS, Jürgen. *A constelação pós-nacional*: ensaios políticos. Tradução de Márcio Seligmann-Silva. São Paulo: LitteraMundi, 2001. p. 67-68.

11 HABERMAS, Jürgen. *A constelação pós-nacional*: ensaios políti-

do em face da globalização gera uma insegurança à sua própria identidade nacional, dada a dificuldade de legitimação cultural em um ambiente cada vez mais transnacional, com reflexos diretos nos processos de enraizamento das práticas democráticas participativas.

A influência direta da globalização nas áreas sociais, políticas e culturais, também, é objeto de reflexão por Boaventura de Sousa Santos. Para o autor, o conceito de globalização não deve ser entendido como um processo ou entidade única no campo econômico; ao contrário, é fruto de um movimento amplo que engloba interações culturais, sociais e até mesmo de hábitos coletivos e individuais, presentes no cotidiano das pessoas. Essas interações formam diferentes ondas de globalização e repercutem tanto sobre os aspectos locais como também globais.[12]

No entanto, partindo desse conceito de globalização, o autor complementa seu raciocínio atribuindo um dado realista a esse movimento. Para Sousa Santos, as relações sociais pressupõem o surgimento de conflitos, por isso, devemos tratá-las dentro de um cenário de vencidos e vencedores. A preocupação que resta é saber se esse cenário será somente retratado do ponto de vista dos vencedores ou se, também, será dada importância para a realidade dos demais, em grande parte negligenciados pelos movimentos globalizantes.[13]

Em meio a esse cenário, é importante, também, distinguirmos os movimentos de globalização hegemônica e contra-hegêmonica. Esses movimentos dizem respeito à posição dos países, em meio à globalização, e à respectiva polarização das temáticas em cada um deles. O primeiro interliga os interesses dos países do Norte Global, que representam os centros influentes do modelo capitalista-financeiro atual, enquanto o outro abriga projetos de cunho paralelo a tal domínio hegemônico, ou seja, com medidas de cooperação que integram mais os países do Sul, marginalizados pela globalização hegemônica.

Tais movimentos denotam a divisão da comunidade internacional de acordo com esse caráter hegemônico da globalização, que polariza não somente a economia, mas também temas de cunho social, político e cultural. Com base nesse entendimento, se verifica o fortalecimento da Cooperação Sul-Sul e um novo desenho das relações internacionais, haja vista o surgimento de novo atores como a UNASUL, os BRIC's, entre outros.[14]

Posto isso, podemos inferir que a globalização é sim fruto dos rumos tomados pelo desenvolvimento econômico da sociedade, contudo, representa um fenômeno maior, que interliga, também, diferentes realidades culturais, sociais e políticas dos Estados e demais entes internacionais. A consequência desse movimento é que os Estados, apesar de serem ainda os principais atores do sistema, já não possuem o poder único e soberano nas relações internacionais.

Acerca desse fenômeno, Lafer sustenta:

> A outra vertente que mina o conceito clássico de soberania é o transnacionalismo, isto é, aquelas relações que não transitam necessariamente pelos canais diplomáticos do Estado, mas que influem nas sociedades e revelam que nenhum Estado é uma totalidade auto-suficiente. Classes, empresas, valores e ideias, partidos, associações profissionais, grupos de pressão, são todos protagonistas no campo das relações internacionais, que agem por formas e caminhos próprios, agregando, por isso mesmo, uma significativa dimensão transnacional às relações internacionais.[15]

É imperioso definirmos, portanto, que a globalização caminha com a transnacionalização dessas realidades, tendo em vista que novos fatos apresentados à humanidade não são mais individualizados dentro de um Estado soberano. Ao contrário, mesmo que localizados internamente, eles possuem reverberação sobre o cenário internacional e vice-versa. Dentre os principais, podemos destacar o terrorismo, o narcotráfico, a crise ambiental decorrente do aquecimento global, o sistema financeiro global e o genoma humano.[16]

É nesse panorama dinâmico que emerge a discussão sobre "novos" direitos fundamentais, pois é cada vez mais relevante a noção de que o que acontece dentro de

cos. Tradução de Márcio Seligmann-Silva. São Paulo: LitteraMundi, 2001. p. 102.

12 SANTOS, Boaventura de Souza. Por uma percepção multicultural de direitos humanos. *Revista Crítica de Ciências Sociais*, Coimbra, n. 48, p. 11-32, jun. 1997.

13 SANTOS, Boaventura de Souza. Por uma percepção multicultural de direitos humanos. *Revista Crítica de Ciências Sociais*, Coimbra, n. 48, p. 11-32, jun. 1997.

14 PACHECO, Silvestre Eustáquio Rossi. *Multilateralismo e cooperação Sul-Sul*: o fórum de diálogo IBAS no marco das relações internacionais entre Brasil, Índia e África do Sul. 2010. Tese (Doutorado) – Programa de Pós-Graduação em Direito, Pontifícia Universidade Católica de Minas Gerais, Belo Horizonte, 2010. p. 27-30.

15 LAFER, Celso. *Paradoxos e possibilidades*. Rio de Janeiro: Nova Fronteira, 1982. p. 80.

16 MARMELSTEIN, George. *Curso de Direitos Fundamentais*. 2. ed. São Paulo: Atlas, 2009. p. 50-51.

uma localidade pode influenciar ou interferir na vida de outrem fora de sua jurisdição. Entrementes, a poluição de um rio ou oceano, o comércio de armas e drogas transfronteiriço ou também o uso de novas tecnologias, para o "aperfeiçoamento" genético, podem afetar toda a humanidade.

Dessa forma, os direitos fundamentais mostram uma necessidade patente de revisitação, pois a realidade, em grande medida, não condiz mais com a clássica divisão elaborada pelo jurista Karel Vasak[17]e outros doutrinadores posteriores. As novas demandas internacionais simbolizam uma realidade que descentraliza a figura estatal e novos direitos, como a paz, possuem características híbridas e não mais fulcradas em um elemento dentro da divisão tradicional em gerações ou dimensões.

O ponto central dessa nova seara é, justamente, o de propor uma análise plural a respeito de como prevenir nossa sociedade de interferências que possam abalar o direito à paz. Apesar da forte presença política dos Estados ainda hoje, como se verificará nessa pesquisa, tais direitos merecem uma análise fora da concepção estreita da soberania, abarcando o entendimento de que as demandas atuais envolvem, ao mesmo tempo, a liberdade, igualdade e outros demais direitos fundamentais cuja titularidade e gozo extrapolam as fronteiras estatais oficiais.

3. Direito à paz e sua inserção na agenda Sul-Americana

A paz é uma das questões que sempre afligiram a convivência e o bem-estar dos seres humanos. Experienciada tanto na dimensão subjetiva como na coletiva, o presente trabalho propõe uma reflexão sobre a paz na perspectiva do Direito e das Relações Internacionais, razão pela qual podemos afirmar que se trata de um fenômeno mutável de acordo com cada realidade interna dos Estados e do sistema internacional.

Nas Relações Internacionais, a paz tem relação direta com a questão da guerra. Tal dicotomia permeia o nascedouro dessa ciência e representa o substrato das duas principais correntes originárias desse campo: o Realismo e o Liberalismo.

A corrente realista é fundada na figura central do Estado. Influenciados pelos ensinamentos de Maquiavel e Hobbes, esses teóricos acreditavam que o sistema internacional possuía um estado de natureza anárquico e que cada Estado era responsável por sua própria sobrevivência nesse ambiente competitivo. Nesse sentido, o conceito de poder e conflito ganha relevância para essa teoria, tal como evidencia Raymond Aron[18]:

> o poder de um indivíduo é a capacidade de fazer, mas, antes de tudo, é a capacidade de influir sobre a conduta ou aos sentimentos dos outros indivíduos. No campo das relações internacionais, poder é a capacidade que tem uma unidade política de impor suas vontades às demais.

Por sua vez, a corrente liberal está fundada sobre os princípios do Iluminismo, tendo como seu principal alicerce as obras de Kant, Montesquieu e Adam Smith. Essa vertente possui uma visão majoritariamente positiva sobre a natureza humana e enaltece os benefícios para o Estado ao valorizar a liberdade e autonomia dos indivíduos frente a suas acepções econômicas e políticas.

Apesar de considerarem o sistema internacional como anárquico, assim como os realistas, os adeptos do liberalismo trouxeram para as Relações Internacionais uma visão cooperativista e pacificadora nas relações entre os Estados, exaltando que a guerra e o conflito seriam barreiras para o desenvolvimento do comércio e das relações diplomáticas, em geral entre os Estados. Em suma, a paz deveria ser buscada com o intuito de gerar melhores condições para os Estados sobreviverem e, consequentemente, também seus cidadãos.

A questão da paz no Direito, contudo, pode ir além da dicotomia conceitual verificada acima. Enquanto

17 O jurista segmentou a evolução dos direitos fundamentais baseando-se na bandeira da França, que simboliza a liberdade (primeira geração/dimensão), a igualdade (segunda geração/dimensão) e a fraternidade (terceira geração/dimensão). Os direitos de primeira geração/dimensão nasceram a partir do século XVIII, sob o pano de fundo do liberalismo e das revoluções Francesa e Americana. Eles representam os ideais de liberdade e possuem lastro nos direitos civis e individuais. Por sua vez, os direitos de segunda geração/dimensão possuem relação com os reflexos da Revolução Industrial do século XIX, e representam os ideais de igualdade. Eles estão alicerçados sobre os direitos sociais, econômicos e culturais. Por fim, os de terceira geração/dimensão consagram o espírito de fraternidade e solidariedade, característicos do período pós Segunda Guerra Mundial e são alinhados aos direitos ao desenvolvimento, meio ambiente e paz (valendo registrar que existem autores que inserem o direito à paz como um direito de quarta dimensão ou ainda de quinta, como demonstraremos mais adiante. Cf. também COMPARATO, F. K. *A afirmação histórica dos direitos humanos*. São Paulo: Saraiva, 2016.

18 ARON, Raymond. *Paz e guerra entre as nações*. Brasília: Universidade de Brasília, 2002. p. 99.

nas Relações Internacionais se busca entender e verificar as ações políticas dos Estados e dos organismos internacionais, o Direito, por sua vez, pode representar uma ferramenta a serviço dos entes internacionais contratantes em acordos que versam sobre a defesa e prevenção de conflitos. A segurança do indivíduo é um objetivo que transpassa a soberania interna dos Estados, sendo, na realidade, um direito intrínseco a todos, não importando, inclusive, suas respectivas nacionalidades. A singularidade desse direito também pode ser vista na análise de Paulo Bonavides ao afirmar que "o direito à paz é o direito natural dos povos".[19]

Esse caráter fundamental foi destacado, inclusive, na Declaração sobre o Direito dos Povos à Paz, aprovada pela resolução 39/11 da Assembleia Geral das Nações Unidas, ao assinalar os seguintes pressupostos:

> 1. Proclama solenemente que os povos do nosso planeta têm um direito sagrado à paz;
>
> 2. Declara solenemente que a preservação do direito dos povos à paz e a promoção da sua realização constituem obrigações fundamentais de todos os Estados;
>
> 3. Sublinha que a garantia do exercício do direito dos povos à paz exige que as políticas dos Estados sejam orientadas para a eliminação da ameaça de guerra, em particular da guerra nuclear, para a renúncia ao uso da força nas relações internacionais e para a resolução de litígios internacionais por meios pacíficos com base na Carta das Nações Unidas;
>
> 4. Apela a todos os Estados e organizações internacionais para que contribuam com todos os meios para a realização do direito dos povos à paz mediante a adopção de medidas adequadas a nível nacional e internacional.

Esse amplo conceito de paz e sua aplicação no meio jurídico estão em constante renovação, haja vista que, desde o fim do período das Grandes Guerras, Guerra Fria e no pós 11 de setembro, se observou que o conflito vai ganhando novas formas, saindo de uma figuração bélica e política clássica até alcançar um patamar de embate religioso, separatista e terrorista, como se vê na atualidade.

É evidente, portanto, que o direito à paz pode ser tratado como um "novo" direito fundamental, pois a mutação constante dos conflitos humanos somada aos reflexos do transnacionalismo e da globalização trazem consigo a necessidade de atualizar, permanentemente, o sentido desse direito. Acerca dessa renovação, Honesko[20]demonstra, ainda, a importante contribuição de Bonavides:

> [...]em recentes debates científicos (IX Congresso Íbero-Americano e VII Simpósio Nacional de Direito Constitucional, realizados em Curitiba/PR, em novembro de 2006, bem como II Congresso Latino-Americano de Estudos Constitucionais, realizado em Fortaleza/CE, em abril de 2008), BONAVIDES fez expressa menção à possibilidade concreta de se falar, atualmente, em uma quinta geração de direitos fundamentais, onde, em face dos últimos acontecimentos (como, por exemplo, o atentado terrorista de "11 de Setembro", em solo norte-americano), exsurgiria legítimo falar de um direito à paz. Embora em sua doutrina esse direito tenha sido alojado na esfera dos direitos de terceira dimensão, o ilustre jurista, frente ao insistente rumor de guerra que assola a humanidade, decidiu dar lugar de destaque à paz no âmbito da proteção dos direitos fundamentais.

Apesar desse debate sobre as dimensões dos direitos fundamentais, temos que, na verdade, o que é relevante não é a discussão em si sobre a localização do direito à paz nessa seara, mas sim a sua viabilidade enquanto um instrumento normativo a serviço do indivíduo. Esse conceito se aproxima do projeto de paz perpétua de Immanuel Kant, tendo em vista que o autor salienta, de forma pioneira, a importância de se resguardar a paz por meio de instrumentos jurídicos, vinculando inclusive os Estados a um modelo de organização internacional.

> Ora, como se chegou tão longe com o incremento em geral da comunidade (mais estreita ou mais ampla) entre os povos da Terra que a violação dos direitos em um só lugar da Terra é sentida em todos os outros: assim, a idéia de um direito cosmopolita não é nenhuma espécie de representação fantástica e excêntrica do direito, porém um necessário complemento de um código não escrito, tanto do direito público como do direito das gentes para o direito público da humanidade em geral e, por conseguinte, um complemento para a paz perpétua, de cuja contínua aproximação só é possível lisonjear-se sob esta condição.[21]

Tais ensinamentos sugerem que a paz transpassa as esferas do direito tradicionalmente classificado en-

19 BONAVIDES, Paulo. A quinta geração de direitos fundamentais. *Revista Direitos Fundamentais & Justiça*, Porto Alegre, ano 2, n. 3, p. 82-93, abr./ jun. 2008.

20 HONESKO, Raquel Schlommer. Discussão histórico-jurídica sobre as gerações de direitos fundamentais: a paz como direito fundamental de quinta geração. In: FACHIN, Zulmar (Coord.). *Direitos fundamentais e cidadania*. São Paulo: Método, 2008. p. 195-197.

21 KANT, J. Guinsburg (Org.). *A paz perpétua*: um projeto para hoje. São Paulo: Perspectiva, 2004. p. 54.

tre público ou privado e que os instrumentos jurídicos podem complementar essa necessidade humanitária bastante difusa de cooperação internacional com base em agendas globais para a paz. Atualmente, podemos observar que alguns acordos internacionais como a Política Comum de Segurança e Defesa (PCSD) na União Europeia[22]e o Conselho de Defesa Sul-americano na UNASUL possuem traços da proposta kantiana.

No caso específico da integração na UNASUL, notamos que se trata de um processo mais amplo na América Latina e que conta com agendas mais abrangentes em comparação a movimentos anteriores como o MERCOSUL e a CAN. Segundo BASSANI[23], "[...] a UNASUL não pretende somente integrar os seus membros no âmbito estritamente econômico, mas prevê, também, uma integração cultural, social, política, entre outras [...]".

Segundo SANAHUJA[24], os movimentos precedentes discutiam agendas de integração de caráter "negativo", visto que seus membros estavam focados na eliminação de barreiras ao livre comércio, em vez de conjugarem seus esforços em torno de políticas comuns e na criação de instituições cooperativas nessa e em outras áreas.

Isso posto, podemos verificar que os objetivos gerais da UNASUL, tipificados em seu Tratado Constitutivo de 2008, respaldam a amplitude de suas agendas, além de refletirem o desenho de um novo movimento de integração regional.

O movimento em perspectiva é denominado de integração pós-liberal e corresponde à nova afirmação das políticas e posturas dos Estados latino-americanos frente às relações globais, proporcionadas pelo momento pós 11 de setembro e o reordenamento estratégico-militar dos EUA perante o mundo. Segundo SANAHUJA[25], a América Latina se mostrou cada vez menos prioritária para os EUA , devido ao seu posicionamento unilateral frente a uma "Guerra contra o terror", o que acabou criando condições para o estabelecimento de uma maior autonomia em relação ao mercado globalizado, sem contar o intento sobre a temática da defesa comum e gestão de crises dentro de seu cenário interno.

Destarte, SANAHUJA conclui:

> consecuentemente, esta visión crítica de La integración regional y la globalización clama por estratégias multilaterales y regionalistas "defensivas", basadas em el retorno de un fuerte y eficiente Estado y demanda de grupos regionales fuertes para rebalancear la relación con Estados Unidos y lãs instituciones financieras internacionales. De esta forma, el regionalismo y La integración regional están siendo redefinidos como una estrategia de apoyo al ideal nacionalista de un "Estado Desarrollista".[26]

É nesse cenário que se projetou a integração na UNASUL, em que os Estados e seus respectivos líderes buscaram redesenhar o multilateralismo na região e trazer à tona algumas pautas antes vinculadas, apenas, ao interesse de algumas potências, como os EUA e a União Europeia. Essa integração passou a ter mais enfoque em uma agenda "positiva", ou seja, centrada na criação de instituições e políticas comuns dentro da região, ao contrário da discussão sobre os meios de eliminação de barreiras comerciais, tal como ocorre no MERCOSUL e CAN.[27]

A temática da defesa e o compromisso dos Estados com a garantia da paz na região são pressupostos definidos no Preâmbulo do Tratado Constitutivo da UNASUL e se relacionam com a nova afirmação de seus membros dentro do cenário global. Segue, *in verbis,* tal conteúdo:

22 No diploma legal constitutivo da União Europeia, em seus objetivos (artigo 3º) e no capítulo que trata das Disposições Relativas à Política Comum de Segurança e Defesa (artigo 42), podemos visualizar a tipificação de diretrizes em torno da segurança e a busca pela paz conjunta.

23 BASSANI, Matheus. A segurança energética como base para maior integração na América do Sul: à espera de um tratado multilateral. *Revista de Direito Internacional*, Brasília, v. 13, n. 1, p. 228-245, 2016.

24 SANAHUJA, José Antonio. *Regionalismo post-liberal y multilateralismo en Sudamérica*: el caso de UNASUR, 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

25 SANAHUJA, José Antonio. *Regionalismo post-liberal y multilateralismo en Sudamérica*: el caso de UNASUR, 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

26 SANAHUJA, José Antonio. *Regionalismo post-liberal y multilateralismo en Sudamérica*: el caso de UNASUR, 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

27 SANAHUJA, José Antonio. *Regionalismo post-liberal y multilateralismo en Sudamérica*: el caso de UNASUR, 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

SEGURAS de que a integração é um passo decisivo rumo ao fortalecimento do multilateralismo e à vigência do direito nas relações internacionais para alcançar um mundo multipolar, equilibrado e justo no qual prevaleça a igualdade soberana dos Estados e uma cultura de paz em um mundo livre de armas nucleares e de destruição em massa;

> RATIFICANDO que tanto a integração quanto a união sul-americanas fundam-se nos princípios basilares de: irrestrito respeito à soberania, integridade e inviolabilidade territorial dos Estados; autodeterminação dos povos; solidariedade; cooperação; paz; democracia, participação cidadã e pluralismo; direitos humanos universais, indivisíveis e interdependentes; redução das assimetrias e harmonia com a natureza para um desenvolvimento sustentável;

Cabe frisar que a garantia da paz tem uma relação mais estreita com a preocupação acerca da violência regional interna do que externa, considerando o histórico colonial e as ditaduras que assolaram os países do continente e que não foram superados totalmente. Segundo dados da Organização das Nações Unidas (ONU) e do Banco Mundial, a América do Sul está entre as regiões mais violentas do mundo, sendo superada apenas pelo Caribe e pelo Sudoeste africano.[28]

O CDS é um dos órgãos da UNASUL responsável pela implantação das políticas de defesa em matéria militar, ações humanitárias e operações de paz, visando atingir os seguintes objetivos: a consolidação de uma zona de paz sul-americana, a construção de uma visão comum em matéria de defesa, a articulação de posições regionais em foros multilaterais sobre defesa, além do apoio mútuo e assistência às vítimas de eventuais desastres naturais e intercâmbio de informações na área da indústria de defesa.

Por meio do CDS, os Estados da UNASUL formalizaram suas intenções perante a busca e garantia do direito à paz na região. Nessa perspectiva, alguns princípios foram elencados no artigo 3º de seu Estatuto fundacional e representam o sustentáculo da organização nesta seara. Dentre eles, podemos destacar: o respeito à soberania, integridade e inviolabilidade dos Estados-parte, autodeterminação dos povos, observância irrestrita aos Direitos Humanos e Internacional por meio da ONU e Organização dos Estados Americanos (OEA), promoção da paz e a solução pacífica de conflitos, salvaguarda do diálogo e do consenso nas matérias de defesa e proteção dos recursos naturais da região e a proteção dos sistemas democráticos em matéria de defesa frente às ameaças internas e externas.

Enfim, juridicamente, foram obtidos grandes avanços por meio da consolidação da UNASUL, sem contar os princípios e objetivos assinalados em seu Tratado Constitutivo e Estatutos de seus Conselhos. Os direitos fundamentais foram levados em consideração e acompanharam o entendimento de que os mecanismos de defesa podem ser fatores relevantes para a garantia do direito à paz, principalmente em um cenário regional marcado historicamente por crimes fronteiriços e desarmonias políticas, além da conjuntura global, semeada com novas ameaças.

Nesse ínterim, cabe-nos avaliar, criticamente, se tais objetivos e preceitos acordados na UNASUL possuem aplicabilidade, ou seja, se não apresentam, apenas, normas de conteúdo unicamente programático considerando os descompassos nas agendas dos estados membros. Nesse sentido, a discussão das Relações Internacionais se faz necessária para avaliarmos o processo de integração em si e o desejo dos Estados inerentes a essa organização latino-americana.

Ao investigarmos tais interesses, nos deparamos com determinados movimentos estratégicos que podem influenciar as relações na região e que, inclusive, podem se interligar com a Teoria Realista das Relações Internacionais. Apesar dos traços liberais e kantianos da construção jurídica e dos objetivos da UNASUL, na realidade, o que se verifica é uma disputa de poder por parte de Brasil e Venezuela. A política regional, desenvolvida por esses dois atores, está pautada na busca pela liderança política e econômica da região.

Nessa perspectiva, as duas agendas políticas se conflitam e podem prejudicar, mesmo que indiretamente, a aplicabilidade dos direitos fundamentais e demais objetivos acordados no âmbito da UNASUL, pois a organização passa a atuar conforme os anseios de seus membros em detrimento de seus pressupostos constitutivos.

28 MEDEIROS FILHO, Oscar. Conselho de defesa Sulamericano: origens, demandas e propósitos. In: ENCONTRO DA ABED, 3., 2009. *Defesa, segurança internacional e forças armadas*. Disponível em: <http://www.abedef.org/conteudo/view?ID_CONTEUDO=72>. Acesso em: 24 jan. 2018

4. As agendas de Brasil e Venezuela e os reflexos ao direito à paz

Nem sempre a cooperação entre diversos Estados e a respectiva normatização de seus objetivos significa êxito do propósito. Em um continente marcado por disputas políticas, ditaduras e crimes transnacionais, a UNASUL e seu CDS poderiam representar um mecanismo de cooperação jurídica eficaz para a consolidação de uma zona de paz, tal como preconizado em seu Estatuto, mas as pressões brasileira e venezuelana, lastreadas na inserção de suas vontades políticas perante seus pares, têm dificultado tais articulações e afetado, em grande parte, a aplicação de importantes direitos, como a paz.

Na realidade, Brasil e Venezuela trouxeram, para dentro do organismo, seus novos anseios políticos e projeções globais, na medida em que seus líderes buscaram evidenciar a potencialidade de seus países diante da política internacional. No caso brasileiro, há a adequação de sua agenda junto aos enfoques diplomáticos do MERCOSUL e a Venezuela, por sua vez, juntamente à Aliança Bolivariana para os Povos da Nossa América (ALBA) e seu projeto "bolivariano".[29]

Apesar de estarem localizados no mesmo continente, com alguns traços e propostas similares[30], ambos os mecanismos possuem ideologias distintas. O primeiro ponto de impasse pode ser visto na relação com os EUA. O Brasil, enquanto líder estratégico do MERCOSUL, privilegia um bom relacionamento com essa potência, e a ALBA, a partir do movimento chavista, buscou o distanciamento diante dos norte-americanos por entender que se tratam de uma ameaça aos seus interesses. Apesar de o Brasil, recentemente, se posicionar, de forma mais autônoma, e rechaçar a influência americana e de outras potências, tal como se evidencia na integração pós-liberal, o país não se coloca em franca oposição ao governo americano assim como a Venezuela e a ALBA.[31]

Outro grande ponto de desvio entre os dois organismos reside no plano econômico. Enquanto o Brasil e o MERCOSUL atuam em maior sintonia com a liberalização econômica e abertura inclusive a outros blocos regionais, a ALBA focaliza sua agenda em três princípios muito claros: a oposição às reformas de livre mercado, ao fortalecimento da ação reguladora do Estado frente à liberalização econômica e a harmonização do "Estado-mercado", na medida em que os governos logram maiores favores às empresas estatais e incentivam, inclusive, suas alianças. O maior exemplo se encontra no campo energético, por meio da aliança continental entre as empresas estatais Petrocaribe, Petroandina e Petrosur.[32]

Esse movimento endógeno na ALBA evidencia a busca pela afirmação hegemônica da Venezuela na América Latina, uma vez que o governo bolivariano emprega uma cruzada ideológica[33]no continente e faz frente aos interesses estratégicos do Brasil. Os interesses brasileiros, por sua vez, se baseiam no desenho de uma base para a solução pacífica de conflitos entre seus parceiros e na busca pioneira, enquanto a maior economia e mercado regional, pela solução diplomática de possíveis impasses.[34]

Os posicionamentos ideológicos e políticos verificados acima nos fazem chegar ao ponto de divergência

29 SERBIN, Andrés. *Déficit democrático y participación ciudadana en el marco del regionalismo post-liberal*. 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

30 Dentre as similaridades, Sanahuja destaca o retorno das políticas desenvolvimentistas, aumento da relevância do papel do Estado na economia globalizada, a busca por uma maior autonomia em relação às influencias globais, além das novas discussões sobre infraestrutura sociais na região. Cf. SANAHUJA, José Antonio. *Regionalismo post-liberal y multilateralismo en Sudamérica*: el caso de UNASUR, 2012.

31 SERBIN, Andrés. *Déficit democrático y participación ciudadana en el marco del regionalismo post-liberal*. 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

32 SERBIN, Andrés. *Chávez, Venezuela y la reconfiguración política de América Latina y el Caribe*. Buenos Aires: Siglo XXI Editora Iberoamericana, 2010. p. 144.

33 Para deixar mais preciso o termo "ideológica", essa "cruzada ideológica" se iniciou com o governo Chávez e está relacionada às aspirações hegemônicas da Venezuela. Essas aspirações podem ser observadas com a postura antiamericana desse governo e com ações para aumentar e diminuir os preços do petróleo no mercado. SERBIN, Andrés. *Chávez, Venezuela y la reconfiguración política de América Latina y el Caribe*. Buenos Aires: Siglo XXI Editora Iberoamericana, 2010. p. 76. Além disso, define que outro componente nessa aplicação ideológica é a própria aspiração pessoal de Chávez em se converter em um dos articuladores de um novo sistema internacional e em um dos grandes líderes do mundo no século XXI, baseando-se nos caminhos trilhados de forma similar por Simón Bolívar. SERBIN, Andrés. *Chávez, Venezuela y la reconfiguración política de América Latina y el Caribe*. Buenos Aires: Siglo XXI Editora Iberoamericana, 2010. p. 46.

34 SERBIN, Andrés. *Chávez, Venezuela y la reconfiguración política de América Latina y el Caribe*. Buenos Aires: Siglo XXI Editora Iberoamericana, 2010. p. 164-168.

das agendas brasileira e venezuelana na área da defesa. Tais diferenças se encontram tanto nos aspectos introdutórios e nas demandas do CDS como também nas normas tipificadas em seu Estatuto.

Em relação ao histórico de criação do Conselho, podemos afirmar que a disputa entre Brasília e Caracas se deu, preliminarmente, diante das propostas nacionalistas de Hugo Chávez e Lula em relação a quais seriam as melhores formas de institucionalizar a defesa na região e sobre quais objetivos estariam espreitadas suas ações.

O objetivo de Chávez era criar uma organização que possuísse um enfoque particularmente militar, ou seja, em que as ameaças que por ventura surgissem fossem repelidas utilizando-se a via militar. Seu anseio era criar uma força armada sul-americana nos moldes da Organização do Tratado do Atlântico Norte (OTAN), com um conteúdo basicamente geopolítico e militar. Por outro lado, a iniciativa do governo brasileiro foi a de criar um Conselho de Defesa, com o objetivo de prevenir o continente diante de conflitos. O interesse brasileiro é mais amplo do que a iniciativa unicamente militar pleiteada pela Venezuela, por justamente não organizar somente uma convencional aliança militar, e sim criar um organismo para debates e cooperação no intuito de prevenir conflitos e garantir relações não violentas.[35]

Com base nas intenções dos dois governos, fica evidente que as propostas brasileiras foram as que mais influenciaram a região. Nesse cenário foi criado o CDS em março de 2008, com o intuito de representar uma instância de consulta e cooperação no setor de defesa. Segundo SANAHUJA[36],

> essa iniciativa se lanzó um dia después del ataque colombiano a um campamento de lãs guerrillas colombianas em território ecuatoriano, em el que fue abatido el Comandante de las FARC Raúl Reyes. El ataque ocurrió dos días antes de la "Cumbre" del Grupo de Río que abordo la grave crisis diplomática causada por ese ataque. La propuesta brasileña responde, em primera instancia, a esa coyuntura de crisis, y eso explica que em ese momento no se precisara su alcance y contenidos.

Diante do cenário conturbado na Colômbia, as propostas brasileiras ganharam ainda mais força na criação desse Conselho, o que acabou por reforçar o papel pioneiro do país. Entretanto, as demandas que o Conselho de Defesa passou a atender possuem traços não somente da perspectiva brasileira, mas também das iniciativas venezuelanas, evidenciando a bipolaridade das agendas políticas na UNASUL.

Nesse panorama, MEDEIROS FILHO[37]esclarece que há quatro demandas relacionadas ao CDS: a manutenção da paz e da democracia entre os países, a construção de uma identidade geopolítica sul-americana, o combate ao crime organizado e a criação de um mercado de defesa na região. A defesa da região, portanto, se respalda mais no fortalecimento do mercado e na cooperação regional do que nacriação de forças militares que, diante do poderio bélico dos EUA, seriam certamente insuficientes e, em termos diplomáticos, traduziriam, apenas, uma provocação política com consequências imprevisíveis.

A demanda pela manutenção da paz e da democracia se situa como fator essencial para a estabilidade das relações na região. Esses elementos estão dispostos nos objetivos do CDS (artigo 4º, A de seu Estatuto) e também nos princípios do mesmo diploma (artigo 3º, B e C). No caso da democracia, a preocupação está ligada à fragilidade histórica do continente diante de movimentos antidemocráticos, como as ditaduras civis-militares, enquanto a demanda pela paz representa a tentativa em se estabelecer uma "Zona de Paz" apta a garantir a isenção de ameaças entre os países em razão dos problemas internos de repercussão transfronteiriça, como a pobreza, as catástrofes naturais, o tráfico de armas, drogas e pessoas.[38]

Ao avaliarmos cada uma dessas demandas, podemos observar a maior relevância da agenda brasileira no âmbito do CDS e da UNASUL, pois, em cada uma delas, ficam evidentes traços da política externa iniciada pelo governo Lula. A busca pelo consenso, democracia, desenvolvimento de um mercado de defesa e da não ingerência de temas que possam afetar a liderança

35 SERBIN, Andrés. *Chávez, Venezuela y la reconfiguración política de América Latina y el Caribe*. Buenos Aires: Siglo XXI Editora Iberoamericana, 2010. p. 166-167.

36 SANAHUJA, José Antonio. *Regionalismo post-liberal y multilateralismo en Sudamérica*: el caso de UNASUR, 2012. Disponível em: <http://www.ieei-unesp.com.br/portal/wp-content/uploads/2012/10/2012-Anuario-CRIES-1.pdf>. Acesso em: 24 jan. 2018.

37 MEDEIROS FILHO, Oscar. Conselho de defesa Sulamericano: origens, demandas e propósitos. In: ENCONTRO DA ABED, 3., 2009. *Defesa, segurança internacional e forças armadas*. Disponível em: <http://www.abedef.org/conteudo/view?ID_CONTEUDO=72>. Acesso em: 24 jan. 2018.

38 MEDEIROS FILHO, Oscar. Conselho de defesa Sulamericano: origens, demandas e propósitos. In: ENCONTRO DA ABED, 3., 2009. *Defesa, segurança internacional e forças armadas*. Disponível em: <http://www.abedef.org/conteudo/view?ID_CONTEUDO=72>. Acesso em: 24 jan. 2018.

do país na região corroboram essa visão e fortalecem a posição do país. No entanto, apesar de minoritária, a agenda bolivariana, também, possui contribuição na demanda relacionada a construção de uma identidade sul-americana, abarcada sob o evidente nacionalismo e radical antiamericanismo de Hugo Chavéz e de seu atual governo.

A polarização política dessas demandas gera *déficit* na execução dos objetivos desenhados pela organização e, por conseguinte, fragilizam a aplicabilidade dos direitos fundamentais. O direito à paz, mesmo tendo sido assinalado como um dos objetivos da UNASUL, ainda fica à mercê da vontade política de seus entes contratantes. Ao contrário do que ocorre na União Europeia, a UNASUL não possui o status de entidade com poderes supranacionais, capaz de vincular seus membros e flexibilizar suas soberanias, o que acaba por tornar as discussões no âmbito da organização um tanto egoístas, na medida em que buscam mais interesses de Estados isolados do que uma efetiva cooperação internacional para o fortalecimento regional.

A falta de vontade dos Estados-membros em estabelecer uma entidade com tais poderes é evidente e expressa em seu principal diploma (artigo 2º do Tratado Constitutivo da UNASUL), ao assinalar o objetivo comum de construir uma organização baseada, apenas, "no consenso e na participação de cada membro", sem atribuir diretrizes que possam afetar a soberania de cada Estado. Nesse sentido, o próprio princípio de "Respeito irrestrito à soberania e de não intervenção em assuntos internos" (artigo 3º, letra A do Estatuto do CDS) reforça esse posicionamento contraditório e gera, cada vez mais, condições para o estabelecimento de agendas políticas lastreadas mais na vontade de um Estado do que no interesse regional.

Outro exemplo controverso do texto normativo do CDS está no princípio de afirmação da plena vigência democrática e do respeito irrestrito aos direitos humanos, artigo 3º, B do mesmo Estatuto, tendo em vista que a Venezuela possui histórico de violações aos direitos humanos e de desrespeito à ordem democrática. Tais rupturas, inclusive, já vêm ensejando pedidos de suspensão do país perante outro importante organismo, no caso a OEA.[39] Em suma, o princípio acima exposto não reflete a realidade regional e nem ao menos possui, no âmbito da UNASUL, outras normas subjacentes que possibilitem operacionaliza-lo.

A disputa política e o interesse de projeção internacional evidenciadas por Brasil e Venezuela dificultam a aplicabilidade de normas e ações que poderiam ser benéficas para a garantia do direito à paz. Os objetivos e princípios acordados na UNASUL e em seu principal Conselho são em grande medida simbólicos e se enquadram, no mundo jurídico, como normas programáticas enunciativas ou declaratórias de direitos. Tais normas "enunciam direitos, geralmente econômicos ou sociais, sem estabelecer a forma em que deverão ser implementados".[40]

Portanto, apesar de o Tratado da UNASUL já ter sido ratificado pelos Estados-membros e refletir o momento de transnacionalização dos problemas globais, as diretrizes pactuadas representam, apenas, enunciados, inexistindo outras normas e vontade política supervenientes que condicionem e orientem os comportamentos dos contratantes no sentido de uma relação efetivamente cooperativa.

5. Considerações finais

A análise e aplicação dos direitos fundamentais, apesar de representar um denso exercício filosófico, não tangenciam, apenas, o campo das ideias. Ao contrário do que sugere parte da doutrina jurídica, sua relevância não está unicamente na inclusão de diversos direitos dentro de dimensões ou gerações. Os direitos à liberdade, igualdade, cultura, ao meio ambiente, à paz, dentre outros, têm exigido efetivação, ou seja, um compromisso mais prático do que teórico.

O desenvolvimento integrado entre as Relações Internacionais e o Direito foi vislumbrado neste estudo com o intuito de ampliar o espectro de aplicabilidade dos direitos fundamentais, trazendo para o debate um tema bastante complexo, ou seja, o direito à paz. Esse elemento não significa, somente, o contrário de guerra,

39 GODOY, Juan M. Rivero. *La situación de Venezuela ante las normas y valores democráticos en la OEA, UNASUR y MERCOSUR*: análisis jurídico sobre los hechos y las consecuencias esperables ¿golpe de Estado?, 2017. Disponível em:<https://co.ijeditores.com/pop.php?option=articulo&Hash=a14da805790796f635f43ba2a2f4a24c>. Acesso em: 24 jan. 2018.

40 PIMENTA, Paulo Roberto Lyrio. Eficácia e aplicabilidade das normas constitucionais programáticas. *Revista de Informação Legislativa*, Brasília, ano 49, n. 193, p. 7-20, jan./mar. 2012.

como vislumbra a maioria dos internacionalistas; é também um estado de espírito e um direito. É, sem dúvida, um "novo" direito fundamental com características próprias.

As Relações Internacionais e suas vertentes de análise política e geoestratégicas complementam o estudo do Direito, ao trazer dados e fundamentos realistas para o arcabouço jurídico, como os motivos para influenciar determinadas cláusulas de um tratado ou de comportamentos diversos em negociações internacionais. O Direito, por sua vez, complementa as Relações Internacionais por ser um dos instrumentos mais importantes de entendimento e cooperação entre entes globais.

O presente trabalho sobre o Conselho de Defesa Sul Americano buscou refletir essa análise integrada no intuito de proporcionar questionamentos e críticas sobre a eficácia de um tratado internacional que versa sobre a defesa da paz e desenvolvimento sustentável dos povos da região sul-americana. A globalização e a transnacionalidade levaram os Estados a discutir e normatizar soluções para problemas externos e, também, fronteiriços, no entanto, no caso apreciado, se evidencia que existe um complexo conjunto de normas ligado a interesses políticos próprios de um ou outro Estado.

As divergências apresentadas entre as agendas de Brasil e Venezuela tornam o direito à paz um objetivo ainda distante, abstrato, sem aplicabilidade efetiva na UNASUL. A própria estrutura da organização é uma simbologia, um arranjo político orquestrado principalmente pelo Brasil, enquanto maior potência regional, mas que também sofre pressões e influências de governos que buscam implementar a qualquer custo e de forma radical os ideais do projeto bolivariano desde o movimento chavista. Apesar desse diagnóstico, acreditamos na possibilidade de avanços na cooperação sul-americana, superados esses obstáculos apontados.

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Resumo

O presente artigo tem por objetivo analisar a atuação do Grupo Mercado Comum frente à criminalidade organizada transnacional, considerando que esta constitui uma das maiores ameaças à economia, à política, à segurança e, em última análise, às sociedades modernas globalizadas em geral. Nessa perspectiva, buscou-se responder à seguinte indagação: de que maneira a atuação do Mercosul, por meio do Grupo Mercado Comum, contribui para o enfrentamento do crime organizado transnacional? Utilizando os métodos dedutivo e histórico, e as técnicas de pesquisa bibliográfica e documental, com a análise de livros, artigos científicos e dissertações sobre o assunto, bem como das Resoluções do Grupo Mercado Comum, dos Protocolos, Convenções e Acordos vigentes no âmbito do Mercosul, e da legislação brasileira, examinou-se, em um primeiro momento, o crime organizado transnacional e a sua estreita relação com a globalização, tendo em vista que esse fenômeno, ao contribuir para o desenvolvimento de atividades econômicas lícitas, também propiciou o avanço das organizações criminosas e sua atuação em escala global. Em seguida, abordou-se o Grupo Mercado Comum, órgão executivo do Mercosul, e suas Resoluções, estabelecendo relação de conexão entre elas e algumas medidas adotadas no Brasil para combater às organizações criminosas transnacionais, verificando que tais Resoluções orientam os Estados Partes do Mercosul para a cooperação jurídica internacional. Por fim, examinou-se a cooperação jurídica internacional em matéria penal, a qual é regulada pelo Protocolo de Assistência Jurídica Mútua em Assuntos Penais, denominado de Pacto de San Luís. Concluiu-se que esse instituto consiste em importante instrumento de enfrentamento do crime organizado transnacional, visto que facilita a investigação e o julgamento de delitos que ultrapassam a competência territorial dos países, e, portanto, deve ser promovido e incentivado no âmbito do Mercosul.

Palavras-chaves: Globalização. Crime organizado transnacional. Mercosul. Grupo Mercado Comum. Cooperação jurídica internacional.

Abstract

This article aims to analyze the performance of the Common Market Group in relation to transnational organized crime, considering that this is one of the greatest threats to the economy, politics, security and, ultimately, globalized modern societies in general. From this perspective, it was tried to answer the following question: in what way does Mercosur's action, through the Common Market Group, contribute to the confrontation of transnational organized crime? Using the deductive and historical methods, as well as the bibliographic and documentary techniques of research, with the analysis of books, scientific articles and dissertations on the subject, as well as the Resolutions of the Common Market Group, the Protocols, Conventions and Agreements in force within Mercosur, and Brazilian legislation, it was examined, in a first moment, the transnational organized crime and its close relationship with globalization, since this phenomenon, by contributing to the development of licit economic activities, also facilitated the advancement of criminal organizations and their action on a global scale. In sequence, the Common Market Group, the executive body of Mercosur, and its Resolutions were discussed, establishing a connection between them and some measures adopted in Brazil to combat transnational criminal organizations, verifying that such Resolutions guide Mercosur States Parties to international legal cooperation. Finally, it was examined the international legal cooperation in criminal matters, which is regulated by the Protocol on Mutual Legal Assistance in Criminal Matters, known as the Pact of San Luis, concluding that this institute consists in an important instrument to deal with transnational organized crime, since it facilitates the investigation and prosecution of crimes that go beyond the territorial jurisdiction of the countries and, therefore, should be promoted and encouraged within Mercosur.

Keywords: Globalization. Transnational organized crime. Mercosur. Common Market Group. International legal cooperation.

1. Introdução

A universalização da economia, política e cultura, assim como a integração dos países do globo, por meio de eficientes sistemas de telecomunicação e transportes, verificadas especialmente após o fim da Segunda Guerra Mundial, são atribuídas ao fenômeno da globalização.

Esse fenômeno consiste em um conjunto complexo de processos, responsável pelo enfraquecimento das fronteiras nacionais, abertura dos mercados, avanços tecnológicos e, consequentemente, pelo desenvolvimento de uma criminalidade organizada transnacional, uma vez que os grupos criminosos organizados se valem dos instrumentos concebidos para a economia formal e para o mercado capitalista legítimo.

Verifica-se, portanto, que, com a intensificação das relações sociais em escala mundial, suscitada pela globalização, os delitos antes praticados somente no plano nacional passaram a ser, também, cometidos no âmbito internacional. Outrossim, a atividade criminal se tornou cada vez mais organizada, isto é, desenvolvida de forma estruturada, com o objetivo de melhorar sua execução por meio da união de esforços dos integrantes da organização, buscando alcançar objetivos comuns a eles.

Nessa perspectiva, a atuação das organizações criminosas transnacionais emerge como uma das maiores ameaças à economia, à política, à segurança e, em última análise, às sociedades modernas globalizadas em geral, de forma que seu estudo, bem como os instrumentos jurídicos para enfrentá-las, merece especial atenção.

De outro lado, o fenômeno da globalização propicia a formação de acordos de integração regional e, assim, de blocos econômicos, na medida em que os Estados se associam com diferentes finalidades, para melhor competir com os demais países ou blocos econômicos.

Nesse cenário, destaca-se o Mercosul: bloco econômico constituído em 1991, com a assinatura do Tratado de Assunção pelos governos da Argentina, Brasil, Paraguai e Uruguai. A Bolívia se encontra em processo de adesão desde 2012, e a Venezuela se tornou membro efetivo do bloco nesse mesmo ano, contudo, foi suspensa em 2017.

Quanto à estrutura institucional do Mercosul, conforme dispõe os artigos 1º e 2º, do Protocolo de Ouro Preto, este bloco é composto por seis órgãos, três deles possuem capacidade decisória de natureza intergovernamental, quais sejam: Conselho do Mercado Comum (CMC); Grupo Mercado Comum (GMC); e Comissão de Comércio do Mercosul (CCM).

Para o presente artigo, interessa analisar, de maneira mais profunda, o Grupo Mercado Comum e as Resoluções por ele emitidas, dentre as quais, algumas se relacionam à segurança pública e ao combate ao crime organizado transnacional.

Considerando-se que referidas Resoluções são obrigatórias aos países membros do Mercosul (muito embora devam ser internalizadas pelos Estados – a depender dos requisitos internos de seus Direitos internos) e seus conteúdos refletem os ordenamentos jurídicos e as medidas adotadas por estes, o artigo que ora se introduz possui como tema a atuação do Grupo Mercado Comum frente à criminalidade organizada transnacional, buscando resposta para a seguinte indagação: de que maneira a atuação do Mercosul, por meio do Grupo Mercado Comum, contribui para o enfrentamento do crime organizado transnacional?

O trabalho foi organizado em três seções, iniciando-se com o estudo da criminalidade organizada transnacional e a sua estreita relação com a globalização. No tópico seguinte, aborda-se o Grupo Mercado Comum, órgão executivo do Mercosul, e suas Resoluções, estabelecendo relação de conexão entre elas e algumas medidas adotadas no Brasil para combater às organizações criminosas. Por fim, analisa-se a cooperação jurídica internacional em matéria penal como importante instrumento de enfrentamento do crime organizado transnacional.

A análise realizada no presente artigo ganha destaque e importância, notadamente ante a ausência de pesquisas específicas referentes aos acordos de cooperação jurídica e o combate ao crime organizado dentro do Mercosul. Com o advento do Novo Código de Processo Civil e os reflexos da globalização, os ordenamentos jurídicos nacionais não podem mais dar as respostas para questões conectadas entre duas ou mais jurisdições.

Para tanto, foi utilizado o método de abordagem científica dedutivo, o método procedimental histórico e as técnicas de pesquisa bibliográfica, com a análise de livros, artigos científicos e dissertações sobre o assunto, bem como documental, a fim de examinar as Resoluções do Grupo Mercado Comum, os Protocolos, Convenções e Acordos vigentes no âmbito do Mercosul, e a legislação brasileira.

Feitas tais considerações, passa-se a discorrer sobre o tema proposto.

2. Crime organizado transnacional: relevante ameaça às sociedades modernas globalizadas

Entende-se por globalização as mudanças verificadas na última década do século XX, que deram origem a um mundo calcado em novas tecnologias e estruturas sociais, como também em uma nova economia e uma nova cultura[1]. Ou seja, trata-se de um conjunto complexo de processos[2] que promoveu, e ainda fomenta, a intensificação das relações sociais em escala mundial[3], sendo especialmente influenciada por desenvolvimentos nos sistemas de comunicação que datam do final da década de 1960[4].

Assim, ainda que se possa considerar, por exemplo, o comércio desenvolvido pela Companhia das Índias Ocidental e Oriental como um princípio de globalização[5], após o fim da Segunda Guerra Mundial, esse fenômeno tornou-se responsável pela universalização da economia, política e cultura e, dessa forma, pela integração dos países do globo, mediante eficientes tecnologias de comunicação, transmissão de dados e transportes, o que contribui para o desenvolvimento de atividades econômicas lícitas e ilícitas, uma vez que os mecanismos concebidos para a economia formal e para o mercado capitalista legítimo são utilizados pelos grupos criminosos ao redor do mundo.

Logo, verifica-se a existência de uma criminalidade econômica transnacional, pois delitos antes praticados somente no plano nacional passaram a ser cometidos internacionalmente. Outrossim, a atividade criminal se tornou cada vez mais organizada, isto é, desenvolvida de forma estruturada, com o intuito de melhorar sua execução por meio da união de esforços dos integrantes da organização, buscando alcançar objetivos comuns a eles.

Afirma-se, então, que: "Criminalidad organizada, criminalidad internacional y criminalidad de los pode-

1 CAPRA, Fritjof. *As conexões ocultas:* ciência para uma vida sustentável. São Paulo: Cultrix, 2015.

2 GIDDENS, Anthony. *Mundo em descontrole.* Rio de Janeiro: Record, 2000. p. 23.

3 GIDDENS, Anthony. *As consequências da modernidade.* São Paulo: UNESP, 1991. p. 69.

4 GIDDENS, Anthony. *Mundo em descontrole.* Rio de Janeiro: Record, 2000. p. 21.

5 POZZOLI, Lafayette. *Direito comunitário europeu:* uma perspectiva para a América Latina. São Paulo: Método, 2003. p. 55.

rosos son, probablemente, las expresiones que mejor definen los rasgos generales de la delincuencia de la globalización"[6].

Organização criminosa consiste na:

> Associação de agentes, com caráter estável e duradouro, para o fim de praticar infrações penais, devidamente estruturada em organismo preestabelecido, com divisão de tarefas, embora visando ao objetivo comum de alcançar qualquer vantagem ilícita, a ser partilhada entre os seus integrantes.[7]

Nessa perspectiva, em síntese, são características das organizações criminosas: a realização de suas atividades de maneira a impossibilitar ou, pelo menos, obstar a persecução penal, de forma que as estruturas das organizações criminosas variarão de acordo com as peculiaridades dos crimes praticados e do modelo repressivo dos países em que atuam, motivo pelo qual serão diferentes entre si; a existência de objetivos econômicos, e a estruturação em moldes empresariais, na qual cada integrante possui funções determinadas e deve ter relevância para a execução dos delitos. Esse caráter empresarial será moldado de acordo com as peculiaridades de cada organização, tamanho, atividade desenvolvida, etc.[8]

Outrossim, as organizações criminosas se identificam pela infiltração nas estruturas dos Estados, principalmente pela corrupção de agentes públicos; pela transnacionalidade; como também pela estruturação hierarquizada ou em rede, na qual diversos grupos criminosos menores atuam de forma integrada, em vez de existir um grande grupo criminoso, identificando-se pela descentralização e fungibilidade de seus membros.[9]

Ressalta-se que as condutas criminosas e de caráter transnacional, possuem uma dimensão quase que institucionalizada dentro do crime organizado. Revestem-se de uma dimensão institucional, vez que possuem regras próprias de funcionamento dentro da instituição criminosa antissocial, a qual as torna não a mais do que a soma de suas partes, mas, sim, algo independente a ela.

É nessa dimensão institucional que reside a diferença dos grupos criminosos organizados em relação aos meros agrupamentos para cometer crimes.[10]

Segundo Guaracy Mingardi[11], é possível identificar, pelo menos, três tipos distintos de organização criminosa, quais sejam: a) organização criminosa tradicional, aquela de estilo mafioso em que a relação entre os membros se assemelha ao sistema feudal, ou seja, existe a figura do padrinho ou mestre, que consiste em patrono e chefe do novo integrante, o qual passa por um período de teste e, se aceito, submete-se a um ritual em que jura fidelidade perpétua; b) organização criminosa empresarial, que tem como principal característica a transposição de métodos empresariais para o crime e, simultaneamente, o esquecimento de conceitos como honra, lealdade, obrigação, dentre outros; c) organização criminosa endógena, isto é, grupo criminoso que surge dentro de uma organização legal, em grande parte das vezes, no aparelho do Estado.

No tocante aos dois primeiros modelos, acrescenta-se que a criminalidade organizada de tipo mafiosa tem sua atividade delituosa fundada no uso da violência e intimidação, com estrutura hierarquizada, distribuição de tarefas, planejamento de lucros e observância da Lei do Silêncio, sendo suas vítimas difusas e o controle social obstado pela corrupção governamental. Em contrapartida, a criminalidade organizada empresarial corresponde a uma empresa voltada para a atividade delitiva, que somente visa ao lucro econômico de seus sócios, os quais são empresários, comerciantes, políticos, *hackers* etc., não se valendo de intimidação ou violência.[12]

6 SILVA SÁNCHEZ, Jesús-María. *La expansión del derecho penal:* aspectos de la política criminal de las sociedades postindustriales. Madrid: Civitas, 2001. p. 86-87. Disponível em: <http://www.derechopenalenlared.com/libros/silva_sanchez_la_expansion_del_derecho_penal.pdf>. Acesso em: 25 jun. 2018.

7 NUCCI, Guilherme de Souza. *Organização criminosa.* 2. ed. Rio de Janeiro: Forense, 2015.

8 ANTONIETTO, Caio Marcelo Cordeiro. *A disciplina penal das organizações criminais transnacionais:* uma análise econômica do tráfico internacional de drogas e lavagem de capitais. 2015. 124 f. Dissertação (Mestrado) – Pontifícia Universidade Católica do Paraná, Curitiba, 2015. p. 16-20.

9 ANTONIETTO, Caio Marcelo Cordeiro. *A disciplina penal das organizações criminais transnacionais:* uma análise econômica do tráfico internacional de drogas e lavagem de capitais. 2015. 124 f. Dissertação (Mestrado) – Pontifícia Universidade Católica do Paraná, Curitiba, 2015. p. 16-20.

10 CORDIN, Nicolás Santiago; HOET, Mariano Javier. Criminalidad transnacional organizada em el ámbito del MERCOSUR: ¿Hacia un Derecho Penal Regional? *Revista de Direito Internacional,* Brasília, v. 12, n. 2, p. 527-539, 2015. p. 532. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3716/pdf>. Acesso em: 25 jun. 2018.

11 MINGARDI, Guaracy. Crime organizado. In: LIMA, Renato Sérgio de; RATTON, José Luiz; AZEVEDO, Rodrigo Ghirghelli (Org.). *Crime, polícia e justiça no Brasil.* São Paulo: Contexto, 2014. p. 320-321.

12 PENTEADO FILHO, Nestor Sampaio. *Manual esquemático de criminologia.* 6. ed. São Paulo: Saraiva, 2016. p. 94-95.

Mingardi[13] ainda destaca que existem outras situações que deram origem a famosas organizações criminosas, como o surgimento de grupos criminosos organizados no interior dos presídios a partir de uma liga de presos, o que corresponde ao atual modelo brasileiro e tem como exemplo o Comando Vermelho (CV), no Rio de Janeiro, e o Primeiro Comando da Capital (PCC), em São Paulo.

À vista disso, em que pese existam algumas distinções quanto à formação e estrutura dos grupos criminosos organizados, nota-se que, de maneira geral, a estratégia utilizada para a internacionalização das atividades criminosas consiste em instalar as funções de gestão e produção em zonas de baixo risco, nas quais se detém relativo controle do meio institucional, e voltar a atenção, como mercados preferenciais, para as regiões com uma procura de elevado nível socioeconômico, que pode pagar mais caro.[14]

É o que ocorre, por exemplo, com os cartéis do narcotráfico na Colômbia, que, incialmente, concentravam suas exportações para os EUA, mais tarde, para a Europa e, finalmente, para todo o mundo, ou mesmo o que se verificou na Rússia e ex-repúblicas soviéticas no período posterior à Guerra Fria, quando os grupos criminosos russos, ex-soviéticos, bem como os provenientes de todas as partes do globo se apoderaram de significativa quantidade de armamentos militares e nucleares para vendê-los a quem pagasse mais caro.[15]

Essa internacionalização das atividades criminosas faz com que as organizações criminosas de diferentes países estabeleçam alianças estratégicas de cooperação com as transações umas das outras, em vez de disputar entre si, mediante acordos de subcontratação e *joint ventures*, cuja prática acompanha a lógica organizacional das empresas, que se reestruturaram e assumiram a forma de redes[16]. Ademais, os próprios rendimentos dessas atividades são globalizados, por meio da lavagem de dinheiro nos mercados financeiros internacionais.[17]

Acerca dos ganhos obtidos pelos grupos criminosos, cumpre destacar que, muito embora as estimativas dos lucros e movimentações financeiras provenientes da economia do crime possuam certa variação e não sejam inteiramente confiáveis, elas demonstram a dimensão do fenômeno da criminalidade organizada transnacional. Nesse sentido, o Escritório das Nações Unidas sobre Drogas e Crimes *(United Nation Office on Drugs and Crime - UNODC*) estima que o comércio ilegal do crime organizado obtém ganhos superiores a US$ 2 trilhões por ano. Já o Fórum Econômico Mundial, pautando-se em uma pesquisa de 2011 feita pelo *Global Financial Integrity (GFI)*, calculou que tais ganhos superam US$ 1 trilhão, sendo o narcotráfico, a falsificação, o tráfico humano, o tráfico ilegal de petróleo e o tráfico de vida selvagem, as cinco atividades ilegais mais rentáveis às organizações criminosas.[18]

Ainda, destaca-se que a formação de redes em escala global entre organizações criminosas não faz desaparecer aquelas enraizadas nacional, regional e etnicamente, isto é, diretamente relacionadas à cultura de países e regiões específicas, à sua ideologia, código de honra e mecanismos de filiação e comprometimento, como os traficantes de drogas colombianos. Ao contrário, tal formação de redes globais permite que as organizações criminosas tradicionais sobrevivam e prosperem, na medida em que escapam do controle de um determinado Estado.[19]

A necessidade de fugir da repressão das forças policiais estatais faz com que alianças estratégicas entre grupos criminosos constituam fator essencial à empreitada delitiva em escala global. Por si só, nenhuma organização criminosa consegue se constituir por completo em todo o planeta, tampouco é capaz de expandir sua área de atuação internacional sem invadir o território tradicionalmente controlado por outra organização. Logo, sob a lógica exclusivamente empresarial, os grupos criminosos firmam alianças de respeito mútuo e encontram pontos de concordância que ultrapassam fronteiras nacionais.[20]

13 MINGARDI, Guaracy. Crime organizado. In: LIMA, Renato Sérgio de; RATTON, José Luiz; AZEVEDO, Rodrigo Ghirghelli (Org.). *Crime, polícia e justiça no Brasil.* São Paulo: Contexto, 2014. p. 322-323.

14 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 210.

15 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 210-211.

16 CASTELLS, Manuel. *A sociedade em rede.* São Paulo: Paz e Terra, 1999. p. 217-219. Disponível em: <https://globalizacaoeintegracaoregionalufabc.files.wordpress.com/2014/10/castells-m-a-sociedade-em-rede.pdf>. Acesso em: 20 ago. 2017.

17 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 211.

18 JUSTO, Marcelo. *As cinco atividades do crime organizado que rendem mais dinheiro no mundo.* Disponível em: <http://www.bbc.com/portuguese/noticias/2016/04/160331_atividades_crime_organizado_fn#orb-banner>. Acesso em: 1 out. 2016.

19 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 212.

20 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 226.

De outro lado, as rígidas instituições dos Estados permanecem circunscritas às suas fronteiras, perdendo, assim, sua legitimidade, isto é, a capacidade de impor a lei e a ordem.[21] Logo, o enfrentamento da criminalidade organizada transnacional compreende a reafirmação do Estado Democrático de Direito, bem como de medidas e métodos que devem ser ordenados para tanto.[22]

Manuel Castells[23] salienta que "a chave para o sucesso e o alargamento do crime global na década de 90 encontra-se na flexibilidade e versatilidade da sua organização". Ou seja, a força organizativa do crime transnacional reside na combinação entre a estruturação flexível em rede de grupos locais, calcados na tradição e na identidade e operando em um ambiente institucional favorável, e o poder de ação global oriundo de alianças estratégicas[24].

Conforme anteriormente afirmado, o tráfico de drogas é a principal atividade das organizações criminosas. Aliado a ele, bem como aos demais crimes, verifica-se a prática da lavagem de dinheiro, que garante a lucratividade econômica dos delitos, por meio da reinserção de tais lucros na economia formal, os quais sustentam e movimentam as empreitadas delitivas, financiam suas relações transnacionais e de corrupção, e, portanto, são elementares à atuação e manutenção dos grupos criminosos.

Nota-se, também, que a atuação das organizações criminosas está diretamente vinculada a atos de extrema violência, como ameaças, homicídios, sequestros e torturas, que asseguram a realização dessas operações consistem em instrumentos de intimidação e proteção. Ademais, relaciona-se a atos de corrupção, como suborno e/ou intimidação da polícia, juízes, autoridades e candidatos a cargos públicos, que possibilitam a infiltração na estrutura estatal.

Outrossim, além de expressarem sua própria identidade cultural, as redes criminosas transnacionais induzem uma nova cultura, a cultura do crime[25], que, ante a pobreza mundial e o desejo de rápida ascensão social, atrai muitos adeptos com o fluxo de grandes quantias de dinheiro e bens.

Isto posto, resta claro que as organizações criminosas desestabilizam as finanças e mercados de capital internacionais, como também as economias nacionais, e interferem nas instituições e políticas democráticas dos Estados e em suas culturas.

Diante disso, entende-se que:

> [...] la respuesta no puede ser local, la política criminal que se desarrolle al efecto debe abarcar la misma dimensión del fenómeno que se trata de prevenir; si el fenómeno criminológico es regional, la respuesta debe tener dicho alcance. De lo contrario, quedaría reducida a un conjunto de declaraciones de buenas intenciones.[26]

Portanto, faz-se necessária, nos âmbitos nacional e internacional, a maior cooperação entre os órgãos de segurança pública, investimentos em recursos tecnológicos e no campo de inteligência, adequada capacitação do contingente policial e a implementação de políticas públicas de prevenção ao crime organizado.

Nesse contexto, analisar-se-á, no tópico a seguir, a previsão de medidas de enfrentamento ao crime organizado transnacional no âmbito do Mercosul e sua correspondente adoção no Brasil.

3. O Grupo Mercado Comum e o combate às organizações criminosas transnacionais

O fenômeno da globalização, além de estar diretamente atrelado ao avanço da criminalidade organizada, consoante demonstrado, propicia a formação de acordos de integração regional e, assim, de blocos econômicos, na medida em que diversos Estados se associam, com finalidades pacifistas, sociais, culturais, mas, especialmente, econômicas, visando melhor inserção no mercado mundial, para melhor competir com os demais países ou blocos econômicos[27]. Desse modo, as organi-

21 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 260.

22 ALBRECHT, Hans-Jörg. *Criminalidad transnacional, comercio de narcóticos y lavado de dinero.* Colombia: Universidad Externado de Colombia, 2001. p. 32.

23 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 225.

24 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 226.

25 CASTELLS, Manuel. *O fim do milénio.* Lisboa: Fundação Calouste Gulbenkian, 2003. p. 262.

26 CORDIN, Nicolás Santiago; HOET, Mariano Javier. Criminalidad transnacional organizada em el ámbito del MERCOSUR: ¿Hacia un Derecho Penal Regional? *Revista de Direito Internacional,* Brasília, v. 12, n. 2, p. 527-539, 2015. p. 530. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3716/pdf>. Acesso em: 25 jun. 2018.

27 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de con-

zações de integração econômica consistem em reação necessária dos Estados ao cenário econômico internacional[28].

Nesse sentido, Alberto do Amaral Júnior[29] afirma que "Globalização e regionalismo são, em princípio, processos complementares, não obstante apresentem lógicas próprias e atores diferentes".

À vista disso, destaca-se o Mercosul: bloco econômico constituído em 1991, com a assinatura do Tratado de Assunção pelos governos da Argentina, Brasil, Paraguai e Uruguai. A Bolívia se encontra em processo de adesão desde 2012, e a Venezuela se tornou membro efetivo do bloco nesse mesmo ano, contudo, foi suspensa em 2017, em virtude do descumprimento de compromissos assumidos no Protocolo de Adesão ao Mercosul.[30]

Ressalta-se que, já em 1948, a integração no continente Latino-Americano foi objetivamente concebida com a criação da Comissão Econômica da Organização das Nações Unidas (ONU) para a América Latina e o Caribe (Cepal), que pugnou pela integração regional nos termos de um projeto de união aduaneira e de uma união de pagamentos na América Latina, bem como adotou, na década de 1950, o conceito de cooperação regional com base em um sistema de preferências comerciais como meio para incentivar o desenvolvimento econômico.[31]

Ademais, no ano de 1960, pelo Tratado de Montevidéu, foi criada a Associação Latino-Americana de Livre Comércio (ALALC), que possuía como objetivo o estabelecimento, em longo prazo, de forma gradual e progressiva, de um mercado comum, o qual se iniciaria com uma zona de livre comércio. A profunda crise econômica suportada pelos países associados, bem como a transição de regimes ditatoriais para regimes democráticos, pela qual passava a maior parte de tais Estados, contribuíram para o fracasso desse bloco econômico.[32]

A ALALC foi substituída pela Associação Latino-Americana de Integração (ALADI), oriunda do Tratado de Montevidéu de 1980. Esta possui objetivos e princípios semelhantes a primeira, entretanto, são mais flexíveis no que se refere ao seu relacionamento comercial. Os motivos que dificultaram o desenvolvimento da ALADI foram a grave crise financeira nas economias dos países membros e a diversidade de políticas econômicas adotadas por seus governos para combater os elevados índices inflacionários existentes.[33]

A ALADI é uma organização dela, resultaram outros blocos econômicos de caráter sub-regional, como o Mercosul e a Comunidade Andina de Nações.[34]

Isto posto, no tocante ao Mercosul, este bloco econômico, como o próprio nome indica, foi criado com o objetivo de se tornar um mercado comum entre seus Estados Partes, por meio da livre circulação de bens, serviços e fatores produtivos, do estabelecimento de uma Tarifa Externa Comum (TEC), da adoção de uma política comercial comum, da coordenação de políticas macroeconômicas e setoriais, e da harmonização de legislações nas áreas pertinentes (artigo 1º, do Tratado de Assunção).[35]

O Protocolo de Ouro Preto de 1994, o qual dispõe sobre a estrutura institucional do Mercosul, atribuiu a esta personalidade jurídica de Direito Internacional, como também alterou o seu regime de funcionamento de zona de livre comércio para união aduaneira imperfeita, com a criação da TEC.

Destaca-se, todavia, que, no Mercosul, a TEC não vigora para todos os produtos de seus países membros, uma vez que:

> [...] é permitida a elaboração de uma *lista de regime de adequação* para os produtos que não têm livre circulação no bloco econômico e sobre os quais incidem tarifas diferenciadas, e de uma *lista de exceções* para os produtos oriundos de terceiros países e importados pelos Estados do Mercosul que não se utilizam da TEC.[36]

trovérsias. 3. ed. Curitiba: Juruá, 2010. p. 37.

28 SOARES FILHO, José. MERCOSUL: surgimento, estrutura, direitos sociais, relação com a Unasul, perspectivas de sua evolução. *Revista CEJ,* Brasília, v. 13, n. 46, p. 21-38, jul./set. 2009. p. 22.

29 AMARAL JÚNIOR, Alberto do. *Curso de direito internacional público. 5*. ed. São Paulo: Atlas, 2015. p. 456.

30 MERCOSUL. *Saiba mais sobre o MERCOSUL*. Disponível em: <http://www.mercosul.gov.br/saiba-mais-sobre-o-mercosul#OMERCOSUL>. Acesso em: 20 ago. 2017.

31 SOARES FILHO, José. MERCOSUL: surgimento, estrutura, direitos sociais, relação com a Unasul, perspectivas de sua evolução. *Revista CEJ,* Brasília, v. 13, n. 46, p. 21-38, jul/set. 2009. p. 23-24.

32 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 52-53.

33 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 53-54.

34 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010, p. 55.

35 MERCOSUL. *Saiba mais sobre o MERCOSUL*. Disponível em: <http://www.mercosul.gov.br/saiba-mais-sobre-o-mercosul#OMERCOSUL>. Acesso em: 20 ago. 2017.

36 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 58-59.

Assim, atualmente, é impraticável a consolidação da união aduaneira e, igualmente, a sua transição para o mercado comum.[37]

Quanto à estrutura organizacional do Mercosul, de acordo com os artigos 1º e 2º, do Protocolo de Ouro Preto, esse bloco é composto por seis órgãos; três deles possuem capacidade decisória de natureza intergovernamental, a saber: 1) Conselho do Mercado Comum (CMC); 2) Grupo Mercado Comum (GMC); 3) Comissão de Comércio do Mercosul (CCM).[38]

Para o presente trabalho, interessa analisar, de maneira mais profunda, o Grupo Mercado Comum.

O Grupo Mercado Comum consiste em órgão executivo integrado por quatro membros titulares e quatro membros alternos por país, designados pelos respectivos governos, dentre os quais devem constar, necessariamente, representantes dos Ministérios das Relações Exteriores, responsáveis pela coordenação do órgão, dos Ministérios da Economia (ou equivalentes) e dos Bancos Centrais (artigos 10 e 11, do Protocolo de Ouro Preto).[39]

Suas funções estão previstas no artigo 14, do Protocolo de Ouro Preto, dentre as quais se destaca a possibilidade de o Grupo Mercado Comum negociar e firmar tratados, mediante delegação expressa do Conselho do Mercado Comum, bem como propor projetos de decisão a aludido Conselho e fixar programas de trabalho que assegurem avanços para o estabelecimento do Mercado Comum.[40]

O Grupo Mercado Comum se pronuncia por meio de Resoluções, as quais são obrigatórias para os Estados Partes[41], muito embora não possuam aplicabilidade direta, tampouco efeito direto, nos ordenamentos jurídicos dos mesmos. Isso porque,

> Os blocos econômicos regidos pelos princípios do Direito Internacional clássico carecem de mecanismos e institutos jurídicos próprios capazes de assegurar a primazia e a aplicabilidade direta das normas produzidas por suas instituições, pois os Estados que integram esses blocos econômicos não consentem, em decorrência do conceito de soberania, delegar poderes a entidades de natureza supranacional. É o caso do Mercosul.[42]

Ou seja, diferentemente do que ocorre no âmbito da União Europeia, em que vigora o Direito Comunitário, caracterizado pela supranacionalidade, no Mercosul, vige o sistema da intergovernabilidade[43], pautado pelos princípios gerais do Direito Internacional Público, sem qualquer delegação de poderes a órgãos comunitários[44].

Assim, ante a ausência de direta vinculação dos Estados às decisões e normas exaradas pelos órgãos do Mercosul, por faltar a elas efetiva coercibilidade e sanção, a aplicabilidade das normas comuns aos Estados Partes resta condicionada aos mecanismos internos de recepção dessas normas, previstos na Constituição de cada país, e ao posicionamento hierárquico que cada ordenamento constitucional assegura às normas internacionais.[45]

No plano do Mercosul, regem as regras da intergovernabilidade, sistema clássico do Direito Internacional. O fundamento de obrigatoriedade do cumprimento das normativas do bloco por parte dos Estados decorre do *pacta sunt servanda*. Quando o Estado ratifica o tratado, ele observa e aplica a norma internacional em seu ordenamento jurídico, sob pena de responsabilização internacional.

Especialmente no caso do Brasil, como também do Uruguai, a aplicabilidade direta das normas emanadas pelo Mercosul, e consequentemente da supranacionalidade, dependeria de uma reforma constitucional, a fim de que se atribua às normas internacionais a primazia sobre as normas nacionais, bem como se reconheça a

37 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 59.

38 BRASIL. *Decreto nº 1.901 de 09 de maio de 1996*. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/d1901.htm>. Acesso em: 20 ago. 2017.

39 BRASIL. *Decreto nº 1.901 de 09 de maio de 1996*. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/d1901.htm>. Acesso em: 20 ago. 2017.

40 BRASIL. *Decreto nº 1.901 de 09 de maio de 1996*. Disponível em: <http://www.planalto.gov.br/ccivil_03/decreto/d1901.htm>. Acesso em: 20 ago. 2017.

41 MERCOSUR. *Órganos Derivados de Textos Fundacionales.* Disponível em: <http://www.mercosur.int/innovaportal/v/3878/11/innova.front/organos-decisorios-y-derivados-de-textos-fundacionales>. Acesso em: 05 set. 2017.

42 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 161.

43 GOMES, Eduardo Biacchi. Integração econômica no MERCOSUL: opiniões consultivas e a democratização no acesso ao tribunal permanente de revisão. *Revista de Direito Internacional*, Brasília, v. 10, n. 1, p. 128-136, 2013. p. 129.

44 KALLAS, Fernanda Marcos. Direito da União Europeia e Direito da Integração. *Textos & Contextos,* Porto Alegre, v. 13, n. 1, p. 74-86, jan./jun. 2014. p. 81. Disponível em: <http://revistaseletronicas.pucrs.br/ojs/index.php/fass/article/viewFile/16750/11755>. Acesso em: 7 jun. 2018.

45 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 160-164.

possibilidade de delegação de competências constitucionais, jurisdicionais e legislativas a organismos supranacionais, uma vez respeitados os princípios da reciprocidade e igualdade.[46]

Ressalta-se, ainda, que, em decorrência da aplicação dos princípios e normas do Direito Internacional Público, as decisões no âmbito do Mercosul são tomadas por consenso e com a presença de todos os associados, preservando os poderes soberanos do Estados Partes e, consequentemente, implicando políticas que representam, primordialmente, os interesses nacionais dos mesmos, e, não, do bloco econômico.[47]

Ainda, vale a pena observar que as normativas Mercosul serão obrigatórias a partir do momento em que todos os Estados partes internalizem a norma em seus respectivos ordenamentos jurídicos internos e comuniquem a incorporação à Secretaria do Mercosul, consoante estabelece o artigo 40, do Protocolo de Ouro Preto, 1994.

Logo, não há de se falar em soberania compartilhada entre os Estados associados, em que pese todos eles tenham suportado a relativização de suas soberanias frente ao processo de globalização e transnacionalização dos mercados e processos produtivos.[48]

Nesse sentido, verifica-se que o Mercosul alcançou alguns de seus objetivos, como o fortalecimento das relações entre os países membros, em termos econômicos, políticos, sociais e culturais. Entretanto, o bloco econômico apresenta diversas deficiências a serem sanadas, a exemplo da

> ausência de coordenação macroeconômica — requisito fundamental para a inserção competitiva de seus membros em nível mundial — o déficit democrático e a falta de efetividade das normas que, mesmo após a sua entrada em vigência, não conseguem ser incorporadas na realidade dos sócios.[49]

Cumpre consignar que tal debilidade no cumprimento das normas não constitui expressa negação ao reconhecimento do direito da integração como um direito específico e próprio, todavia, reforça a ausência de coercibilidade como premissa necessária que pode obstar o avanço do processo integrador a etapas mais profundas, ou seja, a implementação de um mercado comum.[50]

Dentre referidas Resoluções do Grupo Mercado Comum, identificam-se algumas que se relacionam à segurança pública e ao combate ao crime organizado transnacional.

Primeiramente, quanto à questão das drogas e substâncias entorpecentes, a Resolução nº 76/1998 estabeleceu a criação da Reunião Especializada de Autoridades de Aplicação em Matéria de Drogas. Esta foi atualizada pela Resolução nº 16/2015, a qual prevê que as atividades de referida Reunião têm por objetivo a promoção, entre os Estados Partes e Associados, de "programas e atividades comuns de cooperação, capacitação e intercâmbio de informação na temática de drogas, com ênfase na prevenção e tratamento, visando a uma abordagem integral do Problema Mundial das Drogas que incorpore sua dimensão social" (artigo 2º).[51]

A Resolução nº 24/2000 trata do controle e fiscalização da origem dos entorpecentes destinados ao uso médico e científico, visando evitar a importação de matérias primas e produtos provenientes de cultivos ilícitos, bem como de países que transformam drogas apreendidas e confiscadas em opiáceos lícitos.[52]

A Resolução nº 20/2010 aborda a necessidade de continua atualização das listas de substâncias psicotrópicas, entorpecentes, precursoras e sujeitas a controle especial pelos Estados Partes, como também de intercâmbio de informações técnico-científicas, que motiva-

46 GOMES, Eduardo Biacchi. Normas comunitárias: aplicação no direito interno dos estados-membros. *Revista da Faculdade de Direito da UFPR,* Curitiba, v. 33, p. 167-176, 2000. p. 176.

47 GOMES, Eduardo Biacchi. *Blocos econômicos:* solução de controvérsias. 3. ed. Curitiba: Juruá, 2010. p. 164-167.

48 LIMA, Ianara Cardoso de; CENCI, Elve Miguel. Soberania na União Europeia e no Mercosul em Tempos de Globalização. In: ARAUJO, Bruno Manoel Viana de; MOSCHEN, Valesca Raizer Borges; CARMO, Valter Moura do (Coord.). *Direito internacional II*. Florianópolis: CONPEDI, 2016. p. 201. Disponível em: <https://www.conpedi.org.br/publicacoes/y0ii48h0/mvc5le3t/1HpBKh0639LsK6fq.pdf>. Acesso em: 7 jun. 2018.

49 MORAES, Isaias Albertin de; MORAES, Flávia Albertin de; MATTOS, Beatriz Rodrigues Bessa. O Mercosul e a importância de uma legislação ambiental harmonizada. *Revista de Direito Internacional,* Brasília, v. 9, n. 3, p. 91-101, 2012. p. 95.

50 DIZ, Jamile Bergamaschine Mata; JAEGER JÚNIOR, Augusto. Por uma teoria jurídica da integração regional: a inter-relação direito interno, direito internacional público e direito da integração. *Revista de Direito Internacional,* Brasília, v. 12, n. 2, p. 139-158, 2015. p. 146-150.

51 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

52 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

ram o controle de determinada substância, entre estes[53]. Acerca disso, destaca-se que a lei brasileira de drogas (Lei nº 11.343/2006) caminha no mesmo sentido ao estabelecer a periodicidade da atualização das listas de substâncias entorpecentes pelo Poder Executivo da União (artigo 1º, parágrafo único)[54].

Com o fim de padronizar os procedimentos entre os Estados Partes para fortalecer o sistema regional de controle e fiscalização de substancias psicotrópicas e entorpecentes, a Resolução nº 21/2010 estabelece "Critérios Comuns do Mercosul para Fatores de Conversão para Substâncias Controladas Nacionalmente pelos Estados Partes que não são Objeto de Controle Internacional", ou seja, trata-se da hipótese em que determinada substância é controlada pelo Estado Parte importador/exportador, mas não consta na lista internacional de substâncias controladas, elaborada pela Junta Internacional de Fiscalização de Entorpecentes. A elaboração de tais critérios tem por objetivo evitar divergências entre os documentos emitidos pelas autoridades competentes de cada Estado Parte.[55]

No tocante à lavagem de capitais, a Resolução nº 82/1999 criou um Grupo "Força Tarefa" entre Bancos Centrais do Mercosul, para prevenir e reprimir a lavagem de dinheiro, por meio do intercâmbio de experiências e metodologias adquiridas.[56]

Já a Resolução nº 51/2015 trata da regulação mínima a ser adotada pelos Supervisores Financeiros para a prevenção à lavagem de dinheiro e ao financiamento do terrorismo, o que incluiu a promoção por tais Organismos de Regulação/Supervisão da aplicação pelas instituições financeiras das Recomendações e documentos do Grupo de Ação Financeira Internacional (GAFI), Grupo de Ação Financeira da América Latina (GAFILAT) e Grupo de Ação Financeira do Caribe (GAFIC), como também da cooperação internacional com suas contrapartes estrangeiras, facilitando o intercâmbio de informações.[57]

Outrossim, essa Resolução prevê que os Organismos de Regulação/Supervisão devem exigir das instituições financeiras sob sua competência a identificação de todo cliente para a obtenção de informações e antecedentes sobre sua solvência, situação patrimonial, econômica e financeira, bem como a comunicação à Unidade de Informação/Inteligência Financeira de fatos ou operações concretizadas ou não, que apresentem indícios relacionados à lavagem de capitais ou financiamento do terrorismo.[58]

Sob a mesma lógica de prevenção à lavagem de dinheiro adotada pela Resolução 51/2015 do Grupo Mercado Comum, a Lei nº 9.613/98, lei brasileira de lavagem de capitais, que sofreu alterações em 2012 pela Lei nº 12.683/12, elenca pessoas físicas e jurídicas sujeitas ao mecanismo de controle, em função da atividade que desenvolvem (artigo 9º), como também estabelece a obrigatoriedade da identificação dos clientes por tais pessoas, da manutenção do registro de toda transação realizada e do cadastramento da pessoa física ou jurídica sujeita a controle no órgão regulador ou fiscalizador e, na falta deste, no Conselho de Controle de Atividades Financeiras (COAF) (artigo 10). Ademais, prevê o dever de comunicar ao Coaf, no prazo de 24h, a proposta ou a realização de operações financeiras (artigo 11).[59]

Nessa perspectiva, cita-se, ainda, no cenário brasileiro, a Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro (ENCCLA), criada em 2003, que consiste em rede de articulação para o arranjo e discussões em conjunto com uma diversidade de órgãos dos Poderes Executivo, Legislativo e Judiciário das esferas federal e estadual e, em algumas situações, municipal, bem como do Ministério Público, e para a formulação de políticas públicas voltadas ao combate aos crimes de corrupção e lavagem de capitais.[60]

Dentre seus principais resultados, destaca-se a estru-

53 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

54 BRASIL. *Lei nº 11.343 de 23 de agosto de 2006*. Disponível em: <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11343.htm>. Acesso em: 29 ago. 2017.

55 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

56 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

57 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

58 MERCOSUR. *Resoluciones del Grupo Mercado Común*. Disponível em: <http://www.mercosur.int/innovaportal/v/527/2/innova.front/resoluciones>. Acesso em: 22 ago. 2017.

59 BRASIL. *Lei nº 9.613 de 03 de março de 1998*. Disponível em: <http://www.planalto.gov.br/ccivil_03/Leis/L9613.htm>. Acesso em: 29 ago. 2017.

60 ENCCLA. *Quem somos*. Disponível em: <http://enccla.camara.leg.br/quem-somos>. Acesso em: 29 ago. 2017.

turação do Grupo Nacional de Combate às Organizações Criminosas, no âmbito dos Ministérios Públicos Estaduais, que consiste em especialização das autoridades brasileiras no combate à criminalidade organizada; o aperfeiçoamento do cadastro de entrada e saída de pessoas do território nacional, que representa modernização e maior controle transfronteiriço; e a consolidação de uma autoridade central para fins de cooperação jurídica internacional, garantindo maior efetividade da justiça com a possibilidade de se buscar provas no exterior[61], o que será abordado de forma mais específica no tópico seguinte.

A Lei nº 12.850/2013, denominada Lei de Combate às Organizações Criminosas, também acompanha o entendimento do Mercosul no que se refere à prevenção e repressão desse delito que se tornou um problema mundial. Além de definir o termo "organização criminosa", essa legislação dispõe sobre a investigação criminal e meios de obtenção de provas, contemplando, por exemplo, em seu artigo 3º, a colaboração premiada e a "cooperação entre instituições e órgãos federais, distritais, estaduais e municipais na busca de provas e informações de interesse da investigação ou da instrução criminal".[62]

Dessa forma, adequa-se, igualmente, à Convenção das Nações Unidas contra o Crime Organizado Transnacional, que foi aprovada pela Assembleia-Geral da Organização das Nações Unidas (ONU) em 2000 e entrou em vigor em 2003, estabelecendo aos Estados signatários a obrigação de adotar uma porção de medidas contra a criminalidade organizada, o que compreende a criação de certos tipos penais, a adoção de novos e amplos sistemas de extradição, de assistência jurídica mútua e de cooperação policial, bem como a oferta de formação e assistência técnica para a construção ou aprimoramento da capacidade das autoridades nacionais de reagir, de maneira eficaz, ao crime organizado.[63]

Ressalta-se que todos os Estados Partes do Mercosul são signatários de aludida Convenção, também conhecida como Convenção de Palermo, a qual constitui o principal instrumento internacional de combate ao crime organizado transnacional e representa o reconhecimento pelos Estados Membros da gravidade do problema e da imprescindibilidade de se promover e intensificar a cooperação internacional. Ademais, é complementada por três protocolos concernentes a áreas e manifestações específicas do crime organizado, quais sejam: Protocolo Relativo à Prevenção, Repressão e Punição do Tráfico de Pessoas, em Especial Mulheres e Crianças; Protocolo Relativo ao Combate ao Tráfico de Migrantes por Via Terrestre, Marítima e Aérea; e Protocolo contra a Fabricação e o Tráfico Ilícito de Armas de Fogo, suas Peças e Componentes e Munições.[64]

À luz do exposto, concluiu-se que referidas Resoluções do Grupo Mercado Comum têm por fim último a cooperação jurídica internacional, mormente, em matéria penal, visando prevenir e combater o crime organizado transnacional de maneira efetiva. Esse entendimento reflete os ordenamentos jurídicos e as medidas adotadas pelos Estados Partes do Mercosul, a exemplo do Brasil, conforme demonstrado ao longo do artigo.

4. A cooperação jurídica internacional em matéria penal no Mercosul

Em suma, cooperação jurídica internacional consiste no "conjunto de medidas e mecanismos pelos quais órgãos competentes dos Estados solicitam e prestam auxílio recíproco para realizar em seu território, atos pré-processuais e processuais que interessem à jurisdição estrangeira"[65]. Em matéria penal, essa cooperação compreende atos de comunicação processual, como citações, intimações e notificações; atos de investigação ou instrução, a exemplo de oitivas, obtenção de documentos, quebra de sigilo bancário e telemático; ou ainda, algumas medidas constritivas de ativos, como bloqueio de bens ou valores no exterior[66].

61 ENCCLA. *Principais resultados*. Disponível em: <http://enccla.camara.leg.br/resultados>. Acesso em: 29 ago. 2017.

62 BRASIL. *Lei nº 12.850 de 02 de agosto de 2013*. Disponível em: <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm>. Acesso em: 31 ago. 2017.

63 UNITED NATIONS. *United Nations convention against transnational organized crime and the Protocols Thereto*. Disponível em: <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>. Acesso em: 31 ago. 2017.

64 UNITED NATIONS. *Prevenção ao crime e justiça criminal:* marco legal. Convenção das Nações Unidas contra o Crime Organizado Transnacional. Disponível em: <https://www.unodc.org/lpo-brazil/pt/crime/marco-legal.html>. Acesso em: 31 ago. 2017.

65 ABADE, Denise Neves. *Direitos fundamentais na cooperação jurídica internacional*. São Paulo: Saraiva, 2013. p. 27.

66 BRASIL. Ministério da Justiça e Segurança Pública. *Cooperação Jurídica Internacional em Matéria Penal*. Disponível em: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal>. Acesso em: 4 set. 2017.

Dessa forma, possibilita o intercâmbio de informações e a realização de medidas processuais em diferentes países, em consonância com o Princípio da Soberania Estatal, tornando-se fundamental à persecução penal e à punição dos agentes envolvidos em delitos transnacionais, na medida em que é imprescindível à produção de provas.[67]

A cooperação jurídica internacional é exercida pelos Estados com base em acordos bilaterais, tratados regionais e multilaterais, bem como na promessa de reciprocidade.[68] Ao se comentar sobre a cooperação jurídica internacional, a título de exemplo, mencione-se o artigo 26, do Código de Processo Civil.

No âmbito do Mercosul, a cooperação jurídica internacional em matéria penal é regulada pelo Protocolo de Assistência Jurídica Mútua em Assuntos Penais, que foi assinado pelos Estados Partes em 1996, sendo promulgado no Brasil por meio do Decreto nº 3.468/2000[69].

Esse Protocolo, também conhecido como Pacto de San Luís, é complementado pelo Acordo de Assistência Jurídica Mútua em Assuntos Penais entre os Estados Partes do Mercosul, a República da Bolívia e a República do Chile, assinado em 18 de fevereiro de 2002 e promulgado pelo Brasil mediante o Decreto nº 8.331/2014[70].

Outrossim, o Pacto de San Luís é acrescido do Acordo Complementar ao Protocolo de Assistência Jurídica Mútua em Assuntos Penais entre os Estados-membros do Mercosul, assinado em 05 de dezembro de 2002, o qual prevê modelos de formulários de solicitação de auxílio jurídico em matéria penal para demandar informações acerca do cumprimento de requisições de assistência. Esse acordo ainda não é vigente no Brasil.[71]

Cumpre destacar que o Pacto de San Luís é regido por alguns princípios, que podem ser divididos em três grupos: princípios funcionais, princípios de garantia e princípios intradogmáticos. Constituem princípios funcionais: 1) Princípio da primazia das normas processuais de fonte supranacional ou internacional; 2) Princípio da aplicação de ofício do Direito Comunitário; 3) Princípio de eficácia na assistência; 4) Princípio do reconhecimento da diversidade dos sistemas jurídicos envolvidos.[72]

Já os princípios de garantia são os seguintes: 1) Princípio da delimitação quanto ao âmbito ou alcance; 2) Princípio do respeito à ordem pública internacional do Estado requerido; 3) Princípio do respeito à lei interna processual e substancial do Estado requerido; 4) Princípio da gradualidade dos requisitos; 5) Princípio da reserva política; 6) Princípio do respeito à jurisdição territorial; 7) Princípio da proteção aos sujeitos do processo; 8) princípio da especialidade com relação ao uso de informações ou provas obtidas; 9) Princípio da responsabilidade.[73]

Por fim, os princípios intradogmáticos se subdividem em dois grupos: 1) Princípios de limitação material, os quais constituem princípios de fundamentação do Estado Democrático, como a proteção da dignidade humana, necessidade de pena, intervenção mínima, proporcionalidade, e observância do bem jurídico; 2) Princípios de limitação formal, que compreendem o princípio da legalidade e aqueles que dele resultam.[74]

67 MACHADO, Bruno Amaral; VIEIRA, Priscilla Brito Silva. O controle penal do tráfico de pessoas: construção jurídica, interações organizacionais e cooperação internacional. *Revista de Direito Internacional,* Brasília, v. 13, n. 3, p. 484-503, 2016. p. 499. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/4383/pdf>. Acesso em: 25 jun. 2018.

68 BRASIL. Ministério da Justiça e Segurança Pública. *Acordos Internacionais.* Disponível em: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/acordos-internacionais>. Acesso em: 04 set. 2017.

69 SPÍNOLA, Luíza Moura Costa. Sistemas de cooperação internacional: cotejo entre políticas de auxílio em matéria penal nos Estados Unidos, na União Europeia e no Mercosul. *Revista CEPEJ,* Salvador, v. 19, Edição Especial, p.243-278, jan./jun. 2016. p. 264. Disponível em: <https://portalseer.ufba.br/index.php/CEPEJ/article/view/22048>. Acesso em: 31 ago. 2017.

70 SPÍNOLA, Luíza Moura Costa. Sistemas de cooperação internacional: cotejo entre políticas de auxílio em matéria penal nos Estados Unidos, na União Europeia e no Mercosul. *Revista CEPEJ,* Salvador, v. 19, Edição Especial, p.243-278, jan./jun. 2016. p. 268. Disponível em: <https://portalseer.ufba.br/index.php/CEPEJ/article/view/22048>. Acesso em: 31 ago. 2017.

71 SPÍNOLA, Luíza Moura Costa. Sistemas de cooperação internacional: cotejo entre políticas de auxílio em matéria penal nos Estados Unidos, na União Europeia e no Mercosul. *Revista CEPEJ,* Salvador, v. 19, Edição Especial, p.243-278, jan./jun. 2016. p. 267-268. Disponível em: <https://portalseer.ufba.br/index.php/CEPEJ/article/view/22048>. Acesso em: 31 ago. 2017.

72 IENSUE, Geziela; CARVALHO, Luciani Coimbra de. Mercosul e Cooperação Jurídica Internacional: um Sistema Processual Estratégico à Integração. *Revista de Direito Brasileira,* São Paulo, v. 16, n. 7, p. 428-444, jan./abr. 2017. p. 437. Disponível em: <http://www.rdb.org.br/ojs/index.php/rdb/article/view/561>. Acesso em: 31 ago. 2017.

73 IENSUE, Geziela; CARVALHO, Luciani Coimbra de. Mercosul e Cooperação Jurídica Internacional: um Sistema Processual Estratégico à Integração. *Revista de Direito Brasileira,* São Paulo, v. 16, n. 7, p. 428-444, jan./abr. 2017. p. 437. Disponível em: <http://www.rdb.org.br/ojs/index.php/rdb/article/view/561>. Acesso em: 31 ago. 2017.

74 IENSUE, Geziela; CARVALHO, Luciani Coimbra de. Mer-

No que diz respeito ao Protocolo de Assistência Jurídica Mútua em assuntos penais e a teor do artigo 1º, item 04, de aludido Protocolo, a assistência jurídica será prestada mesmo quando as condutas não constituam delitos no Estado requerido, o que afasta a exigência de dupla incriminação.

Ademais, cada Estado Parte deve designar uma Autoridade Central para receber os pedidos de assistência jurídica e transmiti-los às respectivas autoridades competentes, por força do artigo 3º, item 01, do mesmo diploma[75]. No Brasil, o Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional da Secretaria Nacional de Justiça e Cidadania (DRCI/SNJ) exerce o papel de Autoridade Central da cooperação jurídica internacional para a maioria dos acordos internacionais em vigor[76]. Ainda, as solicitações transmitidas por uma Autoridade Central terão por base os pedidos de assistência de autoridades judiciais ou do Ministério Público do Estado requerente, encarregadas do julgamento ou investigação de delitos, consoante dispõe o artigo 4º[77]. Ou seja, os pedidos de cooperação jurídica internacional são recebidos, exclusivamente, de autoridades públicas.

Os atos passíveis de assistência estão previstos no artigo 2º, do Pacto de San Luís, o que inclui a produção de provas, que será regulada pelas regras do Estado requerido[78]. Já o artigo 5º estabelece as hipóteses de denegação de assistência.[79]

Destaca-se, ainda, no âmbito do Mercosul, a atuação do Grupo de Cooperação Internacional (GCI), órgão auxiliar ao Grupo Mercado Comum, responsável por assegurar o cumprimento das diretrizes da Política de Cooperação Internacional, garantindo que os programas e projetos de cooperação sejam elaborados e executados de acordo com os princípios e objetivos dessa Política.[80]

Seguindo a mesma lógica de cooperação entre os países, cita-se a existência do Acordo Quadro sobre Cooperação em Matéria de Segurança Regional entre os Estados Partes do MERCOSUL, a República da Bolívia, a República do Chile, a República da Colômbia, a República do Equador, a República do Peru e a República Bolivariana da Venezuela, aprovado pelo Conselho do Mercado Comum por meio da Decisão nº 16/2006, que substituiu o Acordo Quadro sobre Cooperação em Matéria de Segurança Regional entre os Estados Partes do MERCOSUL e o Acordo Quadro sobre Cooperação em Matéria de Segurança Regional entre os Estados Partes do MERCOSUL, a República da Bolívia e a República do Chile, aprovados pela Decisão do Conselho do Mercado Comum nº 35/04.[81]

Cita-se, também, o Acordo sobre Mandado MERCOSUL de Captura e Procedimentos de Entrega entre os Estados Partes do MERCOSUL e Estados Associados, aprovado pela Decisão nº 48/2010 do Conselho do Mercado Comum, referente à entrega de pessoas procuradas pela prática de determinados crimes; ao qual se aplica o requisito da dupla incriminação.[82]

Por fim, ressalta-se que, de acordo com a Cartilha de Cooperação Jurídica Internacional em Matéria Penal[83],

cosul e Cooperação Jurídica Internacional: um Sistema Processual Estratégico à Integração. *Revista de Direito Brasileira,* São Paulo, v. 16, n. 7, p. 428-444, jan./abr. 2017. p. 437. Disponível em: <http://www.rdb.org.br/ojs/index.php/rdb/article/view/561>. Acesso em: 31 ago. 2017.

75 BRASIL. Ministério da Justiça e Segurança Pública. *Protocolo de Assistência Jurídica Mútua em Assuntos Penais – Mercosul.* Disponível em: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/arquivos/protocolo-de-assistencia-juridica-mutua-em-assuntos-penais-mercosul.pdf/view>. Acesso em: 4 set. 2017.

76 BRASIL. Ministério da Justiça e Segurança Pública. *Autoridade Central.* Disponível em: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/autoridade-central-1>. Acesso em: 04 set. 2017.

77 BRASIL. Ministério da Justiça e Segurança Pública. *Protocolo de Assistência Jurídica Mútua em Assuntos Penais – Mercosul.* Disponível em: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/arquivos/protocolo-de-assistencia-juridica-mutua-em-assuntos-penais-mercosul.pdf/view>. Acesso em: 04 set. 2017.

78 SPÍNOLA, Luíza Moura Costa. Sistemas de cooperação internacional: Cotejo entre Políticas de Auxílio em Matéria Penal nos Estados Unidos, na União Europeia e no Mercosul. *Revista CEPEJ,* Salvador, v. 19, Edição Especial, p. 243-278, jan./jun. 2016. p. 266. Disponível em: <https://portalseer.ufba.br/index.php/CEPEJ/article/view/22048>. Acesso em: 31 ago. 2017.

79 BRASIL. Ministério da Justiça e Segurança Pública. *Protocolo de Assistência Jurídica Mútua em Assuntos Penais – Mercosul.* Disponível em: <http://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/arquivos/protocolo-de-assistencia-juridica-mutua-em-assuntos-penais-mercosul.pdf/view>. Acesso em: 04 set. 2017.

80 MERCOSUR. *Aspectos institucionales.* Disponível em: <http://www.mercosur.int/innovaportal/v/6307/2/innova.front/aspectos-institucionales>. Acesso em: 06 fev. 2018.

81 MERCOSUR. *Decisiones.* Disponível em: <http://www.mercosur.int/innovaportal/v/526/2/innova.front/decisiones>. Acesso em: 22 ago. 2017.

82 MERCOSUR. *Decisiones.* Disponível em: <http://www.mercosur.int/innovaportal/v/526/2/innova.front/decisiones>. Acesso em: 22 ago. 2017.

83 BRASIL. Ministério da Justiça e Segurança Pública. *Cooperação jurídica internacional em matéria penal.* 2014. p. 26. Disponível em:

elaborada pelo DRCI, o Brasil é um país predominantemente requerente, ou seja, emite muito mais solicitações de cooperação do que efetivamente recebe. Os principais parceiros brasileiros, no que se refere às relações de cooperação em matéria penal, são os EUA, Uruguai, Paraguai e Argentina.

No mesmo sentido, o Ministério da Justiça e Segurança Pública[84] afirma que mais de 80% de todos os pedidos de cooperação jurídica internacional são demandas de autoridades brasileiras para o exterior.

Logo, resta claro a importância da cooperação jurídica internacional para a efetividade da justiça no Brasil, mormente em se tratando de crimes organizados transnacionais, cuja própria estrutura e modus operandi obstam a persecução penal restrita às fronteiras territoriais de um único país.

5. Considerações finais

O conjunto complexo de processos que, notadamente a partir da última década do século XX, promoveu mudanças na economia, nas estruturas sociais, na política e na cultura, por meio do enfraquecimento das fronteiras nacionais, abertura dos mercados e avanços tecnológicos, denominado de globalização, ao contribuir para o desenvolvimento de atividades econômicas lícitas, também propiciou a atuação das organizações criminosas em escala global, transcendendo as fronteiras dos países em que tiveram origem.

As organizações criminosas transnacionais caracterizam-se, em síntese, pela associação de pessoas, divisão de tarefas, existência de objetivos econômicos, infiltração nas estruturas estatais, internacionalização das atividades criminosas, mediante o estabelecimento de alianças de cooperação com outros grupos criminosos, e pela realização de tais atividades de maneira a impossibilitar ou, pelo menos, dificultar a persecução penal.

Dessa forma, as organizações criminosas desestabilizam as finanças e mercados de capital internacionais, bem como as economias nacionais, e interferem nas instituições e políticas democráticas dos Estados e em suas culturas, representando uma das maiores ameaças às sociedades modernas globalizadas em geral.

Logo, entende-se que a prevenção e o combate à criminalidade organizada transnacional devem compreender medidas de intercâmbio de informações, de harmonização dos ordenamentos jurídicos e de assistência entre os diferentes Estados.

No âmbito do Mercosul, verifica-se a existência de Convenções e Acordos, como também de Resoluções do Grupo Mercado Comum, que sugerem a adoção de tais medidas, em que pese não possuam aplicabilidade direta, tampouco efeito direto nos ordenamentos jurídicos dos Estados Partes, ante a adoção do sistema da intergovernabilidade.

Assim, por meio da orientação para a cooperação jurídica internacional, o Grupo Mercado Comum contribui para o enfrentamento da criminalidade organizada transnacional, considerando que a cooperação jurídica internacional constitui importante instrumento nesta batalha, tendo em vista a facilidade que confere à investigação e ao julgamento de delitos que ultrapassam a competência territorial dos países.

Portanto, defende-se a promoção e o incentivo à utilização desse instituto no âmbito do Mercosul, mediante a estruturação organizada deste e seu aperfeiçoamento. Por fim verificou-se, com o presente artigo, que, além das normativas existentes dentro do Mercosul, o Código de Processo Civil traz os instrumentos da cooperação jurídica internacional como elementos essenciais para a efetivação dos atos judiciais referentes ao combate ao crime transnacional.

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Counter-terrorism legislation and terrorist attacks: does human rights have space?

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Counter-terrorism legislation and terrorist attacks: does human rights have space?*

Legislação antiterrorismo e ataques terroristas: têm os direitos humanos espaço?

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Abstract

The proposed theory for this study argues that terrorist attacks affect people's perception of security, creating an intense sensation of fear that leads to the support of repressive measures to counter terrorism. Evaluating United States before and after 9/11, this study found that terrorist attacks result in intense perception of danger and a consequent sensation of fear. In turn, this fear led to the support of relaxation of due process, sacrifice of civil liberties in exchange of security, and torture. The legislation analysis presented relaxation of due process rights, especially with the acceptance of illegal evidence, the only indicator that followed the causation process here proposed. Even though it was not found strong support for the theory, the study presents that the fear populations experience after terrorist attacks is connected with high support for the assassination of suspects of terrorism, which was a real surprise. Therefore, campaigns like #wearenotafraid, are interesting mechanisms to be propagated in order to reduce the sensation of insecurity among citizens and to maintain a certain rationality to calculate the costs and benefits of the measures proposed, not accepting undue restrictions.

Keywords: Terrorism. Counter-terrorism Legislation. Human Rights. Fear. Security.

Resumo

A teoria proposta para este estudo argumenta que os ataques terroristas afetam a percepção de segurança das pessoas, criando intensa sensação de medo que resulta no apoio de medidas repressivas contra o terrorismo. Avaliando os Estados Unidos antes e depois do 11 de setembro, este estudo encontrou que estes ataques resultaram em intensa percepção de perigo e uma conseqüente sensação de medo. Por sua vez, esse medo levou ao apoio do relaxamento do devido processo legal, do sacrifício das liberdades civis em troca de segurança e apoio à tortura. A análise da legislação apresentou o relaxamento dos direitos processuais, especialmente quanto à aceitação de evidências ilegais, o único indicador que seguiu o processo de causalidade proposto. Apesar de não ter encontrado forte apoio para a teoria, o estudo apresenta que o medo das populações após ataques terroristas está ligado ao

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alto apoio ao assassinato de suspeitos de terrorismo, o que foi uma verdadeira surpresa. Portanto, campanhas como #wearenotafraid, são mecanismos interessantes para serem propagados a fim de reduzir a sensação de insegurança entre os cidadãos e manter certa racionalidade para calcular os custos e benefícios das medidas propostas, não aceitando restrições indevidas.

Palavras-chave: Terrorismo. Legislação contra o terrorismo. Direitos Humanos. Medo. Segurança.

1. Introduction

Terrorism as a phenomenon is older than one might suppose. David Rapoport[1] proposed an identification of four waves of terrorism throughout history, starting with the Anarchists in the late 19th century, which identified themselves as "terrorists" and used terrorism as a strategy to change public attitudes and conventions. Following, the second wave was marked by "freedom fighters", greatly directed against colonial domain. The radicalism of the third wave, named "New Left Wave", had a revolutionary ethos often combined with nationalist aspirations. Concluding, the author identified the current wave as centered in religious ambitions. Differently from previous movements, the religious radical groups aim to establish a religious New World, and it is important to note that Islam, although highly representative, is not the only religious community producing terrorism.

As one can perceive from Rapoport[2] historical evaluation, terrorism has been used to address quite different phenomena, at distinct historical periods, with varied methods. Nonetheless, terrorism as a method of violence, lacks a definition universally accepted. Anglí[3] argues that, although a concept broadly used in political discourse and mass media articles, the characteristics that terrorism entangles are not unanimously agreed in most national and international criminal law. The author presents that the act of violence itself is usually already prescribed within common criminal legislation, like bombing a building, however, what categorizes it as a terrorist act is the creation of collective fear that affects the perception of security of all members of society, sending a communiqué that as long as *status quo* remains, other acts of terrorism will happen. Additionally, the element of randomness of terrorist attacks implies that its victims have just a symbolic meaning, as a message that anyone can be the next victim. In this scenario, the subjective sense of security is greatly affected, even though, objectively, the chances of dying from other causes are much higher[4].

Hence, there is a general understanding among scholars[5] that terrorist attacks like 9/11 greatly affect the states' ability to protect its citizens and undermine the democratic ways of problem solving. Nonetheless, although terrorist violence presents itself as a serious challenge to democratic countries, Hoffman[6] argues that it does not threaten the very existence of governmental institutions, the civil community, or the life of the nation. As Paul Wilkinson observed, "it is part of the price we must pay for our democratic freedoms that some may choose to abuse these freedoms for the purposes of destroying democracy, or some other goal"[7].

This, however, is not the main understanding among citizens, politicians and international organizations. Shortly after the 9/11 attacks, George W. Bush launched the "War on Terror"[8], and the Security Council (hereafter UNSC) adopted the Resolution 1373 urging all countries to unite in the international fight against

1 RAPOPORT, D. The four waves of rebel terror and September 11. *Anthropoetics,* v. 8, n. 1, Spring/Summer 2002. Available on: <http://anthropoetics.ucla.edu/ap0801/terror/>.

2 RAPOPORT, D. The four waves of rebel terror and September 11. *Anthropoetics,* v. 8, n. 1, Spring/Summer 2002. Available on: <http://anthropoetics.ucla.edu/ap0801/terror/>.

3 ANGLÍ, M. L. What does terrorism means? In: MASFERRER, A.; WALKER, C. *Counter-terrorism, human rights and the rule of law:* crossing legal boundaries in defence of the state. Cheltenham: Edward Elgar, 2013. p. 18.

4 ANGLÍ, M. L. What does terrorism means? In: MASFERRER, A.; WALKER, C. *Counter-terrorism, human rights and the rule of law:* crossing legal boundaries in defence of the state. Cheltenham: Edward Elgar, 2013. p. 20, 22, 23.

5 *See generally* DOUGLAS, R. *Law, liberty, and the pursuit of terrorism.* Ann Arbor: The University of Michigan Press, 2014.; MASFERRER, A.; WALKER, C. Countering terrorism and crossing legal boundaries. In: MASFERRER, A.; WALKER, C. *Counter-terrorism, human rights and the rule of law:* crossing legal boundaries in defence of the state. Cheltenham: Edward Elgar, 2013.; WILKINSON, P. *Terrorism versus democracy:* the liberal state response. 3. ed. Taylor & Francis, 2011.

6 HOFFMAN, L. *A v Secretary of State for the Home Department.* UKHL. 56 para 96, 2004.

7 WILKINSON, P. *Terrorism versus democracy:* the liberal state response. 3. ed. Taylor & Francis, 2011. p. 220.

8 THE GUARDIAN. Text of George Bush's speech: State of the Union Address. *The Guardian,* sept. 21, 2001. Available on: <https://www.theguardian.com/world/2001/sep/21/september11.usa13>.

terrorism with preventive measures of suppression against anyone that participates in "financing, planning, preparation or perpetration of terrorist acts"[9], in line with the perception that the existent legal responses within national criminal law were not sufficient to deal with the threat of radicalism. Even though the nations were urged to comply with the international fight against terrorism, neither the Resolution 1373 nor the subsequent ones provided a definition of terrorism generally accepted. These instruments specify only the consequences of terrorism, a rather narrow approach to this complex and multifaceted phenomenon. Therefore, there is a prevailing understanding[10] among scholars as Sarah Pellet, Antonio Cassese and Gilbert Guillaume, that adequate answers to terrorism depend upon the establishment of an internationally recognized definition, and that the lack of it has compromised the capacity of both countries and international community to respond effectively[11], frequently with "solutions" that comply with instruments as Resolution 1373 but in detriment of human rights.

Masferrer presents that when faced with the radical violence of 9/11 with sub-sequential incidents in other locations, and the call to enter the "war on terror", frequently to do whatever it takes, several countries decided to enter it. The author explains that modern western constitutionalism considered rights as natural, pre-political in character, which means that the very existence of the State was justified in the recognition and protection of these rights. However, the radicalism of the 21st century found states where human rights are based in democratic consensus, socially contracted, with the possibility of rights' derogation, which raised the discourse of an "irreconcilable" struggle between state security and the freedoms of its citizens[12].

Thus, liberal democracies' legal responses to this challenge have distinct character. Some responses may have a prophylactic aim, implementing reforms in areas that otherwise could lead to grievances and maybe even violence. A statute giving greater autonomy for the Basque region adopted in 1978 by the Spanish Parliament represents this kind of preventative attempt. Other laws may aim to deter, stipulating harsh penalties for terrorist acts, like aircraft hijacking. However, what we are interested in this study is to analyze the legal measures that aim to reassure the citizens that something is being done, mainly with a symbolic or psychological function of making the state safer[13]. Roger Douglas argues that prompted by this necessity of reaction from the public, or by the perception of its intense fear, the executive and legislative sometimes come up with opportunistic strategies incompatible with liberal values of liberty and justice that would otherwise be politically unacceptable[14].

Although the executive and legislative might act upon false pretenses – adopting legal measures only to show that there is response against terrorist violence or seizing the moment to take repressive measures -, either way, the general population accepts and even urges for security measures. For this reason, this study aims, focusing on the United States (US) as a case study, to assess the effects of terrorism on counter-terrorism legislation and its respect of human rights standards through an evaluation of citizens levels of fear following violent radicalism. In addition, it hopes to be relevant to the field of peace and conflict research furthering the understandings on the effects of terrorism on societies, as well as furthering the juridical debate upon counter-terrorism laws.

9 UNSC. *United Nations Security Council Resolution 1373*. Adopted by the Security Council at its 4385th meeting, on 28 September 2001. p. 2. Available on: <https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf>.

10 Legal Analyst and attorney Jennifer R. Breedon, among other scholars as Daniel Goldhagen (Goldhagen, Daniel Jonah, Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity. *Public Affairs Publisher*, 1st ed. 2009), argues that modern violent extremist groups have eliminationists purposes and intend to fulfill them through international crimes as genocide, conspiracy to commit genocide and crimes against humanity, which are all already universally defined. For this reason, she understands that a universally accepted definition of "terrorism" is unnecessary, given that the States have the courage to call these crimes by their names, "genocide", and properly prosecute them before international courts and tribunals. *See more at* BREEDON, Jennifer. Redefining terrorism: the danger of misunderstanding the modern world's gravest threat. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, 2015 p. 463-483.

11 PELLET, S. A ambiguidade da noção de terrorismo. In: BRANT, L. N. C. (Coord.). *Terrorismo e direito:* os impactos do terrorismo na comunidade internacional e no Brasil. Rio de Janeiro: Forense, 2003. p. 9, 13, 14, 18.

12 MASFERRER, A. The fragility of fundamental rights in the origins of modern constitutionalism: its negative impact in protecting human rights in the "war on terror" era. In: MASFERRER, A.; WALKER, C. *Counter-terrorism, human rights and the rule of law:* crossing legal boundaries in defence of the state. Cheltenham: Edward Elgar, 2013. p. 50-51.

13 WILKINSON, P. *Terrorism versus democracy:* the liberal state response. 3. ed. Taylor & Francis, 2011. p. 92-93.

14 DOUGLAS, R. *Law, liberty, and the pursuit of terrorism*. Ann Arbor: The University of Michigan Press, 2014. p. 1-2.

Therefore, the research question is *"How does terrorist attacks possibly affect the respect of human rights standards in national counter-terrorism legislation, especially the US legislation?"*

After a brief historical introduction of terrorism, the problems of its definitions, and the responses from national and international community, the next sections will have the following structure. In the Theory part we will address the definition of terrorism adopted in this study, the independent and dependent variables, the causal mechanism that we expect to exist between them, and how do we expect them to influence each other. In the sequence, the Research Design part will contain my strategy to case selection, operationalization of the independent and dependent variables, sources of data collection and explanation of the chosen method of analysis. The last two sections will present and discuss the results obtained and their possible interpretations, summarizing the outcomes and future possibilities following this research.

2. Theory

In this paper, for pragmatic reasons, we will adopt the following Bruce Hoffman's definition of terrorism:

> We may therefore now attempt to define terrorism as the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change. All terrorist acts involve violence or the threat of violence. Terrorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack. It is meant to instill fear within, and thereby intimidate, a wider "target audience" that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general. Terrorism is designed to create power where there is none or to consolidate power where there is very little. Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence, and power they otherwise lack to effect political change on either a local or an international scale.[15]

Nonetheless, we should emphasize that this is not an incontestable definition. The aspects considered especially important for this research are that terrorism include violent actions by groups that have specific motivations, but that, generally, have random targets that function as messengers of the group's aims to the main target, e.g. a country's population, and, finally, that the groups try to propagate their aims through the creation of a terror atmosphere.

This study assumes, therefore, that terrorist violence aims to create psychological conditions of fear amongst a general population, not only the immediate victims, influencing their attitudes and intimidating governments[16]. Building upon Alex Braithwaite[17] assessment that terrorist attacks do change the mindset of countries' citizens creating fear, however, contrary to Long's affirmation that terrorists "use the unreasonable fear and the resulting political disaffection it has generated among the public to intimidate governments into making political concessions in line with its political goals" [18], we aim to show that instead of giving in to the demands of radicals, the psychological violence creates an intense sense of fear that leads to the application of the precautionary principle instead of a cost-benefit analysis, which makes citizens urge for security measures and, at the same time, prevents them to rationally assess the costs and actual benefits from the legal measures adopted, influencing the content of these laws, and agreeing with reductions imposed on their own rights.

Henceforth, the theory of this study is that terrorism, materialized in terrorist attacks[19], negatively affects the content of national counter-terrorism legislation, which becomes less respective of human rights standards because these acts of psychological violence create an intense sense of fear not only in the direct victims, but, most importantly, in the general population, that for this reason perceives the existent criminal rules as not enough protection and, with the mentality that it is "better to be safe than sorry", perceives as necessary to have "tougher" anti-terrorism laws, even if there is no proven connection between less protection of hu-

15 HOFFMAN, B. *Inside terrorism*. New York: Columbia University Press, 2006. v. 2. p. 40-41.

16 FRIEDLAND, N.; MERARI, A. The psychological impact of terrorism: a double-edged sword. *Polit Psychol*, v. 6, p. 591–604, 1985. p. 591-604.

17 BRAITHWAITE, A. The logic of public fear in terrorism and counter-terrorism. *Journal of Police and Criminal Psychology*, v. 28, p. 95-101, 2013. DOI 10.1007/s11896-013-9126-x.

18 LONG, E. *The anatomy of terrorism*. New York: Free Press, 1990. p. 5.

19 Although we believe that threats of terrorist violence also have an effect upon populations and countries not directly affected, we can not say that the effects are the same of actual attacks, and assessing the difference would be rather complex for this paper and its limited length, aside from diverting slightly from the chosen focus.

man rights and actual prevention of terrorist attacks.

For this study, terrorist attacks of violence will be considered the independent variable, whilst the dependent variable will be evaluated through the possible existence of changes in the counter-terrorism legislation regarding their respect for human rights standards. The expected relationship between the variables, the causal mechanism, would be the fear that terrorist attacks may generate in a country's population and its consequent support for the adoption of the precautionary principle in legal measures as a means of protection.

The scope conditions of this theory are fully democratic countries that suffered international terrorist attacks. Thus, the relevant population for this research are countries that experience both at the same time. This study assumes that in fully democratic countries the citizens' aspirations have a saying into the policies and legal measures adopted because of the its free election of representatives. These countries also limited our choice once we assume that democracies are more committed with upholding human rights in their territory. The occurrence of international terrorist attacks is also a limitation, excluding countries that suffer from national terrorism, once we assume that these phenomena have rather different aims and impact nationwide. National terrorism relates to internal grievances and local disputes that usually divide its citizens between supporters and non-supporters, which is rather different from Al Qaeda's jihadist fight with random victims, for example.

The precautionary principle, according to Hahn and Sunstein[20], is a mindset directed to the avoidance of risk. It is a risk averse approach to complex and possibly harming situations, resumed by the old saying "better safe than sorry". The authors argue that this mindset can be harmful for a couple of reasons, one of them is exemplified in a declaration given in a meeting of environmentalists in 1998: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically"[21]. The statement presents that, guided by the precautionary principle, scientific uncertainty of the relationship between a threat and its possible harms is not a reason not to take or to postpone preventive measures, even if these actions could greatly affect society. In an attempt to be safer at any costs, these measures should be taken before the actual understanding of the causality chain, which the authors present as possibly leaving the real risks inadvertent and the question "how safe is safe enough?" open for unlimited measures. Their view is that we cannot afford to live in a risk-free environment because preventative measures may as well create other risks or be unfeasible, as would be banning air travel to eliminate a possible source of hijackings.

Although, in its origins, the precautionary principle was directed to environmental law and regulation, becoming an established principle by instruments like the Rio Declaration on Environment and Development 1992[22], according to Lennon[23], "precautionary measures in counter-terrorism are not new", what is indeed new is the articulation of these measures as precautionary. Through the lens of Stern and Wiener[24], applicating the precautionary principle in countering terrorism is not unreasonable, given the potential for harm resulted from a terrorist attack and the uncertainty of threat's materialization. They argue that counter-terrorism "frequently operates on the basis of incomplete, even sketchy, evidence or hints of planning by secretive, shadowy groups whose true intentions, capacities,

20 HAHN, R. W.; SUNSTAIN, C. R. The precautionary principle as a basis for decision making. *The Economists' Voice,* v. 2, n. 2, article 8, 2005.

21 HAHN, R. W.; SUNSTAIN, C. R. The precautionary principle as a basis for decision making. *The Economists' Voice,* v. 2, n. 2, article 8, 2005. p. 1.

22 The Principle 15 of the Rio Declaration on Environment and Development 1992 has the following terms: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Retrieved from: <http://www.unesco.org/education/pdf/RIO_E.PDF.>. This principle has already been used by the Brazilian Supreme Court in order to justify the national policy regarding the import of used tyres. The application is somewhat erroneous, given that there is little scientific uncertainty over the toxic residues from tyres and the difficulty of safely discarding them. Nonetheless, it is an interesting decision to see how the principle is being applied worldwide. *See more at* BORGES, D. D. O princípio do desenvolvimento sustentável no direito internacional público. In: MANIGLIA, E. (Org.). *50 anos do Estatuto da Terra:* 25 anos de Direito Agrário na UNESP. São Paulo: Cultura Acadêmica, 2014. p. 179-196.

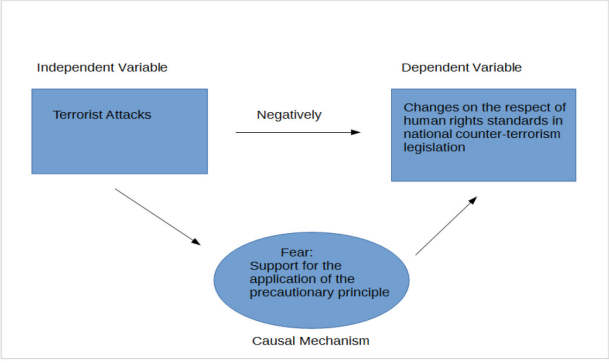
23 LENNON, G. Precautionary tales: suspicionless counter-terrorism stop and search. *Criminology & Criminal Justice,* v. 15, n. 1, p. 44-62, 2013. p. 45-46. Available on: <https://doi.org/10.1177/1748895813509637.>.

24 STERN, J.; WIENER, J. Precaution against terrorism. *Journal of Risk Research,* v. 9, n. 4, p. 393-447, 2006. p. 397-398. Available on: <https://www.belfercenter.org/sites/default/files/legacy/files/Precaution%20Against%20Terrorism.pdf>.

members, locations and weaponry are unknown"[25].

Nevertheless, there is a profound difference between the precautionary measures adopted for environment regulation, mainly financial burdens over businesses and government, whereas on counter-terrorism regulation, the potential impacts are upon human rights, impacting people directly. The precautionary measures to counter terrorist attacks involve a temporal shift in the focus of traditional criminal law, changing from a "post-crime" to a "pre-crime" approach. The "pre-crime" approach means that instead of investigating, trying and punishing individuals prompt by the occurrence of crimes, it will be possible to take coercive actions against people "who are believed will commit an offence in the future but have not done so yet", exactly in the opposite direction that criminal justice traditionally runs[26], presenting the potential dangers of this method on the protection of human rights.

Therefore, to further illustrate our proposed theory, there follows an arrow diagram aiming to provide a visual comprehension:



Our hypotheses, therefore, reflect the pursue to understand the causal mechanism between terrorist attacks and counter-terrorism measures less protective of human rights, and we ought to do it through a process-tracing analysis, which means going step by step through the aspects that, if correct, will unveil how an intense sense of fear, risen because of acts of terrorism, affected the following counter-terrorism legislation.

Thus, the hypotheses that will be analyzed in this study are:

Hypothesis 1: *if terrorist attacks lead to an intense sensation of fear, there should be evidence of greater fear among people after a given attack.*

Hypothesis 2: *if fear leads to support for the application of the precautionary principle, there should be evidence of this support among citizens' public opinion.*

Hypothesis 3: *if the precautionary principle leads to counter-terrorism laws that are less protective of human rights standards, there should be evidence of this type of change in counter-terrorism legislation.*

3. Research Design

This research will be conducted upon one single case, the United States (hereafter US), before and after 9/11. The decision to conduct the study on the US response to these specific terrorist attacks involves the country's prominent influence on international politics and is based on scholars understanding that countries which are more likely to be politically pressured by western countries, or that maintain close relations with them, often lead to the adoption of more repressive policies[27]. Shor et al. corroborates this with their research results that show support for the claims in which governments that keep relevant political and economic relations with the US and are dependent of its aid, this "tend to have deleterious effects in terms of countries' respect for human rights" [28]. Thus, analyzing any other case would possibly be a country that was influenced by US anyhow, being hard to isolate such a variable. Also, analyzing a country that does not have close relations with US would, possibly lead to a non-democratic country, which is also a control variable that we deem of significant importan-

25 STERN, J.; WIENER, J. Precaution against terrorism. *Journal of Risk Research,* v. 9, n. 4, p. 393-447, 2006. p. 397-398. Available on: <https://www.belfercenter.org/sites/default/files/legacy/files/Precaution%20Against%20Terrorism.pdf>.

26 LENNON, G. Precautionary tales: suspicionless counter-terrorism stop and search. *Criminology & Criminal Justice,* v. 15, n. 1, p. 44-62, 2013. p. 45-46. Available on: <https://doi.org/10.1177/1748895813509637.>.

27 *See generally* CHOMSKY, N. *The culture of terrorism*. Boston: South End Press, 1988.; CHOMSKY, N. International terrorism: image and reality. In: GEORGE, A. (Ed.). *Western state terrorism*. New York: Routledge, 1991. p. 12-38.; GEORGE, A. Introduction. In: GEORGE, A. (Ed.). *Western state terrorism*. New York: Routledge, 1991. p. 1–11.; GILL, L. *The school of the Americas:* military training and political violence in the Americas. Durham: Duke University Press, 2004.; LUSTICK, I. S. *Trapped in the War on Terror*. Philadelphia: University of Pennsylvania Press, 2006.; SIKKINK, K. *Mixed signals:* U.S. human rights policy and Latin America. Ithaca: Cornell University Press, 2004.

28 SHOR, et al. Terrorism and state repression of human rights: a cross-national time-series analysis. *International Journal of Comparative Sociology,* v. 55, n. 4, p. 305, 2014.

ce, once we assume that a non-democratic country is less likely to maintain high human rights standards.

The choice was also made upon the fact that although US is a signatory state of, surprisingly, quite a few human rights treaties until May of 2016[29], its Constitutions is one of the firsts concerned with the defense of human rights. The Bill of Rights annexed to the Constitution a couple of years later, 1791, included several protections to the person accused of crime as "speedy and public trial, information as to the nature and cause of accusation", also "prohibition of the suspension of the writ of *habeas corpus* and prohibition of *ex post facto* laws"[30], some of the rights that will be investigated in this study and that US has protected almost from its origin. One could say that these principles are deeply rooted in the country's foundations.

Regarding the choice of terrorist attack, we chose September 11 for several reasons. First, although US had previously experienced terrorist attacks, they had never caused this much casualties, almost 3.000 deaths[31]. Second, because the attacks, according to a poll conducted by Zogby International in 2007 showed that, even after 6 years of the attacks, 81% of those interviewed either "strongly agreed" or "somewhat agreed" that the events of 9/11 permanently altered how Americans "view the world"[32]. Third, because we agree with what Howie argues, that other terrorist attacks that followed 9/11, like 7/7 of London, may seem less important not only because there were fewer casualties and destruction, but also because, as the author suggests, 9/11 had "real-time, powerful and terrifying images", allowing people from different space and time situations to witness what was occurring[33]. One of the authors, only a kid at the time, remembers watching on the news, over and over, the crash of the airplanes and the fall of the twin towers, to the point that she believes it is rather unlikely that, whenever thinking about terrorist attacks, 9/11 would not appear as the first image. Although other terrorist acts of violence also produce terrifying images and consequences, Howie argues that they are all "part of a post9/11 theatre of terrorism", and perhaps, in most parts of the world, evoke the memories of 9/11[34]. To sum up, we assume that the events of September 11 changed the way people in general, but specially US citizens, perceive terrorism.

Regarding the method of analysis more suited to conduct this study, initially, we imagined that doing an across-case analysis using structured focused comparison would be rather interesting, because we could take a country that had terrorist attacks and a country that did not have and compare them, however, when accessing terrorist attacks databases, we could not find a country that we had linguistic knowledge to assess its legislation and had no historic of terrorist attacks. Of course, the consideration of an attack as terrorist depends on the definition used by the dataset, and comparing theirs with ours, perhaps we would not have considered them as such. However, even if we do not consider events like bombings with no claimed authorship, or manifestations that seem more like genuine struggles than like terrorist attacks, it does not change that fact that national authorities and the media could have perceived them as so, possibly influencing the country's population and legislative decisions anyways. Therefore, given this difficulty to find cases where there was no occurrence of terrorist attacks, we decided to do a within-case analysis, through the evaluation of a country's counter-terrorism legislation before and after a terrorist attack.

The choice of method of analysis was also guided by our ambition to understand and possibly explain the full process through which the causal mechanism develops itself in this particular case. We do not aim only to explain how terrorist acts of violence possibly affect counter-terrorism legislation, but also to break down the steps between one and another, if, in fact, they are connected. As explained by Bennett and Checkel, the process-tracing method aims "the examination of the intermediate steps in a process to make inferences about hypotheses on how that process took place and

29 UNHR. Status of Ratification Interactive Dashboard. *Ratification of 18 International Human Rights Treaties*. United Nations Human Rights: Office of the High Commissioner. Available on: <http://indicators.ohchr.org/>.

30 DOWLING, N. T. Protection of human rights under the United States Constitution. *The Annals of the American Academy of Political and Social Science*, v. 243, p. 96-100, 1946. p. 96-97. Available on: <http://www.jstor.org/stable/1025061>.

31 STATISTIC BRAIN. 9/11 death statistics. *Statistic Brain*, nov. 2015. Available on: <https://www.statisticbrain.com/911-death-statistics/>.

32 SHANTY, F. Impact of 9/11 on U.S. public opinion. In: GOLDMAN, J. (Ed.). *The War on Terror Encyclopedia:* from the rise of Al Qaeda to 9/11 and beyond. ABC-CLIO; LLC, 2014. p. 180.

33 HOWIE, L. *Terrorism, the worker and the city*. Farnham: Gower, 2012. p. 5.

34 HOWIE, L. *Terrorism, the worker and the city*. Farnham: Gower, 2012. p. 5.

whether and how it generated the outcome of interest"; it uses the available sources "to see whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequence and values of the intervening variables in that case"[35].

Hence, we have broken down the possible connection between the independent and dependent variables in three hypotheses, so that only if all of them hold the proposed theory would also holds. The first hypothesis is about the terrorist acts of violence and its consequential fear. We intend to infer this causation through public opinion polls conducted in US after the attacks of September 11 that assess the general levels of fear. The second hypothesis reasons upon the US citizens support for the application of the precautionary principle in the country's policy, and we believe it is possible to assess this also by public opinion polls regarding some indicators like governmental access to private information, due process, preventive detention, torture and coercive questioning, if possible, prior to the actual moment of taking any measures. Through the third hypothesis, we expect that the application of the precautionary principle, assuming that the second hypothesis was confirmed, will result in changes on counter-terrorism legislation that, previously, did not but, after the terrorist violence, includes measures that violate human rights standards that US was legally committed to protect.

Regarding the operationalization of the variables involved in this research, with the aim of proving our theory, it will be done as follows. The independent variable is the "occurrence of terrorist attacks", and, for the specific case chosen to this study the measure to this variable will be a yes or no question, also analyzing why, according to the definition of terrorism adopted in this research, the chosen act of violence is considered as a terrorist attack. The dependent variable is the "possible change in counter-terrorism legislation regarding its respect of human rights standards", and it will be assessed by the analysis of counter-terrorism legislation from before and after the occurrence of the chosen terrorist attack, specifically the "Anti-terrorism and Effective Death Penalty Act of 1996", and the "USA Patriot Act of 2001". This legislation will be compared through a set of indicators that follows: access to private information; due process; preventive detention; torture and coercive questioning. We expect these factors to be the most relevant ones to suffer alterations because we assume that US society, as the country with the highest incarcerated population of the world[36], almost twice the numbers of China, the second in the ranking, to be more prone to try to solve and deal with the new threats increasing detentions and other measures that surround it. The intervening variable, also named as causal mechanism in this study, is the population's fear caused by the terrorist attack. We believe that this fear is expressed as support for the application of the precautionary principle on the measures that the executive and legislative propose and adopt. Therefore, this variable will be operationalized through the observance of public opinion polls regarding the adoption of repressive measures including the indicators previously mentioned.

One may wonder, "why legislation should matter?", and we should say that the choice to analyze the possible effects of terrorist acts of violence on legislation was based in the presumption that democratic countries take their legislation seriously. In addition, because researchers like Fitzpatrick[37] have found that legislation, in general made to assist countries in the fight against terrorism and secure the safety of their citizens, came at the expense of the respect of human rights standards even in liberal democracies, taken as a zero-sum game. One may also wonder, "why the 'Anti-terrorism and Effective Death Penalty Act of 1996' and the 'Patriot Act of 2001'?", and, as previously mentioned, the chosen terrorist attack is 9/11, so, the legislation chosen from before these attacks is the 1996 Act, which the proper name raises some questions upon its human rights standards, however, as debatable as death penalty is, it is a measure federally not prohibited and adopted in several states in US, existent before the 9/11 attacks. Therefore, this Act was chosen because it included the latest "state of the art" before the events. The legislation to be compared is the Patriot Act, which became public law on the 26th of October of 2001, exactly forty-six days after the attacks. We believe that these were the in-between days of most terror and fear on most of

35 BENNETT, A.; CHECKEL, J. T. *Process tracing:* from metaphor to analytic tool. Cambridge: Cambridge University Press, 2015. p. 6.

36 WPB. Highest to lowest: prison population total. *World Prison Brief*. Institute for Criminal Policy Research. Available on: <http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All>.

37 FITZPATRICK, J. Speaking law to power: the war against terrorism and human rights. *European Journal of International Law,* v. 14, n. 2, apr. 2003.

the world and, specially, on US citizens, which we expect to have greatly influenced the content of this law.

An important aspect of the process-tracing method involves casting the net widely for alternative explanations, which means to "assess the process-tracing evidence" of a wide range of proposed alternative explanations for my specific case. Therefore, "failing to consider a potentially viable explanation that readily occurs to the readers and critics of a case study can make the process tracing unconvincing"[38].

This study will consider and apply the process tracing method also on the following two alternative explanations brought up by Shor et al.[39] and Roger Douglas[40]. The theory proposed by Shor et al. is that "states choose to react to terrorism with repressive measures because they believe this is the best way to stop or at least reduce these attacks, but also in order to win the support of their local constituency and guard against oppositional forces"[41]. What their study expect is that unpopular and unstable governments will react more repressively to terrorist attacks. In addition, their approach expects that domestic pressure created by involvement in wars, international disputes or political pressure may, as well, increase repression. Therefore, "countries involved in violent disputes (whether international or domestic) and those suffering from political instability and unrest will be more likely to adopt repressive policies"[42]. We do believe that these factors may have significant impact to the specific case of US, therefore we intend to assess their possible influence through a brief presentation of the US situation just before the terrorist attacks of 9/11, and the public support for George W. Bush through public opinion polls.

In turn, the alternative explanation proposed by Roger Douglas suggests, as previously mentioned, that situations like the 9/11 terrorist attacks present itself as opportunities for the executive to take measures and to be seen as "doing something" for the protection of the population. Furthermore, that these moments can also be perceived by the executive and legislative as opportunistic situations to introduce measures that would otherwise be politically unacceptable[43]. Therefore, we intend to process-trace the Patriot Act creation and adoption in order to evaluate its possible "opportunism".

As presented so far, the empirical material that will be used involves a series of different sources, and there is the need for some source criticism beforehand. Regarding the measurement of the independent variable, the occurrence of terrorist attacks, September 11, although surrounded by several conspiracy theories[44], is widely recognized by the international and national communities as a terrorist act of violence, hence that is what we will adopt. However, we would just like to note that if any of these theories were, in fact, right, it would change completely the understandings on terrorism and what measures should be taken. Considering the operationalization of the dependent variable, it involves the operationalization of the whole causal mechanism, traced through the three proposed hypotheses. The empirical material to be collected to the first two hypotheses, measurement of levels of fear on the population right after 9/11 and of population's support for the application of the precautionary principle consist in public opinion polls. Polls of public opinion are complex sources, once it is not always clear what the interests behind the involved companies are, also, the wording of the questions and possible introduced bias can greatly affect the results, following the inclinations of the survey. Therefore, what we intend to do is to triangulate different sources of polls that have, as much as possible, the same thematic approach to try to lessen the possible impacts that these shortcomings might have on this research. In turn, the third hypothesis does not have these problems once it is a primary source, meaning that we can analyze it without the interference of the interpretation of anyone else. However, we also must note that, in spite of our efforts to remain as impartial as possible,

38 BENNETT, A.; CHECKEL, J. T. *Process tracing:* from metaphor to analytic tool. Cambridge: Cambridge University Press, 2015. p. 23.

39 SHOR, et al. Terrorism and state repression of human rights: a cross-national time-series analysis. *International Journal of Comparative Sociology,* v. 55, n. 4, 2014.

40 DOUGLAS, R. *Law, liberty, and the pursuit of terrorism*. Ann Arbor: The University of Michigan Press, 2014.

41 SHOR, et al. Terrorism and state repression of human rights: a cross-national time-series analysis. *International Journal of Comparative Sociology,* v. 55, n. 4, 2014. p. 298.

42 SHOR, et al. Terrorism and state repression of human rights: a cross-national time-series analysis. *International Journal of Comparative Sociology,* v. 55, n. 4, 2014. p. 298.

43 DOUGLAS, R. *Law, liberty, and the pursuit of terrorism*. Ann Arbor: The University of Michigan Press, 2014. p. 1-2.

44 JAMES, B. 9/11 Conspiracy theories: inside the lonely lives of truthers, still looking for their big break. *International Business Times,* sep. 2015. Available on: <http://www.ibtimes.com/911-conspiracy-theories-inside-lonely-lives-truthers-still-looking-their-big-break-2091474>.

our interpretations of the possible changes on counter-terror legislation will be affected by our background knowledge and understandings on these subjects. That is why we intend to be as clear and transparent as possible on the assumptions involved in this study so that you, our reader, can critically assess the results obtained and how they might have been affected by us.

Just before continuing to the section of this research where we will present the results found empirically, we wish to further illustrate the results that were expected beforehand, when we developed the theory, through the following tables for each hypothesis:

Hypothesis 1: if terrorist attacks lead to an intense sensation of fear, there should be evidence of greater fear among people after a given attack.

Terrorist attack	Levels of fear
9/11	High levels of sensation of fear

Hypothesis 2: if fear leads to support for the application of the precautionary principle, there should be evidence of this support among citizens' public opinion.

Indicators	Access to private information	Due Process	Preventive Detention	Torture and Coercive Questioning
Support/ Non-support	More than 1/3 of support	More than 1/3 of support	More than 1/3 of support	More than 1/3 of support

Hypothesis 3: if the precautionary principle leads to counter-terrorism laws that are less protective of human rights standards, there should be evidence of this type of change in counter-terrorism legislation.

Legislation/Indicators	Access to private information	Due Process	Preventive Detention	Torture and Coercive Questioning
Before 9/11 Act of 1996	Not allowed	Present	Not present	Not present
After 9/11 Act of 2001	Allowed	Not present	Present	Present

4. Results and Analysis

This section will present, primarily, the results found for the proposed theory, and will follow the given sequence: independent variable, dependent variable divided in the results found for each of the three proposed hypotheses. In the sequence, the results found on the alternative explanations will be presented. The analysis of the results and the interpretation that this study adopts will follow the same aforementioned structure, once it will be given connected to each of the results presented.

The empirical material to analyze the independent variable was collected from three different sources. First, the RAND Database of Worldwide Terrorism Incidents, a compilation of data from 1968 to 2009 that define terrorism "by the nature of the act, not by the identity of the perpetrators or the nature of the cause", adopting the following criteria: "violence or the threat of violence; calculated to create fear and alarm; intended to coerce certain actions; motive must include a political objective; generally directed against civilian targets; can be a group or an individual"[45]. This database considers the events of 9/11 as terrorist attacks and divide them into three distinct incidents: in Washington, DC[46]; Shanksville[47]; New York City[48]; that together sum up to over 3.000 deaths.

Second, the Global Terrorism Database[49], an open-source database that includes information on terrorist events from 1970 to 2014. Their definition of terrorism is "the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation", with the following criteria: "the violent act was aimed at attaining a political, economic, religious, or social goal; the violent act included evidence of an

45 RAND. Database Scope. *Database of Worldwide Terrorism Incidents (RDWTI)*. Available on: <https://www.rand.org/nsrd/projects/terrorism-incidents/about/definitions.html>.

46 RAND. Terrorism Incidents Database Search. Incident Detail: Sep 11, 2001. Washington, DC, United States. Al Qaeda. *Database of Worldwide Terrorism Incidents (RDWTI)*. Available on: <http://smapp.rand.org/rwtid/incident_detail.php?id=7759>.

47 RAND. Terrorism Incidents Database Search. Incident Detail: Sep 11, 2001. Shanksville, United States. Al Qaeda. *Database of Worldwide Terrorism Incidents (RDWTI)*. Available on: <http://smapp.rand.org/rwtid/incident_detail.php?id=7758>.

48 RAND. Terrorism Incidents Database Search. Incident Detail: Sep 11, 2001. New York City, United States. Al Qaeda. *Database of Worldwide Terrorism Incidents (RDWTI)*. Available on: <http://smapp.rand.org/rwtid/incident_detail.php?id=7757>.

49 GTD. Using GTD. Data collection methodology: data collection and the definition of terrorism. *Global Terrorism Database*. Available on: <https://www.start.umd.edu/gtd/using-gtd/>.

intention to coerce, intimidate, or convey some other message to a larger audience (or audiences) other than the immediate victims; and the violent act was outside the precepts of International Humanitarian Law"[50]. This database also considers the attacks of 9/11 as terrorist acts of violence and categorizes them in four events: the crash in the North Tower of the World Trade Center[51]; the crash in the South Tower of the World Trade Center[52]; the Pentagon[53]; and the plane that crash-landed near Shanksville but had the US Congress as target[54].

Third, the United States Department of State uses the definition provided by the "Title 22 of the United States Code, Section 2656f(d)", in which "the term terrorism means premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience"[55]. The State Department produces annual reports on terrorism since the year of 2000 called "Patterns of Global Terrorism" until 2004, when it became "Country Reports on Terrorism". A brief evaluation of the report produced for the year of 2001 shows that 9/11 is defined as the "worst international terrorist attack ever"[56].

Therefore, to further illustrate the results obtained analyzing the independent variable there is the following table:

Sources	Results
RAND	Terrorist Attacks
GTD	Terrorist Attacks
US State Department	Terrorist Attacks

We believe there is no need to further discuss the independent variable, except to stress that the events of 9/11 are well accepted as terrorist attacks, although, as previously mentioned, not unquestionably. We would like just to make a note before the next results to explain the choice of US State Department as a source. This choice was just to make clear that the US government as a whole also considered the 9/11 events as terrorist attacks, which is important because it shows its interpretation of these incidents and how its institutions enunciated them to its citizens and world. Through these results, this study aims to have provided a solid ground for the subsequent presentation of its actual outcomes.

In the sequence, the results found for the independent variable will be presented divided by the proposed hypotheses.

Hypothesis 1: if terrorist attacks lead to an intense sensation of fear, there should be evidence of greater fear among people after a given attack.

Question	Date	Result	Source
How worried are you that you or someone in your family will become a victim of terrorism?	2000 April 7-9	Very/somewhat worried: 24%	Gallup[1]
How worried are you that you or someone in your family will become a victim of terrorism?	2001 September 11	Very/somewhat worried: 58%	Gallup[2]
How worried are you that you or someone in your family will become a victim of terrorism?	2001 October 11-14	Very/somewhat worried: 51%	Gallup[3]

50 GTD. Using GTD. Data collection methodology: data collection and the definition of terrorism. *Global Terrorism Database*. Available on: <https://www.start.umd.edu/gtd/using-gtd/>.

51 GTD. GTD ID: 200109110004. When: 2001-09-11. Country: United States. *Global Terrorism Database*. Available on: <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200109110004>.

52 GTD. GTD ID: 200109110005. When: 2001-09-11. Country: United States. *Global Terrorism Database*. Available on: <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200109110005>.

53 GTD. GTD ID: 200109110006. When: 2001-09-11. Country: United States. *Global Terrorism Database*. Available on: <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200109110006>.

54 GTD. GTD ID: 200109110007. When: 2001-09-11. Country: United States. *Global Terrorism Database*. Available on: <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200109110007>.

55 UNITED STATES OF AMERICA. *Patterns of Global Terrorism 2003*. United States Department of State, 2004. p. 12. Available on: <https://www.state.gov/documents/organization/31932.pdf>.

56 UNITED STATES OF AMERICA. *Patterns of Global Terrorism 2001*. United States Department of State, 2002. p. 1. Available on: <https://www.state.gov/documents/organization/10319.pdf>.

How worried are you that another terrorist attack will happen soon?	2001 October 1-3	Very/somewhat worried: 73%	Pew Research Center[4]

1 The results from this and the following Gallup public opinion polls cited in this table can be found at the Gallup website under the heading "Terrorism in the United States". Available at: <http://www.gallup.com/poll/4909/terrorism-united-states.aspx.>.

2 GALLUP. Terrorism in the United States. *Gallup*. Available on: <http://www.gallup.com/poll/4909/terrorism-united-states.aspx>.

3 GALLUP. Terrorism in the United States. *Gallup*. Available on: <http://www.gallup.com/poll/4909/terrorism-united-states.aspx>.

4 The results from this Pew Research Center public opinion poll can be found at the Gallup website under the heading "Americans Open to Dissenting Views on the War on Terrorism". Available at: <http://www.people-press.org/2001/10/04/americans-open-to-dissenting-views-on-the-war-on-terrorism/>.

All these polls where conducted with Americans living in US, and the results were collected and presented here from different dates, initiating before the attacks, on the exact day, and on the period after them, to give a sense of how the levels of fear evolved. It shows the usual levels of fear previous to 9/11 and how people reported to be affected by this terrorist incident. What can be inferred from these empirical materials is that the usual levels of fear from terrorism were not as significant as after the attacks, and that the high levels of fear perpetuated through the time. Although the numbers from Pew Research Center[57] are significantly higher from Gallup[58], we believe that both numbers show the existence of great distress among American citizens and, therefore, corroborate and support my proposed hypothesis that the occurrence of terrorist attacks would influence the levels of fear of a given population, increasing its perceptions of danger.

Hypothesis 2: if fear leads to support for the application of the precautionary principle, there should be evidence of this support among citizens' public opinion.

The empirical data collected for this hypothesis will be limited by the indicators that were previously mentioned, access to private information, due process, preventive detention, and torture, once my theory proposes that public support for the application of the precautionary principle in these areas will lead to its actual enactment, which will be further discussed on Hypothesis 3.

Indicator/Question	Date	Result	Source
Assassinate known terrorists[5]	2001 October 5-6	Willing: 77%	Gallup[6]
Assassinate leaders of countries that harbor terrorists[7]	2001 October 5-6	Willing: 52%	Gallup[8]
Torture known terrorists if they know details about future terrorist attacks in the U.S.[9]	2001 October 5-6	Willing: 45%	Gallup[10]
Sacrifice Civil Liberties to Curb Terrorism.	2001 September 13-17	Yes: 55%	Pew Research Center
National ID cards	2001 September 13-17	Favor: 70%	Pew Research Center
CIA assassinations	2001 September 13-17	Favor: 67%	Pew Research Center
Monitor credit cards	2001 September 13-17	Favor: 40%	Pew Research Center
Internment camps	2001 September 13-17	Favor: 29%	Pew Research Center
Monitor phone/email	2001 September 13-17	Favor: 26%	Pew Research Center

5 The question asked for this indicator was "Would you be willing -- or not willing -- to have the U.S. government do each of the following, if the government thought it were necessary to combat terrorism? How about -- [RANDOM ORDER]?".

6 GALLUP. War on terrorism. *Gallup*. Available on: <http://www.gallup.com/poll/5257/War-terrorism.aspx?g_source=terrorism%202001&g_medium=search&g_campaign=tiles>.

7 The question asked for this indicator was "Would you be willing -- or not willing -- to have the U.S. government do each of the following, if the government thought it were necessary to combat terrorism? How about -- [RANDOM ORDER]?".

8 GALLUP. War on terrorism. *Gallup*. Available on: <http://www.gallup.com/poll/5257/War-terrorism.aspx?g_source=terrorism%202001&g_medium=search&g_campaign=tiles>.

9 The question asked for this indicator was "Would you be willing -- or not willing -- to have the U.S. government do each of the following, if the government thought it were necessary to combat terrorism? How about -- [RANDOM ORDER]?".

10 GALLUP. War on terrorism. *Gallup*. Available on: <http://www.gallup.com/poll/5257/War-terrorism.aspx?g_source=terrorism%202001&g_medium=search&g_campaign=tiles>.

57 PEW RESEARCH CENTER. *Americans open to dissenting views on the War on Terrorism*. Pew Research Center. October 4, 2001. Available on: <http://www.people-press.org/2001/10/04/americans-open-to-dissenting-views-on-the-war-on-terrorism/>.

58 GALLUP. Terrorism in the United States. *Gallup*. Available on: <http://www.gallup.com/poll/4909/terrorism-united-states.aspx>.

These are the polls we could find from before the enactment of the Patriot Act, this decision upon the collection of data relies on a common understanding that laws may alter people's perception of what is right or wrong, therefore, we believe that what appears on them beforehand will be reflected on the content of the Patriot Act. These polls reveal some intriguing data, once both the Gallup[59] and the Pew Research Center[60] polls showed strong support for the assassination of terrorists. It does not say "death penalty if convicted through a due process, with proper chances of defense", but assassination directly. It is our understanding that this reflects what Hahn and Sunstein[61] question regarding the pursuit of a "risk free" environment, "how safe is safe enough?", and it appears that Americans were willing to support measures that would not follow the due process of law, at least regarding suspected terrorists, given that these individuals are mere suspects until convicted or absolved. We do not expect to find legal measures that make these types of assassinations legal on the Patriot Act, once this would attract great international and national attention, however, we do expect it to reflect as relaxation of the due process, providing less opportunity of defense to individuals accused of terrorism.

Regarding torture, its support is not as strong as for assassinations, nonetheless, 45% of the questioned population would be willing that the government conducted torture procedures on terrorists that had information on terrorist attacks. If one can claim that these polls are indeed generalizable, then, we believe that 45% of US population is significant enough to endorse this type of measure. Therefore, we also expect to find relaxation of the methods of interrogation on the Patriot Act.

The access to private information have mixed results according to the polls, once Americans seem to agree that it is necessary to sacrifice civil liberties in order to curb terrorist activity. However, when further inquired about which specific rights could be sacrificed in order to halt terrorism national ID cards were highly supported (70%) and monitoring credit cards also had considerable support (40%), but internment camps for legal immigrants from hostile nations, like the Japanese camps on US during World War II, and monitoring phone/email conversations without legal injunction were strongly opposed, both with less than one-third of population's support. From these results we assume that Americans in general were not so prone to believe that more intrusive regulatory measures would lead to greater safety, and finding this type of legal prescription on the legislation will require further research to explain.

Concluding, we could not find any polls from before the enactment of the Patriot Act about Americans opinion on torture, therefore, without this data we cannot apply our theory to this indicator, regardless of finding it or not on the counter-terrorism legislation.

Hypothesis 3: if the precautionary principle leads to counter-terrorism laws that are less protective of human rights standards, there should be evidence of this type of change in counter-terrorism legislation.

The results found for this hypothesis will be presented as follows. First a table with both the empirical data collected from the "Anti-terrorism and Effective Death Penalty Act of 1996" and the "Patriot Act of 2001" divided by the proposed indicators and their evaluation. In the sequence, the discussion upon the possible implications and interpretations of the empirical results.

Legislation/Indicators	**Access to private information**	**Due Process**	**Preventive Detention**	**Torture and Coercive Questioning**
Before 9/11 **Act of 1996**	Not allowed	Partially Present	Not present	Not present
After 9/11 **Act of 2001**	Partially allowed	Not present	Present	Not present

4.1. Access to private information

In the Act of 1996, the Section 804, Requirement to Preserve Record Evidence, stipulates that "[a] provider

59 GALLUP. War on terrorism. *Gallup*. Available on: <http://www.gallup.com/poll/5257/War-terrorism.aspx?g_source=terrorism%202001&g_medium=search&g_campaign=tiles>.

60 PEW RESEARCH CENTER. *American psyche reeling from terror attacks*. Pew Research Center. September 19, 2001. Available on: <http://www.people-press.org/2001/09/19/other-important-findings-and-analyses-48/>.

61 HAHN, R. W.; SUNSTAIN, C. R. The precautionary principle as a basis for decision making. *The Economists' Voice,* v. 2, n. 2, article 8, 2005.

of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process", continuing indicating that the recorded evidence "shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity"[62]. At first, it might not seem problematic, nevertheless, on a deeper analysis, it does not say that a governmental entity may request the recording of any private conversation, however, it does say that if there is some record evidence, the governmental entity can require its preservation even in the absence of a court order, however, this type of decision, whether to record or to keep the recordings, should only be made by the judiciary.

Nonetheless, on the Section 810 the Attorney General is asked to submit a report to the Congress including "recommendations for the use of electronic devices in conducting surveillance of terrorist or other criminal organizations", and "a summary of instances in which Federal law enforcement authorities may have abused electronic surveillance powers and recommendations, if needed, for constitutional safe-guards relating to the use of such powers"[63]. Although at Section 804 there is a procedural issue, it does not exactly constitute a violation of rights, and the Section 810 is clear that the surveillance should be done according to the law, not indicating anything that could lead to an understanding that this law was enlarging surveillance powers by doing it without juridical authorization.

The "Title II – Enhanced Surveillance Procedures" in the Patriot Act[64] under Section 501 stress that in order to collect evidence to an investigation, the Director of the Federal Bureau of Investigation has to apply for an order that may be granted or not by a United States Magistrate Judge (2001, p. 16). The provisions of the Patriot Act, according to my understanding, preserve the dependence upon judicial approval of collecting evidence through surveillance, however, in the Section 203, it authorizes information obtained in criminal investigations to be shared with intelligence agencies[65], releasing private information to become data of these agencies. The legislation that we discovered to contain the most invasive measures still in practice is the Foreign Intelligence Surveillance Act of 1978 (FISA), through which "the president, through the attorney general, is permitted to authorize surveillance and searches without the need for a court order, but only if there is little likelihood that this will affect a US person"[66]. However, as the FISA legislation is from 1978, several years before the 9/11 terrorist acts of violence, this study's theory cannot be applied to it.

4.2. Due Process

Under the Title IV of the Act of 1996, criminal procedural involves mainly the prosecution of aliens alleged as terrorists, and the removal hearing seems to follow all the necessary legal requirements to give proper opportunity of defense and the Judge has to decide only upon the evidence introduced at this hearing[67]. However, there is a dangerous provision denying the access of classified information to the defense when its disclosure is considered to present a risk to national security, and an alien can be convicted as terrorist and expelled from the country based solely on this type of information, from which the alien cannot properly defend[68]. Therefore, it is my understanding that this breach compromises the due process and its application is dangerously convenient. Hence, we would argue that there is some compromise of the due process in this

62 ANTI-TERRORISM ACT. Anti-terrorism and Effective Death Penalty Act of 1996. *Public Law 104–132*. April 24, 1996. p. 94. Available on: <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf>.

63 ANTI-TERRORISM ACT. Anti-terrorism and Effective Death Penalty Act of 1996. *Public Law 104–132*. April 24, 1996. p. 99-100. Available on: <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf>.

64 PATRIOT ACT. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (*USA PATRIOT ACT*) Act of 2001. p. 7. Available on: <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>.

65 PATRIOT ACT. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (*USA PATRIOT ACT*) Act of 2001. p. 10. Available on: <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>.

66 DOUGLAS, R. *Law, liberty, and the pursuit of terrorism*. Ann Arbor: The University of Michigan Press, 2014. p. 69.

67 ANTI-TERRORISM ACT. Anti-terrorism and Effective Death Penalty Act of 1996. *Public Law 104–132*. April 24, 1996. p. 48-49. Available on: <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf>.

68 ANTI-TERRORISM ACT. Anti-terrorism and Effective Death Penalty Act of 1996. *Public Law 104–132*. April 24, 1996. p. 50. Available on: <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf>.

specific provision, but that, in general, the rest of the procedure is respective of due process rights.

The Patriot Act presents that "a court may admit evidence that is otherwise inadmissible under the Federal Rules of Evidence, if the court determines that the evidence is reliable, and that compliance with the Federal Rules of Evidence may jeopardize the national security interests of the United States"[69], which clearly is a relaxation of the due process, opening the opportunity to use evidence collected illegally, like wiretapping done without court order, or even collected by torturing suspects. Regarding the use of secret evidence, there is no specific provision in the Patriot Act, however, it is known to have been applied also after 9/11[70].

4.3. Preventive Detention

There was no mention of this type of measure in the Act of 1996, not with the terms "preventive detention", "administrative detention", "temporary custody", or any variations from these combinations. The provisions involving detention and custody were solely regarding post-conviction.

In the Patriot Act, however, the Section 412 refers to "Mandatory Detention of Suspected Terrorists", presenting that the Attorney General shall take custody of any alien that is engaged in any activity that endangers the national security of the country[71]. The Attorney General has no more than seven days after the beginning of the detention to charge the individual with a criminal offense otherwise, the alien shall be released[72].

4.4. Torture and Coercive Questioning

On the Act of 1996, there was no mention of the words and expressions "torture", "coercion", "coercive questioning", "coercive interrogation", or as the CIA and the military describe them, "enhanced interrogation techniques"[73], except when referring to crimes, condemning this type of measure, therefore, nothing suggesting its possible use.

The same happened in the Patriot Act, which did not present any procedural measures about interrogation, but condemned practices like torture, including it in the Federal definition of terrorism[74]. Nonetheless, the reality is that torture techniques were used against suspects of terrorism at Guantanamo Bay and Abu Ghraib prisons[75], and the pictures revealed from these situations were a great scandal showing how US was treating its prisoners. Shor et al. actually argue that avoiding new legislation that violate human rights standards might be preferable by some countries, to avoid drawing attention to these measures and invite international criticism[76].

To give a summarizing answer to my research question, according to my empirical results, there was medium support for the sacrifice of civil liberties and the Patriot Act introduced partial changes with the information-sharing between criminal cases and intelligence agencies. Considering the respect of due process, it was a highly attacked right by the polls, given the high support for extrajudicial killings. Due process actually faced a relaxation on its respect, once the Patriot Act allows the use of illegal evidence in court. Preventive detention will not be considered, because we could not access US citizens perception of it before the enactment of the Patriot Act, nonetheless, we did not find any mention of it in the Act of 1996, while on the Patriot Act it

69 PATRIOT ACT. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (*USA PATRIOT ACT*) Act of 2001. p. 38. Available on: <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>.

70 SECRET evidence in the War on Terror. *Harvard Law Review,* v. 118, n. 6, p. 1962-1984, 2005. Available on: <http://www.jstor.org.ezproxy.its.uu.se/stable/4093289>.

71 PATRIOT ACT. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (*USA PATRIOT ACT*) Act of 2001. p. 80. Available on: <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>.

72 PATRIOT ACT. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (*USA PATRIOT ACT*) Act of 2001. p. 80. Available on: <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>.

73 GRONKE, et al. U.S. public opinion on torture: 2001–2009. *Symposium:* Terrorism and Human Rights, july 2010. DOI:10.1017/S1049096510000697. p. 438.

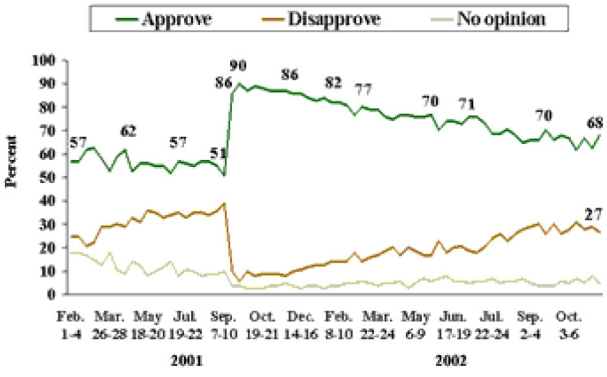
74 PATRIOT ACT. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (*USA PATRIOT ACT*) Act of 2001. p. 107-108. Available on: <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>.

75 WHITE, J. Abu Ghraib tactics were first used at Guantanamo. *The Washington Post*, july 14, 2005. Available on: <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/13/AR2005071302380.html>.

76 SHOR, et al. Terrorism and state repression of human rights: a cross-national time-series analysis. *International Journal of Comparative Sociology,* v. 55, n. 4, 2014. p. 13.

became a procedure. Torture, which also had medium support among US citizens, was not present in neither of the legislation.

Regarding the alternative explanations, Shor et al. defended that countries experiencing internal distress, with unstable and unpopular governments would be more likely to adopt repressive measures, however, the ratings from before the terrorist attacks show a strong support for George W. Bush before 9/11, hence, we cannot consider this a viable explanation for the measures adopted.



Source: Gallup[77]

One should explain that to properly process trace Roger Douglas alternative explanation it would be necessary a deeper previous knowledge on how the US political scenario develops and more time to analyze the political exchanges during the process of enactment of the counter-terrorism legislation that followed 9/11. However, what we could assess is that the content of the Patriot Act precedes the terrorist attacks, in other words, it was prepared before them. There was already a pursuit of more repressive measures among political representatives, and the terrible incidents of September 11 provided a rare opportunity to enlarge the government powers and reduce the civil liberties of American citizens[78].

Recapitulating the proposed theory for this study, it argues that terrorist attacks create an intense sense of fear in the population that, in turn, responds supporting repressive measures to counter terrorism. This study found that terrorist attacks really lead to an intense perception of danger and a consequent sensation of fear. The research also found that this fear led to a support of some of the proposed indicators, specifically, relaxation of due process, sacrifice of civil liberties in exchange of security, and torture, while there was no available data on the support or not for preventive detention. Finally, when accessing the legislation, there was clear further relaxation of due process rights, especially with the acceptance of illegal evidence, and this is the only indicator that this research can actually explain the changes, because it is the only one that follows the causation proposed by the theory. Therefore, our theory holds only for this indicator. The alternative theory from Douglas[79] is not an excluding theory, once the opportunism of the Patriot Act is quite clear, especially with the information that its project preceded 9/11. Also, because it aims to explain the process of counter-terrorism legislation promulgation through the perspective of decision-makers, whilst we aimed to explain the process through the perspective of the country's population, because in a democratic country that upholds its sense of legality, legitimacy and respect of the law, without the support of its citizens, such changes would hardly be accepted.

This study, even though it was not found strong support for our theory, shows briefly that the fear populations experience because of acts of violence, especially terrorist attacks, does no good. The high support for the assassination of suspects of terrorism really surprised us. That is why we believe that campaigns like #wearenotafraid, done in Indonesia after the Jackarta attacks should be propagated, helping to reduce the sensation of insecurity among citizens and to maintain them rational enough to calculate the costs and benefits from the measures proposed and not accept undue restrictions[80].

77 This graphic was retrieved from Gallup, Bush Approval at 68%. by David W. Moore. November 15, 2002. Available at: <http://www.gallup.com/poll/7222/bush-approval-68.aspx>.

78 CONN, T. L. Use of secret evidence by government lawyers: balancing defendants' rights with national security concerns. *Cleveland State Law Review*, 2004. p. 581. Available on: <http://engaged-scholarship.csuohio.edu/cgi/viewcontent.cgi?article=1297&context=clevstlrev>.

79 DOUGLAS, R. *Law, liberty, and the pursuit of terrorism*. Ann Arbor: The University of Michigan Press, 2014.

80 MOGUL, P. Jakarta attacks: indonesians share 'we are not afraid' #KamiTidakTakut message on Twitter. *International Business Times,* jan. 2016. Available on: <https://www.ibtimes.co.uk/jakarta-attacks-indonesians-share-we-are-not-afraid-kamitidaktakut-message-twitter-1537913>.

5. Summary and conclusion

Firstly, we deem worth reminding the challenges to assess the legal terminology from these legislation, even though we are familiar with legal terminology from Brazil, it soon became clear that the legal terms were quite different, and the dictionaries were invaluable companions. Nonetheless, we expect to have made ourselves clear enough to provide a good understanding of what those bills include, their differences and similarities. What was also challenging is the fact that US legislation on terrorism and criminal procedure is not concentrated in the Anti-terrorism and Effective Death Penalty Act of 1996 and the Patriot Act of 2001 as we expected it would be. Also, the Patriot Act did not prove itself the so called "game changer". Therefore, the results of this paper represent an initial effort of a broader research agenda on the impacts of terrorist attacks on societies and how to respond to them.

Future research could develop upon what are the possible effects of counter-terrorism legislation that is less protective of human rights on terrorism and terrorist attacks. Also, if, in fact, counter-terrorism legislation has any effect on terrorism and on the actual occurrence of terrorist attacks.

Furthermore, throughout this paper's analysis we were frequently confronted with a discourse about the risk society[81] and its consequent sensation of fear and insecurity used by politicians and intellectuals to justify new methodologies, especially on constitutional and criminal laws. So much that we have to agree with Canotilho on the necessity of clarifying the differences between the typical risks of a technological civilization, like nuclear, chemical, environmental and pharmaceutical risks, at large, part of our daily life, and the very different risk that comes from psychological and ideological dimensions, caused by the mere existence of the "other", the "enemy", the one that belongs to another political, ideological or religious "tribe". As previously mentioned, the latter has been used to legitimize preventive and repressive actions towards the implementation of a "criminal law of the risk", less protective of human rights. In other words, the psychological and ideological risks, grounded with the ideas of security and citizens' protection, are the arguments behind the precautionary principle and its consequent actions of combat against individuals and organizations that are the "embodiment" of those risks[82]. Although it might be possible that constitutional and criminal laws need new paradigms to deal with the typical risks of a technological civilization and the terrorist phenomenon, compromising human rights standards and criminalizing the "other" for its mere existence do not seem adequate responses.

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81 *See more at* BECK, Ulrich. *Risk society:* towards a new modernity. London: Sage Publications, 1992.

82 Canotilho, J. J. G.. Terrorismo e direitos fundamentais. In Canotilho, J. J. G.. (2008). *Estudos sobre Direitos Fundamentais*. São Paulo: Coimbra Editora e Editora Revista dos Tribunais. pp. 240, 241.

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Territories of gender violence: international standards and the "Campo Algodonero" (Mexico) – "Morro do Garrote" (Brazil) cases

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Resumo

O artigo insere-se no campo de estudos da violência contra a mulher, na perspectiva do assassinato de mulheres por razões de gênero. Pretende-se, a partir da análise comparada de dois casos em que foram assassinadas adolescentes e mulheres, um deles na cidade de Juárez/México e outro na cidade de Castelo/Piauí-Brasil, desvelar similitudes nas dinâmicas dos assassinatos tomando-se por base a interpretação de Rita Laura Segato de que existiria uma economia simbólica de poder; um poder moldado na perspectiva de gênero que precariza a vida (Butler) e um poder soberano que torna a vida nua e apropriável (Agamben). O objetivo do estudo será apresentar os dois casos para evidenciar que a dinâmica dos fatos no Piauí é similar à de Juárez, e sugere o diálogo com as abordagens teóricas selecionadas. A pesquisa permitirá compreender como o assassinato de mulheres fora do âmbito doméstico é igualmente revelador de um poder cunhado na perspectiva de gênero, passível de apreciação pelas Cortes Internacionais ante a inércia ou preterição da demanda pelo estado, por ocasião da condução da investigação policial a cargo dos agentes públicos que o representam. A hipótese neste estudo é a de que existem categorias teóricas e jurídicas aplicáveis a feminicídios resultantes de relações íntimas e não íntimas, tendo por motivação, em ambos os casos, a "condição de ser mulher".

Palavras-chave: Vida precária. Gênero. Normativa Internacional. Feminicídio. Investigação policial.

Abstract

The article is in the research field of violence against women, in the perspective of the murder of women based on gender. Based on the comparative analysis of two cases in which adolescents and women were murdered, one of them in the city of Juárez / Mexico and the other in the city of Castelo / Piauí-Brazil, we intend to reveal similarities in the dynamics of the murders. Our departure is the interpretation proposed by Rita Laura Segato, that there would be a symbolic economy of power; A power molded from

a gender perspective that *precarizes* life (Butler) and a sovereign power that makes life nude and appropriable (Agamben). The objective of this research is to present the two cases in order to show that the facts in Piauí are similar to those occurred in *Juárez*, what inspires the discussion with the selected theoretical approaches. The research argue that the murder of women outside the domestic sphere is also revealing of a power coined in the perspective of gender that can be appreciated by the International Courts in case of the inaction of the state in conducting the police investigation. It is hypothesized in this study that there are theoretical and juridical categories applicable to femicides resulting from intimate and non-intimate relations, motivating in both cases the "condition of being a woman".

Keywords: Precarious life. Gender. International Standards. Feminicide. Police investigation.

1. Introdução

Os assassinatos de mulheres por razões de gênero ocupam a agenda política nos últimos anos. De acordo com o Observatório de Igualdade de Gênero da América Latina e do Caribe – OIG, das Nações Unidas, Honduras registrou o maior número de feminicídios[1]. No Brasil, segundo Atlas da Violência 2016 do Instituto de Pesquisa Econômicas Aplicadas – IPEA[2], 13 mulheres são assassinadas por dia, apresentando um crescimento na taxa de homicídio de mulheres por 100 mil habitantes de 11,6%, entre 2001 e 2014. O México registrou, em 2014, segundo a OIG, 2.289 casos, uma média de 8 assassinatos por dia. De outro ângulo, a tipificação do feminicídio é fenômeno jurídico recente. O México foi o 7º país, em 2012, e o Brasil foi o 16º país da América Latina, em 2015, a aprovarem lei sobre feminicídio, conforme tabela 1 do Apêndice[3].

No plano normativo internacional, nota-se preocupação com a violência contra a mulher desde 1979, cujo marco foi a Convenção sobre a eliminação de todas as formas de discriminação contra a mulher de 1979, internalizada no Brasil pelo Decreto nº 4.377, de 13.09.02. Nela se estabeleceu, no art. 1º, que "toda a distinção, exclusão ou restrição baseada no sexo [...]" configura discriminação contra a mulher[4]. Em 1994, foi promulgada a Convenção interamericana para prevenir, punir e erradicar a violência contra a mulher, conhecida como "Convenção de Belém do Pará" – Decreto nº 1.973, de 01.08.94 e adotou o Sistema Interamericano de um instrumento internacional voltado para enfrentar a violência contra a mulher. A norma descreve a violência baseada nas relações de gênero e serviu de base para reformas legais dos ordenamentos jurídicos de diferentes países da América Latina.

No Brasil, a Convenção de Belém do Pará constitui-se no documento que fundamentou reformas normativas, como a lei que prevê a notificação compulsória dos agentes de saúde nos casos em que se vislumbrem sinais de violência (Lei nº. 10.778/03) e a Lei nº. 11.340/06, que trata da violência doméstica. Apresenta-se, também, como marco conceitual para orientar argumentações e razões das decisões a serem adotadas pelas organizações no enfrentamento à violência contra a mulher. A mudança normativa é, apenas, uma das frentes, pois supõe, também, mudanças na forma de atuação organizacional. Segundo o Guia de Estudo do Sistema Interamericano de Direitos Humanos – SIDH, "[...] as convenções que têm a finalidade de proteger os direitos humanos desfrutam de uma normatividade superior à legislação interna brasileira[5]".

No âmbito da jurisprudência internacional, pesquisa organizada por Herrmannsdorfer[6] assinala a prevalência

1 Observatório de Igualdade de Gênero da América Latina e do Caribe – OIG, das Nações Unidas. Disponível em: <http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idAplicacion=11&idioma=e>. Acesso em: 25 jul. 2017.

2 CERQUEIRA, Daniel et al. *Atlas da violência 2016*, n. 17. Brasília, 2016. Disponível em: < http://www.ipea.gov.br/portal/images/stories/PDFs/nota_tecnica/160405_nt_17_atlas_da_violencia_2016_finalizado.pdf>. Acesso em: 4 jun. 2017.

3 Acesso em: 25 jul. 2017.

4 PIMENTEL, Silvia. *Convenção sobre a eliminação de todas as formas de discriminação contra a mulher*. 1979. Disponível em: <http://www.onumulheres.org.br/wp-content/uploads/2013/03/convencao_cedaw.pdf>. Acesso em: 14 jun 2017.

5 Disponível em: <http://www.soi.org.br/upload/70b6275030bd89a8546ca7a55976db749c7e952c243cead26f610e2e6ad03596.pdf.>. Acesso em: 15 jun. 2017. Devemos advertir que há enorme e diversificado debate no campo de estudos do gênero e das violências contra a mulher. Recomendamos, entre inúmeros outros textos, a leitura de HARDING, Sandra. Ciencia y feminismo. Madri: Ediciones Morata, 1996. sobre ciência e feminismo e de TUBERT, Silvia Rosa. La crisis del concepto de género. In: LAURENZO, Patricia; MAQUEDA, María Luisa; RUBIO, Ana. *Género, violencia y derecho*. Buenos Aires: Del Puerto, 2008. sobre a origem do conceito de gênero, o impacto nas ciências sociais e a crise conceitual nos últimos anos.

6 LOPES, Ana Maria D´Ávila; LIMA, Lorena Costa. *A influência do fator gênero nas decisões do Sistema Interamericano de direitos humanos e do*

de 3 categorias nas decisões sensíveis ao gênero: identificação do patriarcado, distinção de construções sociais e linguagem sensível ao gênero. No Brasil, reconhece-se a necessidade da utilização de parâmetros interpretativos na perspectiva de gênero tomando-se por base a jurisprudência do Sistema Interamericano de Direitos Humanos[7]. Como forma de auxiliar os estados na compreensão da violência de gênero, a ONU lançou, em 2016, Diretrizes Nacionais Feminicídio para investigar, processar e julgar com perspectiva de gênero as mortes violentas de mulheres, tomando por base inferências do *Modelo de protocolo latino-americano de investigación de las muertes violentas de mujeres por razones de género*[8].

A hipótese neste estudo é a de que existem categorias teóricas e jurídicas aplicáveis a feminicídios resultantes de relações íntimas e não íntimas, tendo por motivação, em ambos os casos, a "condição de ser mulher". O termo remete a categorias teóricas pautadas em relações de poder que se estabelecem, socialmente, e emolduram seres humanos, no caso mulheres, em estruturas verticais e horizontais de subordinação, colocando-as, artificialmente, em cenários que precarizam suas vidas e tornam consumíveis os seus corpos.

Certamente, para se alcançar parâmetro de atuação sensível às questões de gênero, faz-se necessário ampliar e difundir espaços que privilegiem o debate sobre a violência praticada contra a mulher, particularmente no âmbito das organizações responsáveis pelo trabalho jurídico-penal. Entre as técnicas de pesquisa, o estudo de caso apresenta-se adequada para compreender não apenas os contextos em que são praticados os atos de violência, mas também para desvendar as formas de atuação das distintas organizações estatais. Neste estudo selecionamos os casos "Morro do Garrote" (PI) e "Campo Algodoeiro" (México). O caso brasileiro desafiou o trabalho jurídico-penal para repensar bases conceituais do homicídio quando se tratasse de assassinato de mulheres por razões de gênero, possibilitando visualizar a dimensão do feminicídio em ambiente alheio às relações interpessoais.

Os dois casos foram escolhidos em razão da similitude fática, especialmente por não se tratarem de casos de violência doméstica, ou seja, as vítimas nunca haviam mantido quaisquer relações interpessoais com os agressores, tendo sido assassinadas após momentos de intenso sofrimento físico e psíquico (tortura) e violação à dignidade sexual (estupro). Pretendemos, a partir da análise dos casos selecionados, discutir os contextos e circunstâncias em que ocorrem os assassinatos de mulher em razão de gênero, analisar a atuação das organizações voltadas à investigação e persecução penal e discutir o impacto da Convenção de Belém do Pará na atuação institucional em relação ao que foi definido juridicamente como feminicídio. O caso brasileiro é descrito com base nos relatos documentados no Inquérito Policial e laudos periciais. O Caso mexicano é narrado com base no conteúdo de decisão da CIDH, de 16.11.09, resultante de denúncia apresentada pela Comissão Interamericana de Direitos Humanos, conhecido como "Caso González y outras (Campo Algodonero) VS. México".

Após a descrição dos casos e da atuação institucional, pretende-se dialogar com Rita Laura Segato, Giorgio Agamben e Judith Butler. Ao analisar o caso mexicano, Segato apresenta uma espécie de economia simbólica de poder cuja marca é o gênero. Haveria, segundo a autora, uma forma de relação tributária em que a territorialização do corpo da mulher corresponderia à conquista, pelo homem, do tributo sexual pela sua virilidade em uma relação entre pares (relação de poder horizontal entre homens), ou pela demonstração de que já possui o território (relação vertical de subordinação da mulher). O primeiro caso incidiria em face de pessoa alheia ao ambiente interpessoal da mulher; no segundo caso, nos casos de violência doméstica em que o autor é conhecido e mantém ou mantinha com ela relações interpessoais. O conceito de territorialização do corpo feminino remete à ideia de território, desagregada da dimensão material, de Giorgio Agamben. A formulação do filósofo italiano remete à exceção ou aos limites da lei, situado em um espaço de soberania plena. É dizer, ao gosto do soberano. A proposta de Agamben evidencia a vulnerabilidade da mulher, também, no am-

Supremo Tribunal Federal brasileiro: (des) protegendo os direitos fundamentais das mulheres. Disponível em: <http://www.publicadireito.com.br/artigos/?cod=4aec1b3435c52abb>. Acesso em: 4 jun 2017.

7 LOPES, Ana Maria D´Ávila; LIMA, Lorena Costa. *A influência do fator gênero nas decisões do Sistema Interamericano de direitos humanos e do Supremo Tribunal Federal brasileiro*: (des) protegendo os direitos fundamentais das mulheres. Disponível em: <http://www.publicadireito.com.br/artigos/?cod=4aec1b3435c52abb>. Acesso em: 4 jun 2017.

8 ONU MUJER. *Modelo de protocolo latino-americano de investigación de las muertes violentas de mujeres por razones de género (femicidio/feminicidio)*. Disponível em: <http://www.hchr.org.mx/index.php?option=com_content&view=article&id=202:modelo-de-protocolo-latinoamericano-de-investigacion-de-las-muertes-violentas-de-mujeres-por-razones-de-genero-femicidios-feminicidios&catid=17&Itemid=278>. Acesso em: 15 jun. 2017.

biente público. No deslocamento da mulher do espaço privado ao público, apresentam-se aberturas para conquista daquele território. Os escritos de Butler remetem ao conceito de vida precária, ajustada a mecanismos de controle.

2. "Circuito da morte[9]"

Narraremos o caso brasileiro, valendo-nos das informações do IPL nº. 004.054/15 e depois o mexicano, a partir da sentença prolatada pela CIDH, com foco na descrição do caso e das críticas acerca da precariedade da investigação policial que ocasionou a provocação da Corte pela Comissão Interamericana de Direitos Humanos.

2.1. Caso "Morro do Garrote" – Brasil

Inicia-se o percurso com a exposição da atuação da polícia na investigação criminal e do Juízo competente. O caso integra o acervo de 27 inquéritos policiais cedidos pela Coordenadoria do Núcleo de Estudo e Pesquisa em Violência de Gênero da SSP/PI para o mapeamento do feminicídio no Piauí.

2.1.1. Dinâmica dos fatos

Em uma tarde do dia 27 de maio de 2015, quatro meninas, uma delas com 18 anos e três adolescentes, deslocaram-se de moto a um ponto turístico denominado "Morro do Garrote", localizado na cidade de Castelo, região norte do Piauí, onde estacionaram suas motocicletas na parte inferior do morro e subiram até uma pedra de onde se pode ter uma vista da cidade.

No alto do morro, as meninas passaram a fotografar com seus celulares. Quando se preparavam para descer o mirante e retornarem para suas casas, foram abordadas por 4 adolescentes e um homem, armados com faca e 2 revólveres municiados com 4 projéteis. Os autores tomaram uma das meninas como refém e determinaram que as demais se deslocassem até um cajueiro e que a refém as amarrasse naquela árvore, tendo sido suas mãos e pés amarrados em pares.

Uma vez amarradas, o homem rasgou com a faca as vestes das meninas, inclusive as roupas íntimas, utilizando os retalhos para vedar os olhos e as bocas das vítimas. Iniciou-se o circuito do terror: violência sexual, intenso sofrimento físico — espancamento com socos e pontapés, com a utilização de paus e pedras, além de esganaduras e sofrimento psicológico. O terror perdurou por aproximadamente 2 horas, das 16h às 18h, e culminou com o arremesso de cada uma delas barranco abaixo, ainda amarradas.

Como as vítimas ainda demonstravam sinais de vida, 2 dos agressores desceram o barranco e passaram a golpeá-las com pedras na região de suas cabeças. Nenhum deles conhecia as meninas e um deles afirmou que "[...] elas não tinham nenhum homem com elas". Há relato de que um deles afirmara que "[...] não gostava de loira porque loira é burra, mas o chefe dele gostava de loira [...]". As meninas foram encontradas lesionadas por populares em uma "[...] base de maciço rochoso com cerca de 10 metros de altura [...]". Três das meninas apresentavam cordas em volta do pescoço e duas delas tinham suas bocas amordaçadas com blusas[10].

2.1.2. O campo organizacional na investigação criminal

A Polícia Civil atua de forma autônoma e discricionária na condução das investigações criminais, sob controle externo do Ministério Público. Estudos no campo das organizações do sistema de justiça criminal apontam para uma cultura organizacional moldada em "[...] rotinas estabelecidas [...]" que "[...] incluem formas, regras, procedimentos, convenções, estratégias e tecnologias a partir das quais as organizações operam". Tais rotinas moldam "[...] subjetividades e ações organizacionais, por força da especialização do profissionalismo[11]". Os saberes policiais envolvem não apenas a formação policial, teórica e reproduzida nas academias de polícias, mas também o saber prático, fruto da atuação contínua no campo da prática policial e da socialização entre os pares.

9 Termo adotado por ATENCIO, Gabriela. El circuito de la muerte. *Tripla Jornada*, n. 61, set. 2003. Disponível em: <http://jornada.unam.mx>. Acesso em: 26 mai. 2017.

10 Informações do IPL nº. 004.054/15 cedidas pela Coordenadoria do Núcleo de Estudo e Pesquisa em Violência de Gênero da SSP/PI.

11 MACHADO, Bruno Amaral. *Justiça criminal*: diferenciação funcional, interações organizacionais e decisões. São Paulo: Marcial Pons, 2014. p. 34 e 37.

2.1.2.1. Polícia investigativa e judiciária

Inicia-se o percurso com a formalização das conduções coercitivas dos investigados. A Polícia apreendeu 4 adolescentes ainda na manhã do dia seguinte do evento e o adulto no dia seguinte. Foram atribuídos ao adulto a prática dos crimes: "[...] Estupro (art.213, §1º do CP), Associação Criminosa (art. 288, § único) Homicídio Tentado (art.121, §2º, I, IV c/c art.14 do CP) e Corrupção de Menores (art.244-B do Estatuto da Criança e do Adolescente)". O Delegado representou pela decretação da prisão preventiva do autuado e o magistrado decretou a medida cautelar por entender presentes os requisitos, sob o fundamento de que "[...] Os crimes foram praticados sem motivação alguma[12]".

Para inibir eventuais revitimizações, além do Delegado titular da Delegacia de Castelo, participaram da investigação a Delegada do Núcleo Policial Investigativo de Feminicídio e uma Delegada da Mulher de Teresina. Adotou-se semelhante metodologia para todo o percurso necessário ao atendimento policial. As meninas foram examinadas, assistidas e ouvidas por Peritas, Psicólogas, Assistentes Sociais mulheres e policiais civis mulheres, propiciando-se ambiente mais confortável para elas e familiares que favorecesse a investigação criminal. Como o estado de saúde das meninas inspirava cuidado, tanto que uma delas veio a óbito não resistindo às lesões sofridas, o tempo de permanência em unidade hospitalar fez com que as 3 sobreviventes somente pudessem ser ouvidas pela polícia 18 dias após o evento. O fato ensejou a adoção de estratégias voltadas ao sigilo das informações já apuradas com a finalidade de se preservar desdobramentos futuros.

A imprensa local foi comunicada que não deveria expor as meninas por duas razões principais: a preservação da intimidade e dignidade delas e de suas famílias e a legitimação das ações policiais ainda por vir, fazendo com que as famílias não se sentissem invadidas na sua privacidade a ponto de intimidar as meninas no momento das suas falas.

2.1.2.2. Polícia técnico-científica

No plano da perícia, analisamos os seguintes laudos periciais: Local de Crime, Estupro e Cadavérico. Aos quesitos 4 e 5 da Requisição do Exame Cadavérico, a perícia respondeu que o meio foi cruel e que houve esmagamento com afundamento facial. Quanto ao Laudo de Violência Sexual, as peritas atestaram ter havido ato libidinoso e resistência a ele. No local do crime, os peritos atestaram o encontro de múltiplos objetos pessoais e "[...] peças íntimas do vestuário feminino (rasgadas e impregnadas por substância hemática) denotam um quadro compatível com crimes contra a vida e indicativos de violência sexual". Em outro sítio a Perícia constatou "[...] evidências que denotam um quadro compatível com crimes contra a vida e indicativos de violência sexual[13]".

Os adolescentes foram condenados por feminicídio consumado, três feminicídios tentados, quatro estupros e Associação Criminosa. O adulto foi denunciado pelos mesmos crimes, porém, ainda aguarda audiência de instrução e julgamento da primeira fase do Júri. Os relatos expõem evidências de violências de gênero. O discurso de um dos adolescentes de que elas não estavam acompanhadas por nenhum homem remete à ideia de propriedade, de conquista pela força, colonização, domínio e posterior consumo e extermínio do corpo feminino. Outros trechos explicitam a violência de gênero: "[...] o agressor ao tempo em que xingava as menores, inclusive, dizendo que não gostava de loira porque loira é burra, mas o chefe dele gostava de loira, arremessava a faca no chão [...]". O relato traduz relação de poder, seja pelo uso da força (faca), seja pela redução da mulher a coisa apropriável. Ou então: "[...] que foi vendada; que lembra que o agressor tocou em seus seios e na sua genitália [...] que o acusado a enforcou [...]; que dizia para [...] não colocar a mão no pescoço; que lembra que ficou completamente despida [...]". A dinâmica dos fatos remete a cenário de terror, impresso pelo agudo sofrimento físico e psíquico que durara por aproximadamente 2 horas[14]. Nos relatos dos adolescentes percebemos assunção pelos atos e suposto arrependimento[15].

De outro ângulo, os laudos periciais confirmaram as

12 Informações do IPL nº. 004.054/15 cedidas pela Coordenadoria do Núcleo de Estudo e Pesquisa em Violência de Gênero da SSP/PI.

13 Informações do IPL nº. 004.054/15 cedidas pela Coordenadoria do Núcleo de Estudo e Pesquisa em Violência de Gênero da SSP/PI.

14 Informações do IPL nº. 004.054/15 cedidas pela Coordenadoria do Núcleo de Estudo e Pesquisa em Violência de Gênero da SSP/PI.

15 "[...] depois que usaram drogas e que estupraram as meninas, (maior) passou a espancar as meninas [...] depois as jogou num barranco [...] elas ficaram muito machucadas [...] (maior) disse que era pra matar [...] elas caíram embaixo do morro, e ficaram somente se mexendo, muito machucadas, dentro do matagal [...] que as meninas gritavam e tentaram se soltar, mas não conseguiram [...]".

narrativas, como nessa passagem do Laudo Pericial de violência sexual: "[...] ato libidinoso recente pela presença de área avermelhada em sulco interlabial (Lesão por ação contundente) [...] vítima com lesão corporal que aponta resistência ao ato [...]". O Relatório final destaca "[...] situações de barbárie e terror [...] haja vista que as mesmas foram estupradas, espancadas, arremessadas de um barranco e apedrejadas, tendo as agressões sido cessadas no momento em que os agressores imaginaram que haviam alcançado o resultado desejado [...][16]".

2.2. Caso "Campo Algodonero" – México[17]

Descrevemos o caso mexicano com base na sentença prolatada em 16.11.09, pela CIDH no processo "Caso González y otras (Campo Algodonero) VS. México". Neste artigo abordamos, especialmente, os capítulos VI – *Prueba* (p.20-29) e VII – *Sobre la violencia y discriminación contra la mujer en neste caso* (p. 29 – 112).

2.2.1. Dinâmica dos fatos

Iniciamos a narrativa dos fatos com base no registro do desaparecimento de 3 meninas no Ministério Público – Promotoria Especial para a Investigação de Desaparecimento e Homicídio de Mulheres: Laura Berenice Ramos Monárrez – 17 anos, desaparecida em 22.09.01; Claudia Ivette González – 20 anos, desaparecida em 10.10.01 e Esmeralda Herrera Monreal – 15 anos, desaparecida em 29.10.01. Os corpos foram encontrados no dia 06.11.01, em uma plantação de algodão e, no dia seguinte, foram descobertos mais cinco corpos de mulheres em local próximo, ainda dentro da plantação de algodão.

Segundo relato da decisão, "[...] los cuerpos de las jóvenes Herrera, González y Ramos fueron objeto de un particular ensañamiento por parte de los perpetradores de los homicidios. Los representantes añadieron que (l) forma en que fueron encontrados los cuerpos (de las tres víctimas) sugiere que fueron violadas y abusadas con extrema crueldad [...][18]".

A violência contra Esmeralda Herrera chama a atenção. A blusa e o sutiã estavam rasgados no lado superior direito, as duas alças levantadas por cima da região peitoral, deixando nu os seios, além da meia rasgada, mãos amarradas, cujo "[...] cordón rodeaba el cuerpo en su totalidad por la región abdominal [...]". O documento ainda registra "[...] Ausencia de región mamaria derecha [...]" e "[...] Ausencia parcial de partes del pezón de la región mamaria izquierda [...][19]".

Em relação à vítima Claudia Ivette González, não foram evidenciados no relato elementos que permitissem retirar inferências de violência na perspectiva de gênero. O documento narra, em relação à vítima Laura Berenice Ramos Monárrez, que tanto a blusa, quanto o sutiã estavam "[...] colocados ambos por encima de la región mamaria y se obserbaba en el pezón derecho herida plana de 5 mm que cercenó la punta del mismo [...]" com as extremidades "[...] superiores extendidas por encima de la extremidad cefálica [...]. El cráneo descarnado en su parte posterior [...]" e "[...] Cabello escaso con cortes irregulares [...][20]".

A perícia de campo concluiu que as ações foram perpetradas no local em que os corpos foram encontrados e embora não tenham afirmado categoricamente que houve violação sexual, "[...] debido a las condiciones de semi desnudez en las que se [...] encontra, es posible establecer con alto grado de probabilidad que se trata de [...] crímen (es) de índole sexual [...]". Quanto à vítima Herrera, concluíram que "[...] (por el grado de dificultad que se apreciaba en el amarre que presentaba [...] de la cintura a sus extremidades superiores, (era) posible establecer que [...] llegó maniatada al lugar de los hechos [...] y que era factible suponer que la causa del deceso fuera por estrangulamiento [...]". Em relação à jovem Ramos "[...] los peritos concluyeron que en base a los hematomas que se apreciaron en diferentes tejidos óseos era posible establecer que [...] fue severamente golpeada antes de su deceso [...][21]".

16 Informações do IPL nº. 004.054/15 cedidas pela Coordenadoria do Núcleo de Estudo e Pesquisa em Violência de Gênero da SSP/PI.

17 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e outras ("Campo Algodoeiro") vs. México*. San José, 2009. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_por.pdf>. Acesso em: 03 mar.17.

18 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e outras ("Campo Algodoeiro") vs. México*. San José, 2009. p. 59.

19 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e outras ("Campo Algodoeiro") vs. México*. San José, 2009. p. 60.

20 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e outras ("Campo Algodoeiro") vs. México*. San José, 2009. p. 61.

21 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judg-

O caso foi entendido pela Fundação Getúlio Vargas SP como o mais emblemático da CIDH porque "[...] pela primeira vez a Corte Interamericana condenou um Estado pelo homicídio de mulheres pela condição de gênero[22]". Do mesmo modo, segundo Pasinato[23], o feminicídio "[...] ganhou espaço no debate latino-americano a partir das denúncias de assassinatos de mulheres em Ciudad Juarez – México [...]", pela repetição de eventos e omissão do estado[24].

2.2.2. O campo organizacional na investigação criminal

O percurso no campo organizacional tem por objeto as decisões das instituições que atuaram no caso. Pretendemos explicitar e analisar em que medida a rotina das ações policiais e do Ministério Público, que assumem a forma de decisões[25], devem ser consideradas como elementos que influenciam, diretamente, na construção jurídica da violação sofrida pelas vítimas.

2.2.2.1 O argumento do formalismo e da inação das Organizações

O Estado do México foi representado pela Comissão Interamericana de Direitos Humanos juntamente à CIDH, para apurar responsabilidade internacional do Estado "pelo desaparecimento e posterior morte" de González, Herrera e Ramos pelas faltas de medidas de proteção às vítimas; de prevenção dessa espécie de crime, tendo em vista se tornarem comuns na região; de resposta das autoridades frente ao desaparecimento das meninas; da devida diligência na investigação dos assassinatos e denegação de justiça e a falta de reparação correta[26].

A provocação à CIDH decorreu, essencialmente, no campo das práticas organizacionais da Polícia, Ministério Público e da justiça, seja pela ausência de ações que deveriam ter sido tomadas, seja pela ineficiência na apuração. Segundo relato de familiares das vítimas, após os registros dos desaparecimentos, foi-lhes dito pelas autoridades responsáveis que era necessário aguardar 72 horas para que fossem consideradas desaparecidas e se iniciassem as buscas e demais atos investigatórios. Por sua vez, a versão oficial apontou a existência de relatório de desaparecimento no momento em que os familiares deram notícia às autoridades.

A Corte entendeu que "[...] el Estado no presentó alegatos ni prueba sobre acciones tomadas en el período referido para movilizar al aparato investigador en la búsqueda real y efectiva de las víctimas [...]", ou seja, "[...] el Estado no ha demostrado que gestiones concretas realizo y cómo busco efectivamente a las víctimas durante el período mencionado [...][27]", restringindo sua atuação à burocracia formal, ao formalismo, não comprovando que ações práticas ou providências realizou no plano fático para apurar as denúncias dos desaparecimentos, endurecendo a realidade em um molde prefixado e reduzindo a riqueza da complexidade dos casos[28]. A visão abstrata reduz a complexidade e, no caso das meninas, pode ter comprometido a visualização da violência.

Em relação a Ramos, a Corte entendeu que as autoridades desconsideraram indícios que poderiam ter auxiliado na sua busca, não se vendo nenhuma gestão

ment. *Caso González e outras ("Campo Algodoeiro") vs. México*. San José, 2009. p. 61.

22 MACHADO, Marta Rodriguez de Assis (Coord.). *A violência doméstica fatal*: o problema do feminicídio íntimo no Brasil. Brasília, 2015. Disponível em: <http://www.compromissoeatitude.org.br/wpcontent/uploads/2015/04/Cejus_FGV_feminicidiointimo2015.pdf>. Acesso em: 14 jun. 2017.

23 PASINATO, Wânia. Feminicídios e as mortes de mulheres no Brasil. *Cadernos Pagu*, n. 37, Campinas, 2011.

24 No plano das organizações responsáveis pela elucidação dos assassinatos, o estudo aponta que "A cultura machista dificulta o esclarecimento dos crimes, e leva a irregularidades nas investigações dos fatos pelas autoridades locais, o que gera um clima de impunidade. Essas irregularidades incluem a demora no começo das investigações, a lentidão das mesmas ou inatividade dos expedientes, a perda de informação e documentos, o extravio de corpos sob custódia do Ministério Público, e a falta de entendimento dos atos de violência contra mulheres como parte de um padrão sistemático de violência de gênero. Além disso, as atitudes das autoridades são notoriamente discriminatórias e dilatórias, o que indica concepções estereotipadas sobre as mulheres desaparecidas. Essas concepções incluem alegações pelas autoridades de que as mulheres desaparecidas teriam fugido com namorados, amantes ou amigos, que se vestiam de forma provocante e por isso expunham-se à vitimização, e que trabalhavam em locais impróprios para mulheres "de família". Isso significa uma percepção de que a busca por mulheres desaparecidas não é importante".

25 MACHADO, Bruno Amaral. *Justiça criminal*: diferenciação funcional, interações organizacionais e decisões. São Paulo: Marcial Pons, 2014..

26 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e Outras ("Campo Algodoeiro") vs. México*. San José, 2009. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_por.pdf>. Acesso em: 4 jun. 2017.

27 IACHR. Inter-American Court of Human Rights. Judgment. *Caso González e Outras ("Campo Algodoeiro") vs. México*. San José, 2009. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_por.pdf>. Acesso em: 4 jun. 2017. p. 52.

28 FLORES, Joaquín Herrera. *A (re) invenção dos direitos humanos*. Florianópolis: Fundação Boiteux, 2009.

em relação a esses indícios para encontrá-la, ainda, com vida. Quanto a González, consta nos depoimentos de testemunhas ouvidas por ocasião do registro do desaparecimento, relatos que auxiliariam na investigação e que não foram considerados, daí a Corte concluir pela ausência de investigação em face das informações colhidas com a finalidade de encontrá-la com vida. Por fim, no caso de Herrera, segundo a Corte, o Estado limitou-se a ouvir o jovem que insistia em sair com ela, não tendo tomado qualquer outra providência para encontrá-la com vida.

2.2.2.2. Os estereótipos projetados pelas Organizações

Consta que os familiares das vítimas foram interpelados pelas autoridades sobre como o comportamento delas teria "influenciado a prática" e entenderam por minimizar o problema com argumentos do tipo "[...] de que eran muchachitas que 'andaban con el novio' o 'andaban de voladas'" ou ainda "[...] su hija 'no está desaparecida, anda con el novio o anda com los amigos de vaga [...]" e que "[...] si le pasaba eso era porque ella se lo buscaba, porque una niña, una mujer buena, está en su casa" e "[...] su hija no está desaparecida, anda con el novio o anda con los amigos de vaga [...]" ou "[...] se había ido con el novio, porque las muchachas eran muy 'voladas' y se les aventaban a los hombres [...]" e que "[...] todas as niñas que se pierden, todas [...] se van con el novio o quieren vivir su vida solas [...][29]".

Houve banalização da violência pelas autoridades, segundo o mesmo documento, subjacente à inação das instituições em face dos desaparecimentos das meninas. Consta que a mãe de Ramos apelou para que os policiais realizassem diligências em busca de sua filha e teria recebido como resposta:

> [...] 'no señora, es muy tarde, nosotros ya tenemos que ir a descansar y usted espere el momento en que le toque para buscar a Laura', y palmeando su espalda habrían manifestado: 'vaya usted para que se relaje, tómese unas heladas a nuestra salud, porque nosotros no podemos acompañarla[30]".

O testemunho de Delgadillo Pérez, também, é elucidativo para se compreender as decisões da Polícia mexicana:

> [...] (s)e determina (ba) la responsabilidad o no de la víctima, de acuerdo al rol social que a juicio del investigador tenía en la sociedad. Esto quiere decir que si la mujer asesinada le gustaba divertirse, salir a bailar, tenía amigos y una vida social, es considerada en parte, como responsable por lo que sucedió. […] entonces la autoridad estigmatizaba a las víctimas de desaparición por el hecho de ser mujeres, siendo el pretexto que 'andaban con el novio' o 'andaban de locas', y llegó también a culpar a las madres por permitir que sus hijas anduvieran solas o que salieran por la noche [...][31].

Os discursos sugerem relações de poder desiguais que posicionam as mulheres, de forma artificial, em espaços domésticos, naturalizando-as como responsáveis pela família, exigindo dedicação e responsabilidade pela manutenção dos laços familiares. Ou seja, subtrai-lhes a possibilidade de trafegar pelos espaços públicos da maneira que lhes convier, sem que sejam vistas como "anormais" e, portanto, "merecedoras" de "castigo". A interpretação dada pela polícia aos casos de desaparecimento das meninas tomou por base categorias construídas culturalmente que posicionam, artificialmente, mulheres em territórios privados, no ambiente doméstico, e aquelas meninas, "resistindo à imposição, assumiram o risco de serem violadas".

A atuação dos policiais remete à escrita de Joaquín Herrera Flores: "[...] todo produto cultural é sempre uma categoria impura, contaminada de contexto e sempre submetida às iniludíveis relações fáticas de poder[32]". Em diálogo com o autor espanhol, pode-se afirmar que os discursos policiais impedem a contextualização do problema porque customizam pessoas com base em estereótipos fundados em preconceitos sobre a condição feminina. Ou seja, desconsidera-se a subjetividade e instala-se forma de modelagem para a categoria mulher. Alerta Herrera Flores: "[...] É preciso superar as abstrações que veem os seres humanos como enteléquias, como entidades despojadas de corpo e, por isso mesmo, de necessidades e carências [...][33]", ou seja, é preciso

29 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e Outras ("Campo Algodoeiro") vs. México*. San José, 2009. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_por.pdf>. Acesso em: 4 jun. 2017. p. 57.

30 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e Outras ("Campo Algodoeiro") vs. México*. San José, 2009. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_por.pdf>. Acesso em: 4 jun. 2017. p. 57.

31 INTER-AMERICAN COURT OF HUMAN RIGHTS. Judgment. *Caso González e Outras ("Campo Algodoeiro") vs. México*. San José, 2009. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_por.pdf>. Acesso em: 4 jun. 2017. p. 57-58.

32 FLORES, Joaquín Herrera. *A (re) invenção dos direitos humanos*. Florianópolis: Fundação Boiteux, 2009. p. 102.

33 FLORES, Joaquín Herrera. *A (re) invenção dos direitos humanos*. Florianópolis: Fundação Boiteux, 2009. p. 102.

desvelar as particularidades de cada pessoa, para não desaguar na reificação e idealização do humano.

Ao final, a CIDH, por decisão unânime, responsabilizou o estado do México em 14 recomendações desde a eficácia do processo, apuração de responsabilidades, transparência, capacitação, indenização, dentre outras.

3. Análise comparativa dos casos

Pretendemos, nesse item, confrontar as decisões das organizações incumbidas da persecução penal nos casos selecionados e trazer reflexões teóricas para a análise. Inicialmente a análise parte do campo organizacional, tomando-se por base a dinâmica policial para, em seguida, dialogar com um espaço formado pela tensão entre o sistema de *status* e o sistema de contrato, conforme propõe Rita Laura Segato.

3.1. O campo organizacional

Analisando a atuação das organizações nos dois casos, vê-se que, no caso brasileiro, houve a preocupação com a condução das investigações criminais desde o acolhimento e atendimento das meninas e familiares até as decisões que levaram ao inquérito policial. Ainda no Hospital de Urgência de Teresina – HUT, local em que as meninas foram atendidas, as autoridades responsáveis promoveram reunião para alinhamento das condutas a cargo do estado com vistas à preservação da dignidade e intimidade das famílias e vítimas.

Definiu-se uma metodologia para a realização das investigações criminais, com foco em um tratamento o mais humanizado possível às meninas e seus familiares. As vítimas foram ouvidas, previamente, por equipe multiprofissional do Serviço de Atendimento à Mulher Vítima de Violência Sexual feminina, sendo examinadas por peritas mulheres e ouvidas por delegadas e escrivãs mulheres para prevenir eventuais estereótipos e revitimizações com elaborados discriminatórios.

No decorrer das investigações, realizou-se reunião no âmbito da Polícia em que se cogitou possível indiciamento por homicídio qualificado por motivo fútil, afastando a qualificadora do feminicídio. O Secretário de Segurança, discordando do resultado, instituiu comissão para avaliar as perícias, depoimentos, interrogatórios e demais rotinas policiais do caso. O Relatório da Comissão concluiu, de forma pioneira, pelo indiciamento dos autores na qualificadora intitulada por feminicídio com base na Convenção de Belém do Pará.

Ao cotejarmos o caso mexicano, deparamo-nos com decisões que não privilegiaram o contexto da violência contra a mulher. Desde a notícia do desaparecimento até o desenvolvimento das perícias criminais e médico-legais. O que evidencia a insatisfatória resposta estatal ao fenômeno da violência contra a mulher na *Ciudad de Juárez*. Estudo realizado pela Fundação Getúlio Vargas corrobora a deficiência da atuação da perícia e da polícia, assim também a falta de acesso, pelos familiares, à investigação.

No Piauí, com base na análise dos casos de feminicídio, notamos que a demora do atendimento policial poderia ter frustrado a investigação policial, comprometendo o deslinde do processo. A ineficiência dos órgãos estatais da *Ciudad de Juárez* encontra-se narrada de forma pormenorizada nas 144 páginas da sentença prolatada pela CIDH condenando o estado do México no cumprimento de 14 recomendações pela violação dos direitos à vida, integridade pessoal, descumprimento do dever de investigar, não discriminação e direitos da criança.

Uma vez relatados os casos e analisados alguns contornos do impacto das práticas organizacionais na condução das investigações, passamos à construção de um campo teórico que possibilite ampliar o horizonte para compreensão das dinâmicas apresentadas e sirva de ferramenta para auxiliar na tipificação do feminicídio em casos semelhantes.

3.2. A linguagem do feminicídio

O assassinato de mulheres na perspectiva de gênero possui linguagem própria, forma de violência estruturada em relações de poder invisíveis e estáveis. Nos dois casos pesquisados, os corpos das meninas representariam quaisquer corpos, genéricos, abomináveis e indesejáveis, ainda que a sexualidade apareça em cena como arma dirigida contra as vítimas. Com a antropóloga argentina, cabe indagar se seria possível dissociar sexualidade de agressividade já que, com relação ao estupro, aos olhos do autor, a violação se apresenta de forma

opaca e irracional[34].

A compreensão dos atos de violência contra a mulher supõe ir além das motivações individuais. Na lente proposta por Segato, "[...] los feminicidios son mensajes emanados de un sujeto que sólo puede ser identificado, localizado, perfilado, mediante una "escucha" rigurosa de estos crímenes como actos comunicativos". É preciso desvendar as estruturas subjacentes à linguagem do feminicídio para se compreender a mensagem do autor. A autora adverte que: "[...] 'Masculinidad' representa aquí una identidad dependiente de un estatus que engloba, sintetiza y confunde poder sexual, poder social y poder de muerte[35]".

Uma língua é o resultado de um processo histórico que estabelece conquistas, colonizações e unificações entre pessoas em um dado espaço territorial. Alerta a antropóloga argentina que os autores de feminicídio compartilham linguagem, na medida em que cabe indagar "[...] por qué se mata en un determinado lugar es semejante a perguntar-se por qué se habla una determinada lengua". Em seu esforço hermenêutico, Segato propõe observar a prática do feminicídio como sistema de comunicação cujo alfabeto é violento e quando ele "[...] se instala, es muy difícil desinstalarlo, eliminarlo. La violencia constituida y cristalizada en forma de sistema de comunicación se transforma en una lenguaje estable y pasa a comportarse con el casi-automatismo de cualquier idioma[36]".

Em sua análise do caso de Ciudad Juarez, a leitura de Segato articula-se ao diagnóstico de Giorgio Agamben. O próprio direito excluiu a violência, em peculiar estado de exceção. Para Agamben, a exceção soberana "[...] é aquilo que não pode ser incluído no todo ao qual pertence e não pode pertencer ao conjunto no qual está desde sempre incluído", ou seja, pode-se inferir que a mulher genérica se apresenta como forma de pertencimento sem inclusão, uma exceção irrepresentável. Nesse sentido, haveria captura da vida pelo direito, "[...] um limiar em que ela está, simultaneamente, dentro e fora do ordenamento jurídico, e esse limiar é o lugar da soberania". Esse lugar soberano corresponde ao campo, "[...] *nómos* do espaço político em que ainda vivemos[37]".

O léxico de Agamben dialoga com o que Segato propõe como território: dissociado da dimensão material, como espaço soberano sob o qual não são aplicadas as normas, seria a exceção, ou seja, "[...] aquilo que não pode ser incluído no todo ao qual pertence e não pode pertencer ao conjunto no qual está desde sempre incluído[38]". No campo da linguagem soberana, sugerimos que o sistema de comunicação proposto por Segato a partir de dois eixos norteadores da violência praticada em face das mulheres representaria forma de língua oculta, o poder soberano "[...] que suspende a lei no estado de exceção [...], que sujeita a vida a um poder de morte, a sua irreparável exposição na relação de abandono[39]".

Esse poder de morte remete à noção de vida precária, "[...] o fato de que a vida de alguém está sempre, de alguma forma, nas mãos do outro[40]", não sendo reconhecida como vida, porque seu "[...] corpo está sempre à mercê de formas de sociabilidade e de ambientes que limitam sua autonomia individual [...][41]". Para Butler, a "condição de ser reconhecido", requer a atuação de normas que permitam moldar "[...] um ser vivo em um sujeito reconhecível [...]". Podemos imbricar o pensamento de Butler à concepção de abandono de Agamben ao se cotejar normas que estabelecem formas distintas de reconhecimento tornando certos sujeitos mais difíceis de serem reconhecidos e, assim, enquadrando-os na perspectiva de "vida nua" cunhada pelo autor. Uma vida sem condições de sustentabilidade porque irrepresentável o sujeito.

Para a autora, algumas vidas não são concebíveis como vida em razão de enquadramentos epistemológicos que diferenciam "[...] as vidas que podemos apreender[42] daquelas que não podemos [...][43]". Os enqua-

34 SEGATO, Rita Laura. *La escritura en el cuerpo de las mujeres asesinadas en ciudad Juárez*. Buenos Aires: Tinta Limón ediciones, 2013. p.44.

35 SEGATO, Rita Laura. *La escritura en el cuerpo de las mujeres asesinadas en ciudad Juárez*. Buenos Aires: Tinta Limón ediciones, 2013. p.31 e 37.

36 SEGATO, Rita Laura. *La escritura en el cuerpo de las mujeres asesinadas en ciudad Juárez*. Buenos Aires: Tinta Limón ediciones, 2013. p.32.

37 AGAMBEN, Giorgio. *Homo sacer*: o poder soberano e a vida nua I. Belo Horizonte: UFMG, 2014. p.33 e 162.

38 AGAMBEN, Giorgio. *Homo sacer*: o poder soberano e a vida nua I. Belo Horizonte: UFMG, 2014. p.33.

39 AGAMBEN, Giorgio. *Homo sacer*: o poder soberano e a vida nua I. Belo Horizonte: UFMG, 2014. p. 84-85.

40 BUTLER, Judith. Quadros de guerra: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.31.

41 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.53.

42 "[...] modo de conhecer que ainda não é reconhecimento ou que pode permanecer irredutível ao conhecimento [...]". BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p. 21.

43 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.17.

dramentos são realizados por meio de normas que se estabelecem por esquemas de inteligibilidade e, por sua vez, condicionam a produção do sujeito e o tornam reconhecido. Segundo Butler, essas normas condicionantes da produção do sujeito não são estanques, elas surgem e desaparecem na medida em que operações mais amplas de poder interagem. Os "[...] enquadramentos decidem [...] quais vidas serão reconhecíveis como vidas e quais não o serão [...]". Eles podem romper consigo mesmos pela circularidade e ingresso de outras possibilidades de apreensão e quando eles "[...] vêm abaixo [...], torna-se possível apreender algo a respeito do que ou quem está vivendo embora não tenha sido geralmente "reconhecido" como vida[44]".

Sugerimos que o poder soberano que suspende a lei, na proposta de Agamben, aproxima-se aos dois eixos traçados por Segato: vertical e horizontal. O primeiro atuaria em situações de desigualdade (relação homem/mulher) e o segundo nas situações de igualdade (relação homem/homem). Os dois atuam em conjunto, um retroalimentando o outro em relação simbiótica. O homem afirma-se na masculinidade, tanto com a subordinação da mulher nas relações domésticas quanto nas relações que ocorrem nos espaços públicos. O primeiro caracteriza-se pela dominação privada e o segundo pela pública. O eixo vertical assinala as relações de subordinação, "[...] el de los estratos marcados por un diferencial jerárquico y por grados de valor, las relaciones son de exación forzada o de entrega de tributo, en sua forma paradigmática, de género, el tributo es de naturaleza sexual[45]". Nesse eixo, a mulher é apresentada ao agressor como extensão territorial do seu patrimônio, portanto, não haveria mais o que conquistar, senão controlar, disciplinar e manter sob sua custódia. A autora alerta que:

> [...] Si al abrigo del espacio doméstico el hombre abusa de las mujeres que se encuentran bajo su dependencia porque puede hacerlo, es decir, porque éstas ya forman parte del territorio que controla, el agresor que se apropia del cuerpo femenino en un espacio público, lo hace porque debe para mostrar que puede[46].

Segato diferencia a violência doméstica, aquela perpetrada na intimidade do casal, daquela perpetrada em ambiente público, correspondendo a primeira a um domínio existente e a segunda à exibição de um domínio. E prossegue: o exercício da soberania exige deixar a mulher viver porque, com a eliminação do corpo, encerra o desiderato do domínio. Quanto aos assassinatos dissociados das relações interpessoais, corresponderiam ao eixo horizontal, onde "[...] el agresor se dirige a sus pares [...]" para "[...] obtención del tributo [...]" em que "[...] la víctima es el desecho del proceso, uma pieza descartable [...] para atravesar el umbral de la pertenencia al grupo de pares [...][47]". Corresponde à necessidade de reafirmação da masculinidade para manter-se no grupo. Na leitura proposta pela antropóloga argentina, afirma-se peculiar forma de Mandato, um tributo sexual no âmbito de uma "[...] economia simbólica del poder cuya marca es el género [...][48]". As mulheres seriam as doadoras do tributo e os homens os receptores e beneficiários e "[...] el cuerpo genérico de la mujer se reduce para adherirse definitivamente a la función de objeto destinado al consumo en la construcción de la masculinidad [...][49]".

A proposta de Segato revela-se útil para nossa análise. Argumentamos que, nos dois casos de violência sexual, há a presença da mulher forçada à entrega do tributo em espaço público, como forma de publicização do domínio masculino. O corpo da mulher autônoma, que ocupa espaços públicos e abandona a posição a ela destinada, conspurca a estrutura de dominação masculina e, por isso mesmo, para restaurar a moralidade masculina, se estabelece um campo de violência aplicável como castigo por tal violação.

3.3. Os espaços normativos

Nesse item analisamos a normatividade jurídica internacional e interna, particularmente dois instrumentos: a Convenção de Belém do Pará e a Lei nº 13.104/15 – Lei do Feminicídio. O objetivo é cotejar os instrumentos normativos com as categorias teóricas apresentadas, na medida em que propiciam horizontes hermenêuticos para compreensão do espectro de proteção da norma em relação aos atos de violência de gênero.

44 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.29.

45 SEGATO, Rita Laura. *Las estructuras elementales de la violencia*: ensayos sobre género entre la antropologia, el psicoanálisis y los derechos humanos. Buenos Aires: Prometeo libros, 2010. p.250.

46 SEGATO, Rita Laura. *La escritura en el cuerpo de las mujeres asesinadas en ciudad Juárez*. Buenos Aires: Tinta Limón ediciones, 2013. p.29.

47 SEGATO, Rita Laura. *La escritura en el cuerpo de las mujeres asesinadas en ciudad Juárez*. Buenos Aires: Tinta Limón ediciones, 2013. p.25.

48 SEGATO, Rita Laura. *Las estructuras elementales de la violencia*: ensayos sobre género entre la antropologia, el psicoanálisis y los derechos humanos. Buenos Aires: Prometeo libros, 2010. p.13.

49 SEGATO, Rita Laura. *Las estructuras elementales de la violencia*: ensayos sobre género entre la antropologia, el psicoanálisis y los derechos humanos. Buenos Aires: Prometeo libros, 2010. p. 252.

Antes de tudo, é preciso contextualizar a Convenção na ordem dos sistemas de proteção aos direitos humanos e com base nos instrumentos adotados pela Organização das Nações Unidas – ONU e regionais — Sistema Interamericano de direitos humanos — Organização dos Estados Americanos – OEA, integrado pela Comissão Interamericana de Direitos Humanos e pela Corte Interamericana de Direitos Humanos. A Convenção Interamericana para Prevenir, Punir e Erradicar a Violência contra a Mulher — Convenção de Belém do Pará — constitui-se em instrumento de proteção dos direitos humanos com âmbito regional, em esforço de aproximação da realidade experimentada pelas Américas.

No Brasil, a Convenção foi adotada em 1994 e ratificada em 27.11.95. Nela vislumbramos a temática da violência contra a mulher de forma explícita, como padrão de violência específico. O caso mais notório de sua aplicação se deu em 20.08.98, quando a CIDH recebeu denúncia apresentada por Maria da Penha Maia Fernandes, resultando recomendações para "Prosseguir e intensificar o processo de reforma que evite a tolerância estatal e o tratamento discriminatório com respeito à violência doméstica contra mulheres no Brasil".

A Convenção estabelece, nos artigos 1 e 2 do Capítulo I, o que se deve entender por violência contra a mulher: "[...] qualquer ação ou conduta baseada no gênero, que cause morte, dano ou sofrimento físico, sexual ou psicológico à mulher, tanto no âmbito público como no privado". Mais adiante, no artigo 2, delineia o âmbito de aplicação:

> Artigo 2
>
> Entender-se-á que violência contra a mulher inclui violência física, sexual e psicológica:
>
> a. que tenha ocorrido dentro da família ou unidade doméstica ou em qualquer outra relação interpessoal, em que o **agressor conviva** ou **haja convivido** no mesmo domicílio que a mulher e que compreende, entre outro, estupro, violação, maus-tratos e abuso sexual;
>
> b. que tenha ocorrido na comunidade e seja perpetrada por **qualquer pessoa** e que compreende, entre outros, violação, abuso sexual, tortura, maus tratos de pessoas, tráfico de mulheres, prostituição forçada, sequestro e assédio sexual no lugar de trabalho, bem como em instituições educacionais, estabelecimentos de saúde ou qualquer outro lugar e
>
> c. que seja perpetrada ou tolerada pelo **Estado** ou seus **agentes**, onde quer que ocorra (grifo nosso).

Destacamos que a violência contra a mulher, nos termos da Convenção, prescinde do elemento específico gênero, podendo ser praticada por pessoa determinada ou não, em ambiente público ou privado. No caso de feminicídio, inferimos que a atuação negligente do estado no trabalho jurídico-penal relacionado ao feminicídio poderá constituir violência institucional caso deixe de tomar as medidas necessárias e suficientes ao enfrentamento e apuração das circunstâncias do crime.

A análise do dispositivo levou em consideração o espaço em que ocorreu a violência, o agressor e as questões de gênero. O resultado da pesquisa pode ser sintetizado na tabela seguinte:

Tabela 1 – Análise dos artigos 1 e 2 da Convenção de Belém do Pará e Lei nº. 13.104/15

PERFIL AUTORIA	**LÓCUS**	**CONTORNOS LEGAIS VIOLÊNCIA**	**CONTORNOS LEGAIS FEMINICÍDIO**
CONHECIDA, DETERMINADA	ESPAÇO PRIVADO	GÊNERO + RELAÇÕES DOMÉSTICAS OU RELAÇÕES INTERPESSOAIS Condição de sexo feminino	Violência doméstica e familiar Violência estrutural privada
DESCONHECIDA, INDETERMINADA	COMUNIDADE ESPAÇO PÚBLICO E PRIVADO	GÊNERO	Menosprezo Discriminação Violência estrutural pública
ESTADO OU AGENTES PÚBLICOS	ESPAÇO POLÍTICO	GÊNERO + IMPESSOALIDADE Condição de sexo feminino	Menosprezo Discriminação Violência estrutural institucional

Fonte: autores do artigo.

Analisando os dois casos a partir dos elementos

da tabela, cogitamos que o caso do Brasil se amolda ao conteúdo do Artigo 2, alínea "b", uma vez que as meninas não conheciam os agressores e o estado não foi omisso nem deficitário nas ações de investigação. O caso do México alcança as alíneas "b" do mesmo artigo, pelos mesmos motivos já mencionados e a alínea "c", dada a violação pelo Estado dos direitos das mulheres assassinadas ante a deficiência na atuação relacionada à persecução penal.

Brasil e México tipificam o assassinato de mulheres em seus Códigos Penais. O México define o feminicídio com base nas razões de gênero, da mesma forma que a Convenção de Belém do Pará e pormenoriza sete circunstâncias caracterizadoras, em apertada síntese: violência sexual, lesões ou mutilações infames ou degradantes, antecedentes de violências, relações de confiança, ameaças anteriores, incomunicabilidade da vítima e exposição do corpo da vítima. Neste artigo o tipo penal foi delineado por circunstâncias objetivas que nos permite cogitar não ser ele um tipo aberto. No caso brasileiro, ao contrário, o legislador previu um tipo penal aberto a duas hipóteses: menosprezo e discriminação à condição de mulher. Indagamos: o que vem a ser "condição de mulher"?

Ao cotejarmos o conteúdo da Tabela 1 com o tipo penal feminicídio brasileiro, percebemos duas possibilidades para lastrear o indiciamento formal no feminicídio, tomando-se por base a Convenção de Belém do Pará: a correspondência da alínea I do inciso VI, do §2º, art.121, do CP com a alínea "b" do artigo 2 da Convenção de Belém do Pará e a segunda, o inciso II – com as alíneas "b" e/ou "c" a depender das circunstâncias. Sinalizamos que a Convenção de Belém do Pará possibilita compreender o que se pode entender por "condição de mulher" ou "condição do sexo feminino" servindo de baliza para o indiciamento formal do feminicídio.

No plano teórico, a Convenção estabelece espaços de poder que remetem ao pensamento de Agamben, Butler e Segato. Entendemos que a ideia de territorialização de corpos e poder soberano de Agamben dialogam com a ideia de vida precária cunhada por Butler[50], "vidas passíveis de luto", ambas referenciando mecanismos de controle, "[...] por meio dos quais os campos ontológicos são construídos", são armados em uma estrutura de poder cuja moldura enquadra conteúdos, em que "[...] a possibilidade de sua manutenção depende, fundamentalmente, das condições sociais e políticas, e não somente de um impulso interno para viver[51]".

Segato propõe compreender a manifestação da violência estruturada em dois eixos: horizontal ou sistema de status, e vertical ou sistema de contrato. O eixo horizontal, ou a relação entre o violador com seus pares, que "[...] se basa en la usurpación o exación del poder femenino por parte de los hombres. Esa exación garantiza el tributo de sumisión, domesticidad, moralidad y honor que reproduce el orden de estatus, en el cual el hombre debe ejercer su dominio y lucir su prestigio ante sus pares [...]". O eixo vertical, ou a relação do violador com sua vítima, representa a contenção da mulher "[...] en el nicho restricto de la posición que la moral tradicional le destina y el exorcismo de lo femenino en la vida política del grupo y dentro mismo de la psique de los hombres[52]". Propomos que o pensamento de Segato articula-se com escritos de Agamben. Na versão do filósofo italiano, há corpos "não propriamente humanos", distintos dos de outros seres humanos, que são usados e usufruídos como se animais fossem[53]. Na sua síntese, "ser cuja obra é o uso do corpo". Na descrição dos casos, tanto no México quanto no Brasil, sugere-se o uso dos corpos das mulheres (violência sexual e amarras em ambos, e mutilações e escalpes no do México).

Sugerimos, também, a possibilidade de articularmos o pensamento de Segato com o de Butler quanto ao enquadramento de corpos como dinâmica de poder que estabelece controle de corpos e "[...] não mantém nada integralmente em um lugar, mas ele mesmo se torna uma espécie de rompimento perpétuo, sujeito a uma lógica temporal de acordo com a qual se desloca de um lugar para outro [...][54]", aproximando-se da ideia de território imaterial proposta por Segato e Agamben.

Ao cotejarmos o pensamento de Segato à Convenção analisada, cogitamos que o eixo horizontal pode ser representado pelas alíneas "b" e "c", e o eixo vertical pela alínea "a". Sugerimos congruência entre a normati-

50 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.22.

51 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.40.

52 SEGATO, Rita Laura. *Las estructuras elementales de la violencia*: ensayos sobre género entre la antropologia, el psicoanálisis y los derechos humanos. Buenos Aires: Prometeo libros, 2010.p.143.

53 AGAMBEN, Giorgio. *O uso dos corpos*: homo sacer IV, 2. São Paulo: Boitempo, 2017. p. 22.

54 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016. p.26.

vidade interna e internacional com as categorias teóricas exploradas, conforme Tabela a seguir:

Tabela 2 – Relação entre categorias

Legal		Teórica	Teórica
Artigo 2 da Convenção de Belém do Pará	Art. 2º- A da Lei nº 13.104/15	Contrato/ status	Relações de poder
A	I	Contrato/vertical	Domínio Existente
B	II	Status/horizontal	Exibição do Domínio
C	II	Status/horizontal	Exibição do Domínio

Fonte: os autores do artigo.

A articulação entre as categorias revela-se útil para a pesquisa: legal - Convenção de Belém do Pará e Lei do Feminicídio; teórica - Segato em diálogo com Agamben e Butler; Contrato/ Status - relações de poder de vida ou de morte e de enquadramento. O quadro analítico permite visualizar a demarcação de territórios da violência de gênero para que o campo normativo-organizacional operacionalize suas dinâmicas pautadas com base nas referidas categorias teóricas. Podemos repensar as categorias com base nos seguintes elementos normativos: perfil do agressor, lugar da morte e motivação, previstos na Convenção de Belém do Pará (CVBP); incisos I e II do §2º - A, da Lei do Feminicídio (LF); Vertical (V) e horizontal (H) referente ao Domínio Existente (DE) e Exibição do domínio (ED) das Relações de gênero (RG), resultando nas hipóteses seguintes: alínea "a"(CVBP) + inciso I (LF) + V + DE = feminicídio com autoria conhecida, interpessoal, subordinação e domínio existente; alínea "b" (CVBP) + inciso II (LF) + H + ED = feminicídio com autoria desconhecida, público, horizontal e exibição de domínio; alínea "c" (CVBP) + inciso II (LF) + H + ED = feminicídio institucional, impessoal, horizontal e exibição do domínio.

Nossa proposta apresenta-se como esforço inicial e sugere a abertura do diálogo e debate para explorar possibilidades outras a serem desvendadas. Certamente, a categoria gênero não deve ser apreendida como se estanque fosse, pois é mediada por "[...] forças articuladas social e politicamente [...][55]", a possibilitarem cenários e enquadramentos diversos, aplicáveis à violência de gênero, a partir de quem a observa, do local que se observa e do momento histórico delimitado.

4. Considerações finais

Os casos analisados, envolvendo violência sexual e assassinato de mulheres, no Brasil e no México, indicam a prática de violência de gênero. Em ambos os casos, notamos a violência sexual acompanhada de práticas de extrema crueldade. Algumas semelhanças fáticas podem ser destacadas. A diferença mais significativa refere-se à forma de atuação das organizações incumbidas da investigação e da persecução criminal. Os documentos utilizados na decisão da Corte Interamericana de Direitos Humanos indicam que a polícia de *Ciudad Juárez* (*Campo Algodonero*) se utilizou de padrões discriminatórios à dignidade das vítimas. Em nenhuma passagem da sentença da Corte se nota o engajamento de outras organizações, como o Ministério Público, com o objetivo de atuar para a proteção das mulheres. No caso praticado no Piauí (Morro do Garrote), de outro lado, a polícia civil agiu de forma rápida na investigação do caso, e há sinais de que buscou preservar a dignidade das meninas e de seus familiares.

A partir da análise dos casos e dos diplomas legais, sob as perspectivas teóricas selecionadas para a discussão, sugerimos, conforme Tabela 2, a imbricação das categorias descritas como caminho factível para a hermenêutica dos contextos em que são praticados os feminicídios. No campo das relações de poder, a categoria Dominação, analisada na perspectiva da Lógica do mandato ou do tributo, proposta por Segato, pode ser traduzida na possibilidade de territorializar o corpo feminino. Um corpo a ser controlado ou consumido ao mostrar-se insubmisso à dominação masculina. As categorias propostas possibilitam vetores para a compreensão dos dois casos analisados na perspectiva da violência contra a mulher.

Sugerimos que a definição legal imprecisa do termo "condição do sexo feminino", presente na qualificadora do feminicídio no Brasil, pode ser compreendida a partir da estrutura proposta pela pesquisa que considera

55 BUTLER, Judith. *Quadros de guerra*: quando a vida é passível de luto?. 2. ed. Rio de Janeiro: Civilização Brasileira, 2016.p.16.

relações de poder e de soberania voltadas ao controle e à apropriação de corpos de mulheres por agressores dela conhecidos ou desconhecidos. A condição do sexo feminino traduz-se na usurpação do poder feminino, retirando-lhe a possibilidade de se constituir um sujeito representável. Opera-se, assim, a territorialização ou apropriação do corpo feminino, uma forma de legitimar e manter o poder masculino.

Sugerimos, ainda, que o assassinato de mulheres que ocorreu no âmbito doméstico é igualmente revelador de um poder moldado na perspectiva de gênero, passível de análise pelas Cortes Internacionais ante a inércia estatal ou deficiente exercício das atividades de persecução e proteção às vítimas. Por fim, o estudo sugere congruência entre as categorias propostas por Segato, a Convenção Interamericana para Prevenir, Punir e Erradicar a Violência contra a Mulher – Convenção de Belém do Pará e a Lei nº 13.104, de 10.03.15. Devemos enfatizar, existem outras possibilidades teóricas, igualmente férteis, que remetem a outras possibilidades de análise sobre os contextos em que são praticados atos de violência contra a mulher. Trata-se de esforço inicial que certamente demanda pesquisas futuras.

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O uso de mecanismos informais de governança global e sua aplicabilidade nas licitações públicas brasileiras

Informal mechanisms of internacional regulation and Brazilian public procurement

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Fabiano de Figueiredo Araujo**
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Resumo

O objetivo do presente trabalho é tratar da influência, nas licitações públicas brasileiras, dos mecanismos informais de governança global, definidos como a normatização internacional sem o uso de regras clássicas de vinculação entre estados soberanos, objetivando trazer o fundamento normativo para a aludida aplicabilidade. Inicialmente, é feito o exame das abordagens de normatização internacional não tradicionais, descrevendo-se os principais projetos de estudos jurídicos da temática, tais como o *Direito Administração Global*, a *Autoridade Pública Internacional* e *In-Law*. Posteriormente, expõe-se que o Direito Internacional tem ascendência no processo licitatório brasileiro, uma vez que o rito de licitação pública, definido legalmente, já teve que ser modificado com a finalidade de se respeitar o que fora ajustado no acordo internacional. Outrossim, apresenta-se que as orientações sufragadas pelo processo de governança global, as quais não sofrem a formalização tradicional do *Direito das Gentes*, também possuem influência no processo licitatório brasileiro e, a despeito de não serem oriundos de tratados vinculantes, são validamente aplicáveis internamente por força do art. 37, XXI, da Constituição Federal, combinado com o art. 3º da Lei nº 8.666, de 1993.

Palavras-Chave: Direito internacional. Direito administrativo global. Licitações. UNCITRAL. Lex Petrolea.

Abstract

This paper aims to examine the influence of the informal mechanisms of global governance, defined as the international regulation without the use of classic rules of agreements between sovereign states, in Brazilian public procurement, in order to show the legal basis for its use. Initially, it examines non-traditional international regulation studies, such as *Global Administration Law*, *International Public Authority* and *In-Law*. Later, this article shows International Law has ascendancy in Brazilian public procurement process, whose procedure is legally defined, because it has already had to be modified in order to respect what was adjusted in international agreement. It is also pointed out that the guidelines given by the global governance process, which do not follow the traditional sources of International Law, also have

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influence in the Brazilian public procurement, and they are legally used in Brazil because of article 37, XXI, of Constitution of the Federative Republic of Brazil, and article 3º of Brazilian Law 8,666/1993.

Keywords: International law. Global administrative law. Public procurement. UNCITRAL. Lex Petrolea.

1. Introdução

Os tratados internacionais são sempre lembrados como meios tradicionais de aplicação do direito internacional, conforme registra, inclusive, o art. 38 do Estatuto da Corte Internacional de Justiça. Sem embargo, convém registrar que, hodiernamente, mecanismos informais de governança global gozam de apreço e ensejam, muitas vezes, uma vinculação do Estado soberano a deliberações estruturadas à margem das clássicas convenções internacionais.

Não se pode deixar de lembrar, por exemplo, dos famosos *acordos de Basileia*, formatados por meio de interação de representantes dos agentes reguladores financeiros locais, não plenipotenciários, que se comprometem em atuar, internamente, em consonância com as deliberações engendradas em conjunto[1]. Tal promessa não é oriunda de uma normatização internacional vinculante (por exemplo: tratado), mas derivada da premissa de que o não cumprimento das resoluções derivadas desses acordos enseja um afastamento do país, na prática, de transações financeiras internacionais.

O processo de informalização normativa não é, por si só, incomum no cenário do Direito Internacional: basta lembrar da proeminência dada aos costumes em tal contexto, bastante reforçada, por exemplo, pela Corte Internacional de Justiça no caso Nicarágua-Estados Unidos (1986), em que a aludida Corte corroborou uso dos costumes para julgar[2].

Sem embargo, visualiza-se a paulatina primazia da informalidade. Há, pois, a existência de um ambiente administrativo global, em que há evidente influência de organismos internacionais, mas também de ferramentas informais de normatização, engendrando a construção de diretivas que influenciam a seara internacional[3].

Essa cooperação transnacional à margem dos instrumentos tradicionais do Direito Internacional foi fomentada por inúmeros motivos, desde os reflexos evolutivos econômicos derivados do processo de Globalização[4] a notória recalcitrância do Congresso Americano em deliberar questões polêmicas em matéria regulatória[5].

Esses mecanismos informais de construção normativa internacional atingem a seara licitatória em nosso país. Afinal, convém lembrar que as diretrizes de contratação pública estabelecidas pelo Banco Mundial, cujos procedimentos não são tratados diretamente em ajustes internacionais, podem incidir em processos licitatórios em nosso país. Por outro lado, a praxe mercadológica estabelecida no setor petrolífero (denominada *lex petrolea*) é o sustentáculo de boa parte das especificações contidas na fase interna das seleções públicas engendradas, previamente, à celebração de contratos de concessão e/ou partilha.

Assim, diante desse fenômeno, o escopo do presente trabalho é delinear a influência do mecanismo informal de governança global, definido como o uso de instrumentos de normatização internacional não tradicionais, nos certames licitatórios brasileiros.

Como primeira etapa, promove-se a análise desse mecanismo informal de normatização e governança global, descrevendo-se os principais projetos de estudos jurídicos da temática, tais como o *Direito Administração Global*, a *Autoridade Pública Internacional* e *In-Law*. Posteriormente, expõe-se que o Direito Internacional tem ascendência no processo licitatório brasileiro, trazendo-se

1 O instrumento empregado internamente para formalizar as regras estruturadas nos Acordos de Basileia é uma simples resolução do Conselho Monetário Nacional, confeccionada com base no art. 4º, VIII, da Lei nº 4.595, de 1964.

2 D´ASPREMONT, Jean. Droit Administratif Global et Droit International. In: BORIES, Clémentine (Dir.) *Un droit administratif global?* A Global Administrative Law? Paris: Éditions Pédone, 2012. p. 92.

3 Kingsbury, B. The Concept of 'Law' in Global Administrative Law. *The European Journal of International Law,* v. 20, 2009. p. 25.

4 HEILMANN, Maria de Jesus R. A. *Globalização e o novo direito administrativo.* Curitiba: Juruá, 2010. p. 97 e ss.

5 O Congresso estadunidense é bastante refratário em atuar no âmbito regulatório, tanto com escopo em matérias internais quanto internacionais. No bojo interno, por exemplo, no final do século XIX, as inúmeras tentativas de estabelecimento, via legislação, de limitações de horário de trabalho eram constantemente afastadas, de sorte que o governo americano teve que utilizar o processo de contratação pública para atingir tal desiderato, mediante a obrigação contratual de limites de horário de trabalho e salários mínimos para aqueles que laborassem sob a égide de um contrato governamental. McCRUDDEN, Chistopher. *Buying Social Justice*: equality, government procurement and legal change. Oxford: Oxford University Press, 2007. p. 258.

exemplos do uso de fontes tradicionais do *Direito das Gentes* nas licitações brasileiras.

Posteriormente, apresenta-se que as orientações sufragadas pelo processo informal de governança global, também, possuem influência no processo licitatório brasileiro e, como não são oriundos de tratados vinculantes, o escopo do presente trabalho consiste em buscar obter o fundamento normativo para o uso desse regramento nas licitações brasileiras.

2. Doutrinas sobre os mecanismos informais de normatização internacional

A doutrina jurídica internacionalista acentua que as fontes formais clássicas do Direito Internacional são o tratado e o costume[6], os quais servem como elementos tradicionais de ordenação das relações entre os Estados soberanos.

Enquanto o costume evidencia "o conjunto de normas consagradas pela prática reiterada nas relações internacionais e, por isso mesmo, tidas como obrigatórias"[7], o tratado consubstancia um documento formal, subscrito por mandatários de duas ou mais pessoas internacionais, que retrata um acordo de vontades entre entes soberanos, com o intuito de vinculá-los na esfera jurídica (*pacta sunt servanda*).

O tratado, como cediço, é o instrumento tradicional de liame entre estados soberanos. Sem embargo do histórico embate doutrinário entre os seguidores das teorias dualista e monista do direito internacional público[8], a Constituição Federal traz o rito institucional no qual ajustes internacionais são incorporados na ordem interna (arts. 49, I; 84, VIII), assim delineado: (i) celebração do ajuste, pelo Presidente da República ou pleniplotenciário; (ii) aprovação da convenção internacional pelo Congresso Nacional, por decreto legislativo; (iii) ratificação da convenção pelo Chefe de Estado por meio de depósito do instrumento do pacto celebrado; (iv) promulgação do acordo mediante decreto, pelo Presidente da República; e (v) publicação oficial do texto da convenção, para início da eficácia interna do ajuste internacional.

Ainda em sede preambular, tratando-se de meios clássicos de normatização internacional, convém lembrar os acordos executivos, isto é, "todo tratado internacional carente de aprovação individualizada do Congresso"[9]. A celebração de tal espécie de ajuste internacional pode ocorrer desde que: a) fosse subproduto de tratado vigente; ou b) fosse expressão da diplomacia ordinária (uma vez que seria da competência privativa da Presidência da República manter relações com Estados estrangeiros)[10].

O intercâmbio internacional jurídico, contudo, não se limita, ordinariamente, a esses meios clássicos de ordenação normativa, e nem mesmo por meio dos participes tradicionais do *Direito das Gentes* (estados soberanos, organismos internacionais e agentes plenipotenciários, estipulados no art. 7º da Convenção de Viena sobre o Direito dos Tratados). Deveras, como já exposto superficialmente na introdução, a globalização e o avanço das comunicações engendraram uma ampliação do processo de interação no âmbito social. Os meios tradicionais de evidência da vontade coletiva, tais como a democracia representativa e o próprio corpo estatal, não são elementos exclusivos de demonstração do desejo da sociedade. Processos de redes sociais, tão verificados hodiernamente, horizontalizam o debate e a discussão, de sorte que o Estado soberano não mais ostenta exclusividade em evidenciar o desejo de cada cidadão.

No cenário internacional, portanto, o papel do indivíduo se torna proeminente, tão quanto a do próprio Estado. Não por acaso, pode-se citar a Convenção de

6 Por todos: ACCIOLY, Hildebrando. *Manual de direito internacional público*. 11. ed. São Paulo: Saraiva, 2000. p. 13.

7 HUSEK, Carlos Roberto. *Curso de direito internacional público*. 14. ed. São Paulo: LTR, 2017. p. 49.

8 Para os dualistas, inexiste conflito possível entre a ordem internacional e a ordem interna simplesmente porque não há qualquer interseção entre ambas. São esferas distintas que não se tocam". BARROSO, Luís Roberto. *Interpretação e Aplicação da Constituição*. 3. ed. São Paulo: Saraiva 1999, p. 16.

"O monismo jurídico afirma [...] que o direito constitui uma unidade, um sistema, e que tanto o direito internacional quanto o direito interno integram esse sistema. Por assim ser, torna-se imperativa a existência de normas que coordenem esses dois domínios e que estabeleçam qual deles deve prevalecer em caso de conflito. Kelsen admite, em tese, o monismo com prevalência da ordem interna e o monismo com prevalência da ordem internacional, embora seja partidário deste último.". Por sua vez, " *Para os dualistas, inexiste conflito possível entre a ordem internacional e a ordem interna simplesmente porque não há qualquer interseção entre ambas. São esferas distintas que não se tocam*". BARROSO, Luís Roberto. *Interpretação e aplicação da constituição.* 3. ed. São Paulo: Saraiva, 1999. p. 16.

9 REZEK, José Francisco. *Direito internacional público*: curso elementar. 7. ed. São Paulo: Saraiva, 1998. p. 66.

10 REZEK, José Francisco. *Direito internacional público*: curso elementar. 7. ed. São Paulo: Saraiva, 1998. p. 67.

Aarhus, ajuste europeu relacionado com o acesso à informação e participação popular nos processos decisórios ambientais, em que soa possível que qualquer indivíduo tenha o direito de participar do processo de decisão de matérias relacionadas com sua abrangência. Caso não lhe seja outorgado tal direito, o interessado poderá reclamar perante um Comitê instalado nas reuniões dos partícipes, para avaliar a decisão administrativa interna e emissão de declaração sobre a não conformidade [11].

Por outro lado, a transversalidade dos problemas modernos enseja a necessidade de atuação conjunta das unidades soberanas: é factível apontar, por exemplo, que dificuldades de poluição surgidas no Estado brasileiro possam prejudicar terceiros países, de sorte que uma atuação conjunta na seara ambiental é medida imprescindível ao bem-estar mundial. Ademais, querelas pertinentes a transações financeiras e comerciais ensejam a necessidade de uma evidente padronização global.

Sob a égide desse cenário, há a emergência da governança global, no sentido de que a multiplicidade de partícipes e de interesses enceta uma complexa articulação, não estruturada, apenas, pelos estados soberanos, como tendia a acontecer outrora, mas por meio de atores e mecanismos diversos, tais como redes informais de articulação de agentes públicos de diversos países ou parametrizações feitas por entidades privadas transnacionais. Em suma, percebe-se um progressivo aumento na intensificação dos povos, passando a serem ligados por vínculos jurídicos originais, além dos tradicionais liames com características estatais[12].

Conforme a visão de Lorenzo Casini[13], existem quatro tipos de administração global. O primeiro é feito por organizações intergovernamentais formais, modelo mais tradicional, de sorte que estados soberanos atuam na formação de organismos internacionais, comprometendo-se, mediante ajustes internacionais, a seguir os ditames delineados por essas entidades. É a lógica engendrada desde *a paz de Westfália*[14]. O segundo é derivado da atuação de organizações público-privadas híbridas e os organismos privados que exercem funções públicas. Essas entidades promovem normatização acatada ao redor do mundo ou atuam em matérias transnacionais de escol, a despeito de não gozarem de personalidade jurídica internacional. Pode-se citar, como exemplo, a Cooperação da Internet para a atribuição de Nomes e Números (ICANN, em inglês), responsável pela alocação dos endereços eletrônicos na rede mundial de Computador, ou a própria Organização Internacional para Padronização (ISO, em inglês).

A terceira espécie retrata a administração global realizada por redes transgovernamentais e transnacionais, configuradas como meios mais simplórios de governança, em que as relações entre os estados soberanos, organismos internacionais ou outros atores são informais, compostos em geral por agentes públicos que escapam da lógica diplomática, a exemplo do comitê de Basileia.

Essas redes costumam ser bastante empregadas para fins de regulação, no afã de intentar promover uma sistematização entre os países acerca de assuntos transversais, tais como concorrência, valores mobiliários e sistema financeiro[15]. Nesse diapasão, os reguladores nacionais intentam formatar *redes de regulação*, possibilitando, assim, que agentes governamentais negociem, diretamente, tais assuntos, comprometendo-se, no futuro, a aplicar, internamente, as diretrizes estabelecidas em tais deliberações.

As grandes características dessas redes transnacionais são as seguintes: (i) não possuem personalidade jurídica internacional; (ii) tendem a atuar por consenso, sem procedimentos formais de votação; (iii) as suas diretrizes não são qualificadas como documentos legais obrigatórios no âmbito internacional; (iv) não possuem procedimento formal de monitorização ou fornecem

11 CASSESE, Sabino. Administrative Law in the global space. In: In: BORIES, Clémentine (Dir.) *Un droit administratif global?* A Global Administrative Law? Paris: Éditions Pédone, 2012. p. 65-66.

12 MOREIRA NETO, Diogo de Figueiredo. Transadministrativismo: uma apresentação. *Revista de Direito Administrativo*, Rio de Janeiro, v. 267, set./dez. 2014. p. 70

13 CASINI, Lorenzo. Além do Estado: o surgimento da administração global. *RDA – Revista de Direito Administrativo,* Rio de Janeiro, v. 267, set./dez. 2014. p. 29

14 KISSINGER, Henry. *Ordem Mundial*. Rio de Janeiro: Objetiva, 2014. p. 23 e ss.

15 Maria de Jesus Heilmann delineia redes transnacionais como *rede informal de autoridades*, consignando que tal modelo se trata "de um conjunto de autoridades que exercem controle e regulação independente de um fundamento jurídico formal ou qualquer tipo de mandato vinculante aos poderes de soberania instituídos por um Estado Democrático. Estes organismos que atuam em redes também não se submetem à distribuição de responsabilidades". HEILMANN, Maria de Jesus R. A. *Globalização e o novo direito administrativo.* Curitiba: Juruá, 2010. p. 165-166. Configuram, pois, fóruns multilaterais internacionais que trazem representantes de órgãos reguladores para facilitar a cooperação multilateral sobre assuntos de interesse mútuos de tais autoridades. VERDIER, P. Transnational regulatory networks and their limits. *The Yale Journal of International Law*, v. 34, jan. 2009. p. 118.

procedimentos de resolução de disputas; (v) não inclui organizações formadas via tratados, bem como arranjos bilaterais reconhecidos via tratados; (v) pode haver atuação de órgãos não governamentais, para fins de assessoramento[16].

A quarta modalidade de administração global ultrapassa o sentido de instituição e redes, com utilização de instrumentos formais e informais, híbridos e multiníveis. Em tal situação, vários atores são envolvidos em nível internacional e nacional, a exemplo do tratado da matéria de patentes, com a integração de legislação interna e cooperações privadas[17].

Observa-se, pela exposição acima, que a orientação sufragada pelos segundo e terceiro exemplos de administração global não possui sustentáculo direto em instrumentos tradicionais do direito internacional, bem como não é propriamente gerado no âmbito do direito doméstico. Encontra-se à margem de fontes clássicas de ambos os modelos de direito[18]. Esses meios de orientação normativa serão aqui definidos como mecanismos informais de governança global**.**

Com efeito, a normatização tradicional mediante regras clássicas está diminuindo, de sorte que a atividade normativa, paulatinamente, se utiliza de instrumentos informais que não se encaixam nas fontes habituais de direito internacional. Essa nova lógica escapa, em larga medida, do processo de *accountability* tradicionalmente verificado nas relações internacionais. Essa sensação do *déficit* de *accountability* é que levou estudiosos a tentarem "domesticar" essas formas plurais de atuação das autoridades públicas. O corpo de normatização surgido além do Estado não configura um Direito Natural, não é estritamente Direito Internacional, por não ser muitas vezes derivado, diretamente, de Tratados, nem é um novo Direito Público Administrativo, pois é separado da Ordem Legal Nacional[19].

Desse modo, projetos de estudos jurídicos relacionados com essa sistemática de cooperação transnacional, à margem de clássicos instrumentos de direito internacional, foram engendrados, tais como o *Direito Administrativo Global,* a *Autoridade Pública Internacional* e o *Informal International Lawmaking*[20].

O Direito Administrativo Global (GAL, em inglês) consubstancia um grupo de estudo formado no âmbito da *New York University*, a partir de 2005, bastante heterogêneo, mas tendo como foco o estudo de uso de mecanismos de aprimoramento do *accountability*, de participação e de transparência na construção desse normativo internacional estruturado à margem dos processos tradicionais de Direito Internacional[21]. O GAL goza de amplitude temática maior do que os demais projetos de estudo.

Por sua vez, o Projeto da Autoridade Pública Internacional (*International Public Authority* – IPA) surgiu no *Max Planch Institute* e visa desenvolver um estudo legal do fenômeno em comento, diferenciando-se do Direito Administrativo Global por focar mais expressamente no direito público, e não na força persuasiva oriunda de instituições não estatais[22]. Por sua vez, *Informal International Lawmaking* (In-Law), uma linha de estudos proposta pela *Hague Institute for the Internalisation of Law*, em 2009, possui uma abordagem direta para construção normativa informal[23].

O escopo do presente trabalho impossibilita um delineamento aprofundado desses projetos. Na verdade, algumas das obras já citadas no decorrer do presente

16 VERDIER, P. Transnational regulatory networks and their limits. *The Yale Journal of International Law*, v. 34, jan. 2009. p. 119.

17 CASINI, Lorenzo. Além do Estado: o surgimento da administração global. *RDA – Revista de Direito Administrativo,* Rio de Janeiro, v. 267, set./dez. 2014. p. 32.

18 PAUWELYN, Joost. Informal International Lawmaking: Framing the Concept and Research Questions. In: *INFORMAL International Lawmaking*. Oxford: Oxford University Press, 2012. p. 13-14.

19 CASSESE, Sabino. Administrative Law in the global space. In: In: BORIES, Clémentine (Dir.) *Un droit administratif global?* A Global Administrative Law? Paris: Éditions Pédone, 2012. p. 67.

20 DANN, Philipp; ENGELHARDT, Marie von. Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority and Global Administrate Law Compared. In: *INFORMAL International Lawmaking*. Oxford: Oxford University Press, 2012. p. 106-107.

21 DANN, Philipp; ENGELHARDT, Marie von. Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority and Global Administrate Law Compared. In: *INFORMAL International Lawmaking*. Oxford: Oxford University Press, 2012. p. 106-107; D´ASPREMONT, Jean. Droit Administratif Global et Droit International. In: BORIES, Clémentine (Dir.) *Un droit administratif global?* a global administrative law? Paris: Éditions Pédone, 2012. p. 84.

22 DANN, Philipp; ENGELHARDT, Marie von. Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority and Global Administrate Law Compared. In: *INFORMAL International Lawmaking*. Oxford: Oxford University Press, 2012. p. 108.

23 PAUWELYN, Joost. Informal International Lawmaking: Framing the Concept and Research Questions. In: *INFORMAL International Lawmaking*. Oxford: Oxford University Press, 2012. p. 13-15.

já procuram trabalhar, com detalhes, esses grupos de estudo.

Nesta sede, a conclusão importante, extraída das linhas de estudo acima referidas, é que a normatização tradicional na esfera internacional mediante regras clássicas está diminuindo, de sorte que a atividade normativa paulatinamente se utiliza de instrumentos não habituais que não se encaixam nas fontes tradicionais de direito internacional. Essa nova lógica escapa, em larga medida, do processo de *accountability* tradicionalmente verificado nas relações internacionais.

É ledo engano, por sua vez, compreender que os processos de licitação brasileiros não sofrem influência de tal cenário. Deveras, as disputas licitatórias de objetos mais vultosas, necessariamente, gozam de atores internacionais, que podem ser desde os agentes que participam dos certames, passando por organismos internacionais que, de alguma forma, atuam no processo de contratação, mediante, por exemplo, empréstimos às unidades administrativas que empreendem a licitação, ou até mesmo agentes regulatórios transnacionais, cujas orientações acabam moldando especificações existentes nos instrumentos convocatórios.

Desse modo, os mecanismos informais de governança global estão influenciando diretamente o cotidiano do processo de contratação governamental. É o que se intentará abordar no próximo tópico do presente artigo.

3. O Direito Internacional e a licitação pública brasileira

Engendrou-se, na esfera pública estatal, o paradigma de que contratações para fornecimento de bens ou prestação de serviços tenham prévios processos objetivos para seleção dos contratantes particulares. Os ordenamentos jurídicos, em geral, acentuam tal necessidade[24]. Deveras, a competição entre particulares enseja a presunção de que ocorrerá uma aquisição, pelo ente público, por patamares mais baixos do que naturalmente existiria caso houvesse uma livre escolha do terceiro que forneceria um determinado bem à Administração Pública[25].

O uso do processo de seleção objetiva de contratação pública, contudo, não apenas possui a serventia de objetivar uma prestação direta à Administração Pública (fornecimento de bens ou serviços). Licitações, também, podem configurar "*barreira de entrada*" para exercício de determinada atividade econômica. Exemplos emblemáticos, na realidade brasileira, do uso da licitação como etapa imprescindível para acesso a setores econômicos são a delegação de serviço público (art. 175 da Constituição Federal) e a atuação no setor petrolífero (art. 177, §1º, da CF c/c art. 36 da Lei nº 9.478, de 1995, ou art. 8º, II, da Lei nº 12.351, de 2010).

A lei é, como cediço, o instrumento que estipula o rito de licitação pública em nosso país, conforme previsão constitucional expressa (arts. 22, XXVII e 37, XXI). Desse modo, os certames licitatórios empreendidos em nosso país acabam seguindo, em regra, o procedimento delineado legalmente.

Partindo-se dessa premissa, havendo celebração de tratado entre a República Federativa do Brasil e estados soberanos que, de certa forma, atinja o processo de compras governamental, pode haver a necessidade de que haja modificação legal do rito outrora definido normativamente, com o fito de respeitar o que foi ajustado no acordo internacional.

Como exemplo, pode-se citar o *Protocolo de Contratações Públicas do Mercosul*, cujo art. 4º criou a regra de *nação mais favorecida* nos processos de contratações governamentais engendradas dentro da esfera do Mercado Comum. Deveras, segundo o preceito, cada membro outorgará aos bens e serviços e obras públicas e aos fornecedores e prestadores de qualquer outro estado soberano parte do acordo, um tratamento não menos favorável que aquele que conceda aos bens e serviços e obras públicas e aos fornecedores e prestadores nacionais.

Mercê de tal realidade, quando adveio a sistemática das margens de preferência na realidade brasileira, metodologia de benefício licitatório que será, inclusive,

24 JÈZE, Gaston. *Principios generales del derecho administrativo.* Buenos Aires: Depalma, 1950. p. 72 e ss.

25 MARIENHOFF, Miguel S. *Tratado de derecho administrativo.* Buenos Aires: Abedelo Perrot, 1983. p. 170. ARROWSMITH, Sue L.; LINARELLI, John; WALLACE JR., Don. *Regulating public procurement:* national and international perspectives. Boston: Kluwer Law International, 2000. p. 37-61; PEREIRA JR., Jessé Torres; DOTTI, Marinês Restelatto. *Políticas públicas nas licitações e contratações administrativas*. 2. ed. Belo Horizonte: Fórum, 2012. p. 33.

explicitado oportunamente, teve a necessidade de previsão expressa no sentido de que "os bens e serviços originários dos Estados Partes do Mercado Comum do Sul – Mercosul" gozassem do mesmo privilégio (art. 3º, §10, da Lei nº 8.666, de 1993).

Ou seja, a vinculação internacional (*pacta sunt servanda*) implicou a necessidade de modificação legal do processo interno de contratação pública, com o intuito de evitar qualquer alegação de que regras estipuladas no ordenamento jurídico nacional estariam violando obrigação vinculante na esfera internacional.

Como consectário desse primado, pode-se lembrar, outrossim, da hipótese de dispensa de licitação estipulada pelo art. 24, XIV, da Lei 8.666, de 1993, na qual se prevê a possibilidade de contratação direta para a aquisição de bens ou serviços nos termos de acordo internacional específico aprovado pelo Congresso Nacional, quando as condições ofertadas forem manifestamente vantajosas para o Poder Público.

Um terceiro exemplo da influência de um ajuste internacional que goza de repercussão nos processos de contratação nacional é o disposto no art. 42, § 5º, da Lei Lei nº 8.666, de 1993, o qual estabelece, de modo expresso, que a Administração Pública em geral poderá utilizar normas e procedimentos licitatórios — inclusive outros critérios de avaliação — próprios dos organismos financeiros internacionais de que o Brasil faça parte, visando à aquisição de bens, obras e serviços, desde que preenchidas as condições do respectivo texto legal.

Em geral, as operações de créditos, derivadas de acordos internacionais, estipulam a necessidade de que as contratações governamentais que usem os recursos emprestados sigam ritos licitatórios normatizados pelo próprio agente financiador, e não pela legislação local.

Em geral, o Banco Internacional para Reconstrução e Desenvolvimento (BIRD), que integra o Grupo Banco Mundial, e o Banco Interamericano de Desenvolvimento (BID) constroem, dentro de suas alçadas, modelos licitatórios (comumente denominados como *diretrizes*) que são empregados de forma ampla em certames ocorridos em nosso país.

A aplicabilidade desses procedimentos licitatórios exigidos nos contratos de empréstimos internacionais era aceita em nosso país antes mesmo da redação vigente do art. 42, § 5º, da Lei nº 8.666, de 1993. Sempre se aduziu, contudo, que tais ritos deveriam estar em consonância com a Constituição Federal[26].

Convém registrar, contudo, a constante resistência de órgãos de controle em pontos específicos dessas diretrizes, mercê da eventual incompatibilidade de algumas questões com os mandamentos constitucionais.

Não se olvida, por exemplo, dos grandes debates ocorridos no Tribunal de Contas da União (TCU) acerca da *regra de confidencialidade,*existente nas diretrizes de aquisição do Banco Mundial, que estabelece o sigilo do procedimento licitatório desde a abertura das propostas até a adjudicação contratual. Após idas e vindas, o TCU sufragou a higidez desse sigilo temporário de informações, por meio do Acórdão nº 1312/2009 – Plenário[27].

Outro ponto que logrou ter divergência perante o TCU foi o da necessidade ou não de equalização das propostas por licitantes estrangeiros no âmbito das diretrizes do Banco Mundial, querela que acabou sendo resolvido, apenas, em 2015.[28]

Com efeito, essas diretrizes de aquisição exigidas pelas organizações financeiras multilaterais, geralmente, são engendradas, internamente, pelas entidades internacionais, de sorte que, à primeira vista, não ostentariam processos amplamente dialógicos para fins de construção. Reitera-se: a sua obrigatoriedade de uso é implementada mediante instrumentos tradicionais de Direito Internacional (acordos que tratam de empréstimos internacionais), mas o rito licitatório em si não é estabelecido pela avença internacional, mas por instrumentação interna do BIRD (ou BID, conforme o caso).

Verifica-se, portanto, que a despeito de existir autorização legal específica para se empregar as diretrizes de contratação dos organismos financeiros internacionais, os procedimentos lá entabulados estão longe de serem estruturados mediante ato normativo formal (lei material interna ou, pelo menos, ajustes cogentes internacionais). Assim, soaria natural o surgimento de críticas acerca da falta de transparência da construção dessas diretrizes, já que seriam estabelecidas, aparentemente, à margem de processos tradicionais de legitimação jurídica, tais como, por exemplo, o complexo rito de interna-

26 Tribunal de Contas da União. Decisão nº 245/1992 – Plenário.

27 ARAUJO, Fabiano de Figueirêdo.A verdade acerca do (constitucional) sigilo de orçamento no RDC para a Copa do Mundo 2014 e Olímpiadas 2016.*Revista Jus Navigandi*, Teresina,ano 16,n. 2920, jun.2011. Disponível em:<https://jus.com.br/artigos/19444>. Acesso em:25 set. 2017.

28 Por intermédio do Acórdão nº 1866/2015 – Plenário.

lização de avenças entre estados soberanos.

Dessarte, em consonância, inclusive, com um dos primados maiores do Direito Administrativo Global, qual seja, a emergência de princípios e procedimentos de *Accountability* e transparência nesses mecanismos internacionais informais[29], o Banco Mundial vem promovendo inúmeros encontros regionais, com os mais diversos atuantes em processos de contratações governamentais, no afã de obter subsídios para revisão das aludidas políticas de aquisição.

Além disso, podemos trazer à baila outros paradigmas nos quais mecanismos informais de governança global possuem força persuasiva no processo de contratação brasileiro.

Pode-se trazer à baila, como primeiro caso para ilustração, a premissa de que a Comissão das Nações Unidas para o Direito Comercial Internacional (UNCITRAL – *United Nations Comission on International Trade Law)* estabeleceu um modelo padrão de licitações públicas (o modelo mais recente é do de 2011), em que se visualiza a primazia de critérios objetivos de seleção, no afã de salvaguardar a competividade.

O próprio fato de tal modelo ter sido construído no bojo da Organização das Nações Unidas (ONU) já evidencia a premissa de que as suas características mais relevantes são coerentes com o que corriqueiramente ocorre nas aquisições públicas perpetradas pelos estados mais representativos da ONU[30]. Ademais, serve como um paradigma de modelo licitatório condizente com os primados da concorrência e da moralidade, de sorte que a construção de uma normatização de contratação governamental local que esteja de encontro a seus preceitos basilares é decerto um elemento de desestimulo à participação de estrangeiros nessas licitações.

Inexistem dúvidas, portanto, de que esse cenário acaba sendo um elemento persuasivo para que modelos de contratações públicas locais sigam os ditames do instrumento paradigma do UNCITRAL.

A legislação brasileira segue, em geral, o regramento lá modelado. Chega ao extremo de, por exemplo, a Lei nº 8.666, de 1993, utilizar uma sistemática de benefícios a produtos e serviços nacionais bastante semelhante com o estipulado no modelo.

Com efeito, a Lei nº 12.349, de 2010, modificou o art. 3º da Lei nº 8.666, de 1993, incluindo vários parágrafos e possibilitando o estabelecimento das margens de preferência nas licitações para produtos e serviços nacionais que atendam a normas técnicas brasileiras. Consoante a normatização, já citada outrora neste artigo, essa margem de preferência pode ser de até 25% por cento. Dessa forma, em situação hipotética, após as disputas de propostas/lances em um certame licitatório, fornecedor de um produto reputado, normativamente, como estrangeiro explicita que o seu bem vale 100 unidades monetárias (u.m.). Caso a margem de preferência seja de 20%, o fornecedor de um produto reputado, normativamente, como nacional logrará êxito no certame caso o preço do bem ofertado seja de até 120 u.m.

Ou seja, pela referida sistemática, não necessariamente o ofertante do menor preço em uma disputa licitatória logrará êxito, porquanto caso este licitante seja um competidor estrangeiro, e ofertante de bem reputado nacional apresente preço superior ao proposto pelo aludido competidor, mas esteja dentro da margem de preferência, o segundo ofertante será considerado vencedor da licitação.

Esse modelo é semelhante com a modelagem de preferência a bens nacionais implementada pelo art. 8º e 11 da Lei Paradigma do UNCITRAL[31].

29 D´ASPREMONT, Jean. Droit Administratif Global et Droit International. In: BORIES, Clémentine (Dir.) *Un droit administratif global?* A Global Administrative Law? Paris: Éditions Pédone, 2012. p. 91.

30 MORETTINI, Simona. Public Procurement and Secondary Policies in EU and Global Administrative Law. In**:** CHITI, Edoardo; MATTARELLA, Bernardo Giorgio (Ed.). *Global Administrative Law and EU Administrative Law*. New York: Springer, 2011. p. 198.

31 Vejamos os arts. 8º e 11 da Lei Modelo da UNCITRAL sobre contratação estatal, no que pertinente: Article 8. Participation by suppliers or contractors. 1. Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations or other provisions of law of this State. [...]Article 11. Rules concerning evaluation criteria and procedures. 1. Except for the criteria set out in paragraph 3 of this article, the evaluation criteria shall relate to the subject matter of the procurement. [...] 3. In addition to the criteria set out in paragraph 2 of this article, the evaluation criteria may include: [...] (b) A margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations. **Tradução livre:** Art. 8º. Participação de fornecedores ou contratados. 1. Fornecedores ou contratados poderão participar do processo licitatório sem distinção em relação à nacionalidade, salvo se a entidade licitante decidir limitar a participar no procedi-

Com efeito, no âmbito internacional, preferências em contratações públicas para produtores e serviços nacionais, a despeito de serem verificadas à saciedade, não são bem acatadas. Não por acaso, existe um acordo de contratação governamental *Government Procurement Agreement* (*GPA)* que propugna por eliminar tal conduta. Em linhas gerais, o *GPA 1994* configura um acordo não obrigatório aos membros da Organização Mundial do Comércio, mas que, no instante em que subscrito, enseja a vinculação dos países que o celebraram[32]. O acordo é guiado pela regra da não discriminação e da nação mais favorecida, intentando, assim, evitar o emprego da sistemática de contratação pública com o fito de beneficiar específicos interesses locais[33]. Assim, na contratação pública de bens e serviços feita por um país signatário, os oriundos dos demais estados celebrantes não receberão tratamento menos favorável do que os nacionais.

O GPA 1994 possui um pequeno número de aderentes, no número de 44 partes[34]. Sem embargo, a sua existência, por si só, já é um elemento refreador de condutas protecionistas no bojo da contratação governamental.

Dessa forma, a construção de modelos de benefícios a bens/serviços nacionais, semelhantes com o paradigma estabelecido pela UNCITRAL poderia até ser um meio de "legitimar" condutas de Função Regulatória da Contratação Governamental, sintetizada aqui, em breves palavras, como o viés de usar a sistemática de aquisição estatal como instrumento de política pública[35], já que, a despeito de essa metodologia ir de encontro a tentativas sufragadas pela Organização Mundial do Comércio (OMC) de maior liberalização econômica, a metodologia estaria condizente com o paradigma do UNCITRAL.

Em suma: a legislação brasileira tem uma tendência de respeitar, em geral, o modelo de contratação governamental sufragado pelo UNCITRAL, mesmo sem haver qualquer instrumento internacional vinculante que exija tal empreendimento.

Outrossim, é trazido outra ilustração da influência de mecanismo informal de governança na contratação governamental brasileira.

Como sabido, a participação de companhias petrolíferas no processo de pesquisa e lavra das jazidas do petróleo em nosso país pressupõe disputa licitatória, de sorte que o futuro vencedor deverá subscrever contrato de concessão ou contrato de partilha (art. 5º da Lei nº 9.478, de 1997), dependendo do regime de exploração e produção.

Em uma breve leitura dos instrumentos convocatórios desses certames, observa-se a menção a praxes mercadológicas existentes nesse setor tão específico. Sempre se estipula, por exemplo, que as empresas licitantes devam cumprir encargos condizentes com as tradições mais visíveis desse mercado. Em suma, os contratos relacionados com tal matéria devem estar coerentes com a chamada *lex petrolea*, corporificação da *lex mercatoria* na área petrolífera.

Com efeito, a *lex mercatoria* se consubstancia na institucionalização de disciplinamentos incidentes no âmbito das transações internacionais, oriundos de costumes, regras de negociação e decisões de arbitragem engendrados na área de negócios. Vê-se que a fonte dessa "normatização" não é, necessariamente, advinda de organizações estatais, mas também de um conjunto de instituições desvinculadas do Estado[36].

Essa mesma lógica serve no âmbito do setor de petróleo e gás. A praxe mercadológica exige que os mais diversos Estados sigam, independentemente do pecu-

mento com base na nacionalidade por força de disposição existente na regra de contratação pública ou outra disposição existente no ordenamento jurídico. Art. 11. Regras pertinentes aos critérios e procedimentos de avaliação. 1. Ressalvado o disposto no parágrafo terceiro deste artigo, os critérios de avaliação guardarão pertinência com o objeto da licitação. 3. Além do critério estabelecido no parágrafo segundo deste artigo, os critérios de avaliação da proposta poderão incluir: (b) uma margem de preferência para fornecedores domésticos ou para bens produzidos internamente, ou outro tipo de preferência, se autorizada ou solicitada pela regra de contratação pública ou por outra disposição existente no ordenamento jurídico.

32 MORETTINI, Simona. Public Procurement and Secondary Policies in EU and Global Administrative Law. In**:** CHITI, Edoardo; MATTARELLA, Bernardo Giorgio (Ed.). *Global Administrative Law and EU Administrative Law*. New York: Springer, 2011. p. 201; MCCRUDDEN, Chistopher. *Buying Social Justice*: equality, government procurement and legal change. Oxford: Oxford University Press, 2007. p. 280.

33 Essa lógica está explicitada, em geral, no art. 3º do Acordo.

34 Armênia, Canadá, União Europeia (28 estados membros), Hong Kong (e não a China), Islândia, Israel, Japão, Coreia do Sul, Liechtenstein, Montenegro, Aruba, Nova Zelândia, Noruega, Cingapura, Suíça, Formosa e Estados Unidos.

35 JUSTEN FILHO, Marçal. *O Estatuto da microempresa e as licitações públicas*. Dialética: São Paulo, 2007. p. 23; OLIVEIRA, Rafael Carvalho R. *Licitações e contratos administrativos*. 3. ed. São Paulo: Método, 2014. p. 159.

36 BRANDÃO, Clarissa. Lex Petrolea. *Revista Brasileira de Direito do Petróleo, Gás e Energia,* Rio de Janeiro, n. 2, 2006. p. 243

liar regime administrativo existente em seu bojo, esse regramento tacitamente implementado, sob pena de não se reputarem ambientes adequados para investimentos de tão grande importe.

Objetivamente falando: caso não sigam essa praxe mercadológica, estão "fora do jogo", inviabilizando que os principais *players* internacionais participem dos certames licitatórios do setor petrolífero realizados localmente.

Conforme acentua Clarissa Brandão[37], *a lex petrolea* se revela, basicamente, na existência de modelos de contratos típicos, tais como o contrato de concessão e o contrato de partilha (expressamente existentes em nossa legislação, como dito outrora), bem como na jurisprudência arbitral, que retratam práticas de conduta tradicionais neste setor e acabam servindo como lastro das especificações nos instrumentos convocatórios de licitações empreendidas pelos mais diversos países.

A fim de corroborar tal ilação, são trazidos alguns pontos do edital, confeccionado pela Agência Nacional de Petróleo, Gás Natural e Biocombustíveis (ANP), da décima segunda rodada de licitações para a outorga de contratos de concessão para atividades de exploração e produção de petróleo e gás natural, que regulou certame licitatório ocorrido no ano de 2013.

Com efeito, observa-se, por exemplo, a existência de várias menções à necessidade de que os licitantes pratiquem "as melhores práticas da indústria do petróleo", para fins de pontuação técnica no certame (vide item 3.4.2.2. do Edital). Esse cenário configura, grosso modo, a satisfação dessa praxe mercadológica retratada no bojo da *lex petrolea*.

Consigne-se, contudo, a inexistência de qualquer preceito legal específico, na legislação interna nacional, que traga, indene de dúvidas, autorização para especificações de tal naipe. Outrossim, não custa anotar que essas praxes mercadológicas não são vinculantes ao Estado Brasileiro por força de clássicos elementos de normatização internacional, e assim, não estaria longe a alegação de que a estipulação dessas especificações poderia ser qualificada como ilegal, viciando o procedimento licitatório.

Sem embargo, a inexistência desse tipo de regramento no instrumento convocatório pode trazer insegurança jurídica ao licitante internacional, desestimulando sua participação nos certames.

Todavia, exemplos de uso de mecanismos informais de governança global não se limitam ao caso em comento. Como outra ilustração, pode-se lembrar dos índices mínimos de registro de capital, estipulados pelos acordos de Basileia[38], como critério de qualificação técnico-financeira em certames licitatórios cuja contratação seja de instituições financeiras.

Reiterando o que foi dito, os aludidos acordos são orientações derivadas de encontros de representantes dos órgãos de supervisão bancárias de dezenas de países, nos quais se acentuaram paradigmas de alocação de capital e de riscos a serem respeitados pelas instituições financeiras, com a finalidade de afastar problemas sistêmicos.

As regras de Basileia acabam sendo utilizadas, ordinariamente, como critério de qualificação técnico-financeira em certames licitatórios nacionais, a despeito de inexistir um comando cogente, oriundo da normatização internacional tradicional, que obrigue tal empreendimento.

Deveras, com a finalidade de comprovar tal fato, citam-se os seguintes precedentes:

(i) Item 7.1, "c", do Termo de Referência da licitação cujo objeto é a contratação de instituição financeira para prestação de serviços bancários, incluindo o pagamento da folha de pagamentos dos servidores ativos, inativos e pensionistas da administração direta, indireta, autárquica e fundacional do Poder Executivo do Estado do Rio de Janeiro[39], na qual se acentua a necessidade de cálculo do índice de Basileia de *solvência bancária;*

(ii) Item 2.5, "b" do Edital de Pregão estruturado pelo Município de Mirassol D´Oeste – MT, no qual se exigiu análise do desempenho de capacidade financeira do licitante "*conforme os mecanismos adotados no Acordo de Basiléia e seus adendos, obedecidas as normativas do Banco Central do Brasil*";

(iii) Item 5.4, "b", do Edital de Pregão feito pelo Tribunal de Contas do Estado de São Paulo[40],

37 BRANDÃO, Clarissa. Lex Petrolea. *Revista Brasileira de Direito do Petróleo, Gás e Energia,* Rio de Janeiro, n. 2, p. 247, 2006.

38 Já explicado outrora.

39 RIO DE JANEIRO. *Termo de referência*. Disponível em: <http://www.fazenda.rj.gov.br/sefaz/content/conn/UCMServer/uuid/dDocName%3AWCC193998>. Acesso em: 15 jan. 2018.

40 SÃO PAULO. Tribunal de Contas do Estado de São Paulo. *Pregão (Presencial) n° 12/14*. Disponível em: <http://www4.tce.sp.gov.br/licitacao/sites/licitacao/files/pre-12-20307_instituicao_bancaria_edital_alterado_reabertura_0.pdf>. Acesso em: 15 jan.

cujo objeto é a "*contratação de instituição bancária para operar os serviços de processamento e gerenciamento de créditos provenientes da Folha de Pagamento dos servidores ativos, inativos e pensionistas*", que também exigiu a apresentação do cálculo do índice de Basileia.

Em semelhança ao que dito outrora, em relação às licitações do setor petrolífero, há outra situação na qual inexiste qualquer preceito legal específico que autorize o uso das orientações sufragadas em Basileia como restrição para participação em certames licitatórios nacionais.

Sem embargo, o fato de não se aplicar tal regramento pode induzir a visão de que o setor público brasileiro estaria condescendente com o equilíbrio sistêmico do setor financeiro nacional, trazendo, assim, evidente prejuízo à visão internacional sobre a realidade brasileira regulatória das instituições financeiras.

Entende-se, porém, que há amparo normativo, de caráter mais geral, para utilização de regras oriundas dos mecanismos informais de governança global, com o fito de expurgar quaisquer alegações de ilicitudes nos procedimentos licitatórios que as usem. É o que se exporá a seguir.

4. O art. 37, XXI, da Constituição Federal e o art. 3º da Lei nº 8.666, de 1993, como preceitos autorizadores do uso, em certames licitatórios, de regras oriundas dos mecanismos informais de governança global

Verificou-se, no tópico anterior, que certames licitatórios nacionais aplicam preceitos derivados de regramentos da administração global que não são, contudo, vinculantes ao Estado Brasileiro, consoante a tradicional normatização internacional. Outrossim, como dito, inexistem normas legais específicas que amparem o uso dos aludidos regramentos. Esse cenário, como se vê, pode ensejar fragilidade na higidez do certame licitatório.

Afinal, a Constituição Federal outorga a necessidade de que o processo de contratação pública, em regra, seja entabulado mediante certame licitatório delineado legalmente (art. 37, XXI).

Sem embargo, a própria norma constitucional autoriza, expressamente, a construção de restrições no bojo do processo de licitação, "*indispensáveis à garantia do cumprimento das obrigações*". Isto é, não é elemento violador do caráter isonômico da disputa licitatória a construção de exigências ou limites participativos com o intuito de filtrar a participação daqueles agentes mais compatíveis com o desejo administrativo de obtenção de uma proposta mais adequada e vantajosa ao corpo administrativo[41].

Consentâneo com o aludido mandamento constitucional, o art. 3º, §1º, I, da Lei nº 8.666, de 1993, autoriza, por interpretação em sentido contrário à sua literalidade, a admissão de cláusulas e ou condições limitadoras de participação de particulares em específico certame, desde que sejam pertinências ou relevantes ao específico objeto contratual.

Entende-se, pois, que os aludidos preceitos, constitucional e legal, são verdadeiras cláusulas gerais autorizativas de construção de especificações que, mesmo eventualmente limitadoras da participação licitatória, tenham o condão de serem adequadas para atender, satisfatoriamente, o interesse administrativo de obtenção de uma proposta mais vantajosa.

Assim, percebe-se que haveria, pois, embasamento normativo para que condições advindas de rede de governança global e/ou oriundas de mecanismos não tradicionais de normatização internacional sejam aplicáveis aos certames licitatórios brasileiros.

Sem embargo, para tal conduta, impõe-se motivação na fase interna do processo de contratação governamental, com o fito de evidenciar que a conduta administrativa não viola a isonomia, bem como que enceta uma qualificação, no instrumento convocatório, imprescindível para atingir à finalidade pretendida pela Administração Pública.

Exemplificando, no caso dos certames licitatórios relacionadas com o setor petrolífero, verifica-se que a utilização de regramentos oriundos da *lex petrolea* nas especificações e nas cláusulas contratuais dos instrumentos paradigmas dos editais tem o condão de incentivar o emprego da boa prática internacional da indústria do petróleo na realidade nacional, com efeitos positivos nas mais diversas searas, tais como ambientais e tecnológica.

Ademais, essa padronização internacional das regras dos contratos do setor petrolífero acaba sendo, factual-

2018.

41 JUSTEN FILHO, Marçal. *Comentários à Lei de Licitações e Contratos Administrativos*. 13. ed. São Paulo: Dialética, 2009. p. 69.

mente, um elemento indutor de investimentos locais, mercê do fato de que estipula a participação internacional nas disputas licitatórias. Em suma, tais exigências, a despeito de serem elementos restritivos de competividade, acabam sendo factualmente elementos indutores da concorrência licitatória.

Dessa forma, o art. 3º, I, da Lei nº 8.666, de 1993, pode ser empregado como a cláusula geral para aplicação, em certames licitatórios, de regramentos oriundos de mecanismos informais de governança global, afastando-se, assim, qualquer alegação de eiva na licitação.

5. Considerações Finais

As breves linhas tecidas tiveram o condão de evidenciar que os mecanismos informais de normatização internacional são aplicáveis no cotidiano das licitações públicas em nosso país.

Os exemplos trazidos estão longe de serem exaustivos. Outras abordagens poderiam ter sido elencadas, tais como: aquelas relacionadas com encargos existentes em contratações diretas da União com entidades particulares estrangeiras, que seriam coerentes com praxes mercadológicas; requisitos ambientais; ou até mesmo especificações licitatórias oriundas de comandos construídos em sede de redes transnacionais de regulação.

Ressaltou-se, nessas rápidas páginas, a premissa de que o regramento existente no âmbito das licitações públicas brasileiras está longe de ficar adstrita ao Direito Administrativo Positivo.

O processo licitatório, metodologia tão conhecida pela sua vinculação a procedimentos rigidamente estabelecidos normativamente, pode sofrer direta influência de mecanismos não tradicionais de normatização na seara internacional.

E, tendo em vista tal realidade, concluiu-se que o art. 37, XXI, da Constituição Federal, bem como o art. 3º da Lei nº 8.666, de 1993 podem ser cláusulas gerais autorizativas de construção de especificações, em instrumentos licitatórios, que possam seguir as regras entabuladas no cenário da governança global.

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Resumo

O presente trabalho visa analisar a autonomia institucional da Igreja Católica em face do Estado por eventuais ilícitos canônicos. Para tanto, a pesquisa, de caráter qualitativo e que tem por fato motivador a restrição da liberdade do Bispo diocesano de Formosa, diocese do interior de Goiás, foi realizada por meio de análise documental, com fulcro na doutrina acerca da soberania da Santa Sé, no Direito Canônico e no tratado internacional celebrado entre a República Federativa do Brasil e a Santa Sé. Analisa-se, inicialmente, o histórico do ordenamento jurídico *interna corporis* da Igreja Católica, bem como a autonomia institucional dessa frente ao Estado Brasileiro à luz do Decreto n. 7.107/2010 (Acordo Brasil-Santa Sé). As normas pertinentes à gestão patrimonial são apresentadas em seguida, com destaque para os parâmetros de atuação impostos pela legislação canônica aos administradores eclesiásticos. Finalmente, estabelecem-se os limites de atuação do Estado diante do cometimento de delitos canônicos e identifica-se a possibilidade de ingerência estatal ocorrida na diocese de Formosa, materializada na ofensa ao Acordo Brasil-Santa Sé, tratado internacional internalizado no ordenamento jurídico pátrio, e, também, na agressão aos direitos e garantias individuais do Bispo desta diocese. Conclui-se que, não obstante os diversos instrumentos normativos e os esforços por uma plena vivência das finalidades comuns, o Estado continua intervindo na soberania da Igreja Católica no Brasil e de suas entidades.

Palavras-chave: Relações Igreja-Estado. Tratado Brasil-Santa Sé. Autonomia da Igreja Católica. Ingerência Estatal.

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Abstract

The present paper aims at analyzing the institutional autonomy of the Catholic Church in the face of the State for potential canonical illicit acts. Therefore, the research, with a qualitative approach, and motivated by restrictions on freedom of the diocesan Bishop of Formosa, a diocese in the state of Goiás, was developed through documental analysis, based on the doctrine regarding the sovereignty of the Holy See, the canon law and on the international treaty complied between the Federal Republic of Brazil and the Holy See. Firstly, it will be analyzed the legal history of *interna corporis* law by the Catholic Church, as well as its institutional autonomy in relation to the Brazilian State in light of Decree n. 7.107/2010 (Brazil-Holy See Agreement). The norms concerning patrimonial management are presented next, emphasizing the action parameters imposed by the canon law to the ecclesiastical administration. Lastly, the limits of the State action are established in the commitment of canon crimes and the possibility of state interference occurred in the diocese of Formosa is identified, materialized by the offense against the Brazil-Holy See Agreement, an international treaty internalized according to the national legal order, and, besides, through the aggression against the rights and individual guarantees of the Bishop. In conclusion, notwithstanding the many normative instruments and the efforts for a full experience of common purposes, the State keeps intervening in the sovereignty of the Catholic Church and its entities in Brazil.

Keywords: Church-State Affairs. Catholic Church Autonomy. Brazil-Holy See Agreement. State Interference.

1. Introdução

A temática da "questão religiosa", conflito ocorrido no Brasil na década de 1870, parece ressuscitar no País em 2018 mediante a ingerência do Estado em assuntos da alçada interna da Igreja Católica. Não obstante a clareza dos instrumentos normativos, a autonomia, independência e soberania dessa Instituição são objeto de questionamentos e de agressões.

Aos 02 de janeiro 1874, foi preso Dom Frei Vital Maria Gonçalves de Oliveira Júnior, Bispo de Olinda. Condenado pelo Supremo Tribunal, no Rio de Janeiro, aos 21 de fevereiro de 1874, foi-lhe imposta a pena de quatro anos de prisão com trabalhos forçados e custas. À mesma pena, foi condenado Dom Antônio de Macêdo Costa, Bispo do Pará, no dia 28 de abril de 1874. O Imperador, Dom Pedro II, concedeu-lhes anistia cerca de um ano e meio após suas condenações, depois de muito clamor popular. Até mesmo sua filha, a Princesa Isabel, católica convicta e admiradora de Dom Vital, intercedeu ao pai pela liberdade dos clérigos.

Da acusação feita a ambos — a respeito da qual decidiram os Bispos não se defender, como expressão de não aceitação do foro a que estavam sendo submetidos — constava o crime de sedição. Ultramontanistas[1], Dom Vital e Dom Macedo cumpriam em suas dioceses as ordens recebidas de Roma, aplicando suspensões do uso de ordens[2] a clérigos envolvidos com a maçonaria e interditos a confrarias controladas por esta, sem prejuízo da aplicação da pena de excomunhão aos que não a renegassem.

Quase um século e meio depois, precisamente aos 144 anos das únicas prisões de Bispos ocorridas no Brasil, o fato se repete. Aos 19 de março de 2018, após investigação conduzida Ministério Público, Dom José Ronaldo Ribeiro, Bispo da Formosa, diocese do interior de Goiás, teve prisão temporária decretada (convertida em preventiva), sob a acusação de apropriação indébita (CPB, art. 168, § 1º, III, por dez vezes), associação criminosa (CPB, art. 288) e falsidade ideológica (CPB, art. 299, por onze vezes), todos c/c o art. 29, do CPB[3]. Notícia veiculada em mídia nacional dá conta de que "o grupo se apropriava de dinheiro oriundo de dízimos, doações, arrecadações de festas realizadas por fiéis e taxas de eventos como batismos e casamentos"[4].

1 Ou ultramontanos, denominavam-se os clérigos que simpatizavam com o movimento surgido na França, na primeira metade do século XIX, de afirmação do catolicismo romano e de defesa das prerrogativas do papa em matéria de fé e de disciplina eclesiástica. A respeito da implantação do ultramontanismo no Brasil, recomendamos o artigo: REIS, Edilberto Cavalcante. Diocese do Ceará como vitrine da romanização (1853-1912). Kairós. *Revista Acadêmica da Prainha*, Fortaleza, ano 1, n. 1-2, jan./dez. 2004. Disponível em: <http://www.catolicadefortaleza.edu.br/wp-content/uploads/2013/12/Revista-Kairos-ok.pdf>. Acesso em: 26 maio 2018.

2 Decisão administrativa episcopal que proíbe o clérigo de exercer os atos próprios de seu status clerical, como celebrar os sacramentos.

3 Juntamente ao Bispo, Dom José Ronaldo Ribeiro, foram denunciados mais cinco sacerdotes da diocese de Formosa. Autos n. 201800073946 (7394-70.2018.8.09.0044), em trâmite na 2ª Vara Criminal da Comarca de Formosa/GO.

4 TÚLIO, Silvio. *Bispo e padres são presos em operações contra desvios de*

À denúncia do *parquet*, o Poder Judiciário local, julgando-se competente para processar o feito, determinou tanto a prisão como o bloqueio de contas bancárias e a indisponibilidade de bens[5]. HC's foram interpostos perante o Tribunal de Justiça do Estado de Goiás, o Superior Tribunal de Justiça e o Supremo Tribunal Federal, todos indeferidos. A prisão preventiva somente foi revogada por força de novo HC[6] interposto perante o TJ/GO, que, aos 17 de abril de 2018, conheceu do pedido e concedeu a ordem, determinando a expedição de alvará de soltura em favor do paciente, a qual se efetivou nesse mesmo dia.

Tanto no caso de Dom Vital e de Dom Macedo quanto no caso de Dom José Ronaldo, há que se questionar a agressão da liberdade e independência da Igreja. No primeiro caso, por interesses políticos (a maçonaria, enraizada não somente no Estado, mas, também, na Igreja, sentiu-se perseguida e ofendida com as decisões firmes do papa e dos Bispos). No segundo, mais recente, o Decreto n. 7.107/2010[7] foi inobservado. Enquanto se conclui, não houve o cometimento dos crimes pelos quais o Bispo de Formosa foi denunciado. Outrossim, ainda que concretizada a hipótese de cometimento de algum delito, este se qualificaria como canônico, sendo incompetente, portanto, o Estado, na investigação e na punição do suposto infrator. A Igreja Católica é autônoma, independente e soberana, nos termos do próprio reconhecimento que lhe fez a República Federativa do Brasil, no prefalado Decreto.

Neste artigo, analisaremos a autonomia institucional da Igreja Católica em face do Estado nos casos de eventuais ilícitos canônicos, tomando como *case* o que vem ocorrendo na Diocese de Formosa.

Assim, num primeiro momento, trataremos do ordenamento jurídico e da autonomia da Igreja Católica à luz do Decreto n. 7.107/2010. Para tanto, não poderemos olvidar da compreensão que a própria Igreja tem de si, sob os enfoques teológicos, históricos, eclesiológicos e jurídicos, bem como analisaremos a autonomia institucional da Igreja frente ao Estado Brasileiro à luz do Acordo Brasil-Santa Sé.

Em seguida, apresentaremos as normas pertinentes à gestão patrimonial dos bens da Igreja Católica, com ênfase nos parâmetros de atuação impostos pela legislação canônica aos administradores eclesiásticos, dentre os quais o Bispo numa diocese.

Por fim, procuraremos delinear os limites de atuação do Estado diante do cometimento de delitos canônicos e identificaremos a possibilidade de ingerência estatal ocorrida na diocese de Formosa, haja vista a ofensa ao Decreto n. 7.107/2010, particularmente quanto à inobservância, por parte do Ministério Público de Goiás, em relação ao reconhecimento inequívoco que faz o Estado ao direito canônico, disciplinador este de processos administrativo e judicial de aferição de responsabilidades por má gestão, por parte do Bispo diocesano.

Chega-se, assim, à conclusão de que ao Estado, nesse caso, assim como em outros que tocam a vida interna da Igreja, não cabe o direito de ingerência. Pretende-se, neste artigo, abordar assunto extremamente contemporâneo, cuja compreensão, por parte da comunidade jurídica e acadêmica brasileira, se faz imperiosa.

2. O ordenamento jurídico e a autonomia da Igreja Católica à luz do Decreto n. 7.107/2010

2.1. O Direito Canônico

A história bimilenar da Igreja Católica a qualifica como uma das instituições mais estáveis. A partir de uma autocompreensão desenvolvida na eclesiologia[8], a Igreja Católica identifica Jesus Cristo como seu fundador, cuja natureza, tanto humana quanto divina[9], deu

recursos da Igreja Católica em três cidades de Goiás. 2018. Disponível em: <https://g1.globo.com/go/goias/noticia/mp-realiza-operacao-contra-desvios-de-recursos-na-igreja-catolica-em-tres-cidades-de-goias.ghtml>. Acesso em: 13 maio 2018.

5 Processos n. 201800349917 (34991-14.2018.8.09.0044) e 201800357707 (35770-66.2018.8.09.0044), em trâmite na 2ª Vara Criminal da Comarca de Formosa/GO.

6 Processo n. 201890359610 (35961-49.2018.809.0000), julgado pela 2ª Câmara Criminal do Tribunal de Justiça de Goiás, aos 17 de abril de 2018.

7 Que promulgou o Acordo entre o Governo da República Federativa do Brasil e a Santa Sé relativo ao Estatuto Jurídico da Igreja Católica no Brasil. Aqui, o Estado, de forma inequívoca, reconhece o Código de Direito Canônico como ordenamento jurídico interno próprio não somente da Santa Sé, mas, também, das entidades eclesiásticas a ela ligadas.

8 Ramo da ciência teológica que estuda os fundamentos da Igreja Católica sob os enfoques bíblicos, doutrinais e históricos.

9 Já no ano 325, a fórmula de fé do Concílio de Nicéia assim se referia a Cristo que, sendo Deus, e sem deixar de ser Deus ("Deus de Deus, Luz da Luz, Deus verdadeiro de Deus verdadeiro"), fez-

gênese à da Igreja, que quer ser, no mundo, ao mesmo tempo, "sinal da íntima união com Deus e da unidade de todo o gênero humano"[10]. Essa característica dual da natureza da Igreja reflete-se na sua missão, compreendida igualmente como recebida de Cristo, a saber: "anunciar e instaurar o Reino de Cristo e de Deus em todos os povos"[11].

Apresenta-se, pois, a Igreja Católica como

> [...] a sociedade organizada hierarquicamente e o Corpo místico de Cristo, o agrupamento visível e a comunidade espiritual, a Igreja terrestre e a Igreja ornada com os dons celestes não se devem considerar como duas entidades, mas como uma única realidade complexa, formada pelo duplo elemento humano e divino[12].

Para efetivar sua missão, a Igreja considera que o seu ponto de partida doutrinal é o ensinamento dos primeiros seguidores de Cristo, os Apóstolos, sob a guia de Simão Pedro, a quem a tradição aponta como sendo, respectivamente, os primeiros Bispos e o primeiro papa. A este, com base no Evangelho, Cristo confiou "as chaves do Reino do Céu", numa referência à autoridade de absolver pecados, pronunciar juízos doutrinais e tomar decisões disciplinares na Igreja[13]. Tal regime, denominado pela tradição católica de "sucessão apostólica", se mantém até hoje e garante a fidelidade que os Bispos e papas atuais tenham direta ligação histórica com o Colégio Apostólico.

Em síntese, afirma-se que:

> A Igreja é o corpo místico de Cristo na terra, tendo sido por Ele fundada, ao entregar as chaves do céu a São Pedro, o primeiro papa, com a missão expressa de pregar a Luz do Evangelho, anunciando a sua verdade a todos os homens[14].

O último cânon do Código de Direito Canônico determina que "a salvação das almas deve ser a lei suprema da Igreja"[15], numa alusão ao fato de que a missão espiritual da Igreja Católica deve ser, primordialmente, conduzir à plenitude — a eternidade feliz junto de Deus — as pessoas, sem descurar, contudo, do aspecto temporal da sua missão, o qual foi interpretada pelo papa Pio XII, na radiomensagem aos fiéis de Roma, realizada aos 10 de fevereiro de 1952: È tutto un mondo, che occorre rifare dalle fondamenta, che bisogna trasformare da selvatico in umano, da umano in divino, vale a dire secondo il cuore di Dio[16].

Considera a Igreja que a reconstrução dos fundamentos do mundo é, também, parte de sua missão, na medida em que o Evangelho é anunciado e são propostas novas formas de vida e de relações sociais justas e fraternas. Ou seja, compreende-se a Igreja como responsável pelo aperfeiçoamento da realidade temporal, pois nada há de verdadeiramente humano que lhe seja indiferente:

> As alegrias e as esperanças, as tristezas e as angústias dos homens de hoje, sobretudo dos pobres e de todos aqueles que sofrem, são também as alegrias e as esperanças, as tristezas e as angústias dos discípulos de Cristo; e não há realidade alguma verdadeiramente humana que não encontre eco no seu coração[17].

Para levar a cabo a sua missão, a Igreja, reconhecendo-se, também, como instituição humana, sentiu, desde os seus primórdios, a necessidade de um ordenamento jurídico, denominado "direito canônico" ou "direito eclesiástico".

Em sua nascente, entre os séculos I e II, esse direito foi de caráter consuetudinário, haja vista as grandes perseguições promovidas pelo Império Romano, as quais somente cessaram no ano de 313, com o Edito de Milão, firmado pelo Imperador Constantino.

se homem ("por nós, homens e, por nossa salvação, desceu dos céus, foi feito carne pelo Espírito Santo da Virgem Maria, e foi feito homem").

10 CONCÍLIO VATICANO II. *Documentos do Concílio Vaticano II*. Constituição Dogmática *Lumen Gentium*, n. 1. São Paulo: Paulus, 2001. p. 102.

11 CONCÍLIO VATICANO II. *Documentos do Concílio Vaticano II*. Constituição Dogmática *Lumen Gentium*, n. 5. São Paulo: Paulus, 2001. p. 105.

12 CONCÍLIO VATICANO II. *Documentos do Concílio Vaticano II*. Constituição Dogmática *Lumen Gentium*, n. 8. São Paulo: Paulus, 2001. p. 110.

13 JOÃO PAULO II. *Catecismo da Igreja Católica*. São Paulo: Loyola, 2000. p. 156.

14 AGUILLAR, Rafael Salomão Safe Romano. *A personalidade jurídica da Igreja Católica no Brasil*: do padroado ao Acordo Brasil-Santa Sé. São Paulo: LTr, 2015. p. 25.

15 JOÃO PAULO II. *Código de Direito Canônico*. 22. ed. São Paulo: Loyola, 2013. p. 749.

16 Tradução do autor: É todo um mundo que é necessário refazer desde os fundamentos, um mundo que é necessário transformar de selvagem em humano, de humano em divino, quer dizer, segundo o coração de Deus. PIO XII. *Radiomessaggio di Sua Santità Pio PP. XII ai fedeli romani*. Discorsi e Radiomessagi di Sua Santità Pio XII, XIII. *Acta Apostolicae Sedis (A.A.S.)*. v. 14, n. 3, p. 158-162, 1952. Disponível em: <https://w2.vatican.va/content/pius-xii/it/speeches/1952/documents/hf_p-xii_spe_19520210_fedeli-romani.html>. Acesso em: 27 jun. 2018.

17 CONCÍLIO VATICANO II. *Documentos do Concílio Vaticano II*. Constituição Pastoral *Gaudium et Spes*, n. 1. São Paulo: Paulus, 2001. p. 539.

Entre os séculos III e XI, a partir da liberdade que foi concedida à Igreja, "desponta a legislação eclesiástica, graças às primitivas coletâneas de atas de concílios e sínodos regionais"[18]. Neste artigo, em virtude da proximidade entre o Estado (o Império Romano) e a Igreja, aconteceram diversas inserções do direito civil no direito eclesiástico. Os imperadores, ingerindo-se em assuntos religiosos, legislavam, tornando mistas as coleções canônicas.

A sistematização do direito canônico deu-se com base no século XII, com as famosas compilações, entre as quais a *Concordia Discordantium Canonum* ou, simplesmente, *Decretum Gratiani*, do monge camaldulense João Graciano (1160-?), considerado pai da ciência canônica. Até então, as normas emanadas eram as mais diversificadas — e, às vezes, contraditórias. Graciano, com sua obra, não somente compilou os textos canônicos, harmonizando as discordâncias, mas, também, de forma didática, elaborou um método científico para seu estudo, criou situações hipotéticas (*causae*) e deduziu temas jurídicos (*quaestiones*), com as respectivas soluções (*capita*), usando como fontes a Sagrada Escritura, o direito natural, as coleções já existentes, os decretos dos papas, os preceitos do direito romano teodosiano e justiniano e as leis civis germânicas.

Embora de caráter privado, o *Decretum Gratiani* passou a ser utilizado como texto de estudos nas *universitas studiorum,* as primeiras universidades, quais sejam Bolonha, Oxford, Paris, Tolosa, Orleans e Angers. Nestas, o Direito uniu-se à Filosofia e à Teologia, ministrado com o rigor eclesiástico[19]. Começava a tomar forma o *corpus iuris canonici*.

Porém, ainda não dispondo de um instrumento unificado, e seguindo a esteira das diversas nações do mundo que passaram a codificar os seus ordenamentos (a exemplo da França e do seu Código Civil de 1804), a Igreja Católica iniciou, no século XIX, o processo de unificação da legislação canônica emanada ao longo da história pelos Bispos e papas, concílios e sínodos. Já no Concílio Vaticano I (1869-1870), os Bispos urgiam do papa a reforma da legislação, ao modo dos códigos civis modernos, num só código, mas sem que se perdesse a tônica do *corpus*. Contudo, novamente os movimentos de ingerência estatal na Igreja fariam com que o intento renovador fosse postergado, em que pese a necessidade de interromper o Concílio, por causa da guerra franco-alemã, que teve por consequência a ocupação de Roma, que fez com que o papa Pio IX suspendesse os trabalhos[20].

Somente no ano de 1917 é que se promulgou o primeiro Código de Direito Canônico (CDC), o qual vigorou até o ano de 1983, quando entrou em vigor o segundo e atual código (para os fies de rito latino, ocidental) que, juntamente à Constituição Apostólica *Pastor Bonus*[21] (promulgada por João Paulo II aos 28 de junho de 1988) e o *Codex Canonum Ecclesiarum Orientali*[22] (para os fieis de rito oriental, promulgado por esse mesmo papa, aos 18 de outubro de 1990), compõe o atual *corpus iuris canonici*[23].

O CDC, que tem papel central no ordenamento jurídico interno da Igreja Católica, possui 1752 cânones e desenvolve, em sete livros, os seguintes temas: I – Das normas gerais; II – Do povo de Deus; III – Do múnus de ensinar da Igreja; IV – Do múnus de santificar da Igreja; V – Dos bens temporais da Igreja; VI – Das sanções na Igreja; VII – Dos processos.

Traçadas as linhas históricas do direito canônico, urge analisar autonomia de que goza a Igreja Católica, haja vista as diversas formas com que se relacionou com os Estados ao longo dos séculos: considerada seita de ateus e baderneiros (até o século IV, durante as perseguições promovidas pelo Império Romano), sendo feita religião oficial do Império (por meio do Edito *Cunctos Populos*, no ano de 380, do Imperador Teodósio), passando pelo cesaropapismo e regalismos, até chegar aos dias atuais, em que goza de relativa liberdade, o que lhe possibilitou estabelecer relações com as principais nações do mundo, como o Brasil.

18 LIMA, Maurílio César de. *Introdução à História do Direito Canônico.* 2. ed. São Paulo: Loyola, 2004. p. 36.

19 LIMA, Maurílio César de. *Introdução à História do Direito Canônico.* 2. ed. São Paulo: Loyola, 2004. p. 111.

20 O Concílio Vaticano I não mais foi retomado. Permaneceu em suspenso até o Concílio Vaticano II (1962-1965), sendo o primeiro ato deste a declaração oficial de que o anterior estava encerrado.

21 A *Pastor Bonus* promoveu a restauração de toda a Cúria Romana, cinco anos depois da promulgação do Código de Direito Canônico, o qual já previa a sua existência, como forma de regulamentar algumas matérias específicas.

22 O CCEO foi promulgado exatamente para ser o Código de Direito Canônico das vinte e uma Igrejas Rituais Orientais Católicas atualmente existentes.

23 Além dos citados, são considerados instrumentos normativos canônicos os diversos atos emanados pelo papa, quanto ao direito universal, e pelos bispos, em suas respectivas jurisdições, quanto ao direito particular, seja do ponto de vista administrativo, seja do ponto de vista judicial.

2.2. A autonomia da Igreja Católica e o Decreto n. 7.107/2010

A Igreja Católica, para cumprir sua missão de anunciar o Evangelho e salvar almas, segundo seu próprio entendimento, mantém permanentes relações com os Estados, por meio da Santa Sé, pessoa jurídica de direito público internacional, assim reconhecida à unanimidade pela comunidade das nações. Até mesmo quando da extinção dos Estados Pontifícios, em 1870, o papado continuou gozando de reconhecimento como sujeito autônomo, celebrando, inclusive, tratados internacionais e tendo representação diplomática.

Baldiseri[24] compreende que a missão da Igreja é materializada na missão do papa, sendo este detentor de dupla soberania, quais sejam a de Pastor da Igreja Universal e de Chefe do Estado da Cidade do Vaticano. O Código de Direito Canônico estabelece a Santa Sé como uma entidade soberana que se configura como órgão central da Igreja e como a personificação jurídica do Estado do Vaticano, composta que é pelo próprio papa e pela Cúria Romana, o alto escalão de comando da Igreja. Sua soberania geográfica é exercida sobre o território do Estado da Cidade do Vaticano, mas estende seu poder institucional e doutrinário sobre as Igrejas locais, as dioceses erigidas canonicamente em torno do mundo.

O Cardeal Bertone afirma que

> La natura sovrana e indipendente, l'autonoma capacità e il potere di auto-organizzazione interni ed esterni sono le caratteristiche espresse nella Comunità delle Nazioni dalla Santa Sede quando agisce come soggetto dell'ordinamento internazionale e manifesta la *capacità* di compiere atti internazionalmente rilevanti, di relazionarsi con altri soggetti, di aderire alle norme pattizie o consuetudinarie e di essere *destinataria* dei principi generali e delle norme fondative di quell'ordinamento[25].

Politicamente, a Igreja Católica é concebida como Estado. Em 1929, a concordata firmada pelo Cardeal Gasparri e por Mussolini afirmou a soberania da Santa Sé sobre a Cidade do Vaticano, prestando a comunidade internacional, por conseguinte, reconhecimento ao Estado da Cidade do Vaticano. Nesse mesmo ano, a Santa Sé promulgou a Lei Fundamental da Cidade do Vaticano, a sua Constituição, que indicava o papa como representante do Estado do Vaticano, a quem, mediante a Secretaria de Estado, caberia não só representação diplomática, mas, principalmente, o estabelecimento de relações com os Estados, por meio de tratados. Em 1964, a Santa Sé ingressou na ONU como observadora permanente, por força da Resolução A/58/L.64, aprovada por unanimidade pela Assembleia Geral.

De regime monárquico, o papa, que é escolhido por sufrágio do colégio de cardeais (o conclave), acumula os poderes legislativo, executivo e judiciário, além do poder espiritual sobre todos os católicos do mundo. A Cidade do Vaticano, por sua vez, tem todas as características de um verdadeiro Estado: território (a *Città Vaticana*), povo (o povo católico) e governo, ou soberania (o papa, a Cúria Romana e o seu ordenamento interno, o direito canônico). Para Rosa[26], "o Vaticano é um Estado cuja nação está espalhada por centenas de outros Estados" e isto agrega um elemento às relações entre a Santa Sé estes Estados, onde boa parte da população (n'alguns a maioria) professa o catolicismo.

Pauta-se o relacionamento da Igreja com os Estados, pois, em três frentes: com as Igrejas locais (paróquias, dioceses, arquidioceses etc., que não devem ser consideradas entes desvinculados da Santa Sé), com os Estados em que a Igreja está presente e com os órgãos de natureza supranacional.

Especificamente quanto ao Brasil, a Santa Sé, somente no ano de 2008, firmou um tratado internacional, comumente denominado concordata, e que longe de angariar privilégios, concessões e benefícios para a

24 BALDISSERI, Lorenzo. *Diplomacia Pontifícia*: Acordo Brasil-Santa Sé: intervenções. São Paulo: LTr, 2011.

25 BERTONE, Tarcísio. *La Santa Sede e la Comunità Internazionale*. Lectio magistralis pronunciada pelo Cardeal Secretário de Estado no dia 23/11/2010 na Pontifícia Universidade Lateranense, de Roma, por ocasião do *Dies Academicus* 2010/2011. Disponível em: <http://www.vatican.va/roman_curia/secretariat_state/card-bertone/2010/documents/rc_seg-st_20101125_uni-lateranense_it.html>. Acesso em: 15 maio 2018. p. 1. Tradução do autor: A natureza soberana e independente, a autônoma capacidade e o poder de auto-organização internos e externos são as características expressas na Comunidade das Nações por a Santa Sé, quando age como sujeito do ordenamento internacional e manifesta a capacidade de cumprir atos internacionalmente relevantes, de relacionar-se com outros sujeitos, de aderir a normas pactícias consuetudinárias e ser destinatária dos princípios gerais das normas fundacionais de tal ordenamento.

26 ROSA, Lilian Rodrigues de Oliveira. *A Igreja Católica Apostólica Romana e o Estado Brasileiro*: estratégias de inserção política da Santa Sé no Brasil entre 1920 e 1937. 2011. 289 f. Tese (Doutorado) – Programa de Pós-Graduação em História, Faculdade de Ciências Humanas e Sociais, Universidade Estadual Paulista, Franca, 2011. Disponível em: <http://www.franca.unesp.br/Home/Pos-graduacao/lilian-ro-rosa.pdf>. Acesso em: 19 maio 2018. p. 34.

Igreja Católica, configura-se como "sinal de maturidade política e jurídica da nação brasileira"[27].

O termo "concordata", segundo Baldisseri[28], trata, no âmbito espiritual, de temas litúrgicos (como na Concordata com o Equador, de 1862), ou, no campo material, de temas referentes à taxação dos bens da Igreja (como na Concordata com a Costa Rica, de 1852), ou seja, não tutela o que, de fato, um tratado entre a Igreja e o Estado deve tutelar, que é, por um lado, a liberdade de consciência dos cidadãos (não permitindo, a Santa Sé, nos tratados que celebra, normas que restrinjam a liberdade dos cidadãos do país ou demais confissões aí presentes) e, por outro, a liberdade da Igreja, observados plenamente a laicidade do Estado e o seu ordenamento interno. "Tratado supõe clara distinção entre Estado e Igreja", evitando-se qualquer confusão com o passado histórico, quando se verificou "mais acentuada confluência entre Igreja e Estado"[29].

No relacionamento entre os dois entes, vigoram a laicidade do Estado e a liberdade religiosa da Igreja. Esta não se deve considerar tão somente a livre prática do culto, mas, unidas as dimensões individual e comunitária, deve manifestar a unidade da pessoa, "deve ser tida em justa consideração a dimensão pública da religião e, portanto, a possibilidade dos crentes de fazer a sua parte na construção da ordem social"[30].

A respeito da laicidade do Estado — considerando as diversas esferas da vida humana, dentre as quais a religião e a fé, que não se antagonizam, mas estão abertas uma à outra, no respeito recíproco da soberania estatal e da independência da Igreja[31] — Moraes[32], numa tentativa de conceituação, identifica-lhe três aspectos essenciais, a saber a separação entre o poder estatal e as confissões religiosas, a afastar a interferência do Estado nos assuntos internos desta ou a ingerência das autoridades religiosas no governo do Estado; a tutela estatal à liberdade religiosa de todos os cidadãos; a neutralidade do Estado frente às diferentes crenças religiosas.

Assim compreendida, a laicidade passa a ser instrumento de promoção do pacífico desenvolvimento da sociedade e de serviço ao homem, ao mesmo tempo cidadão e crente. Trata-se do estabelecimento da laicidade em oposição ao laicismo, compreendido como animosidade religiosa, ou "uma forma de exclusão da religião, bem como de tudo que, em matéria ética, possa derivar de uma verdade ou de um ensinamento enraizado em verdades religiosas"[33].

Por ocasião do julgamento da ADI 4.439, que julgou a inconstitucionalidade do ensino religioso confessional nas escolas públicas e, ao mesmo tempo, a inconstitucionalidade do Decreto n. 7.107/2010, o Ministro Dias Toffoli[34], em seu voto, consignou que a laicidade deve ser lida à luz dos demais princípios que informam o sistema jurídico constitucional pátrio, dentre os quais a liberdade de consciência religiosa ou de crença, a liberdade de culto, a liberdade de associação religiosa e a liberdade de comunicação das ideias religiosas, razão pela qual não somente o Decreto está em sintonia com o comando constitucional, como também o ensino religioso confessional.

Na mesma ação, embora não firmando o mesmo entendimento que Toffoli, o Ministro Celso de Mello[35] entendeu que elemento viabilizador da liberdade religiosa é a separação institucional entre Estado e Igreja, significando isso que, no Estado laico, "haverá sempre uma clara e precisa demarcação de domínios próprios de atuação e de incidência do poder civil (ou secular) e do poder religioso (ou espiritual)". Vale dizer, a ingerência do Estado em questões *interna corporis* da Igreja configura-se como agressão do princípio da laicidade

27 PINHEIRO, Alcyvania Maria C. de Brito; ABRANTES, Renato Moreira de. A legalidade do Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao estatuto jurídico da Igreja Católica no Brasil. *Revista Expressão Católica*, Quixadá, v. 1, n. 1, jun. 2012. Disponível em: <http://publicacoesacademicas.fcrs.edu.br/index.php/rec/article/view/1291/1054>. Acesso em: 20 maio 2018. p. 3.

28 BALDISSERI, Lorenzo. *Diplomacia Pontifícia*: Acordo Brasil-Santa Sé: intervenções. São Paulo: LTr, 2011.

29 BALDISSERI, Lorenzo. *Diplomacia Pontifícia*: Acordo Brasil-Santa Sé: intervenções. São Paulo: LTr, 2011. p. 91.

30 BENTO XVI. *Discurso na ONU aos 18 de abril de 2008*. p. 8. Disponível em: <https://w2.vatican.va/content/benedict-xvi/pt/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit.html>. Acesso em: 02 jul. 2018.

31 BALDISSERI, Lorenzo. *Diplomacia Pontifícia*: Acordo Brasil-Santa Sé: intervenções. São Paulo: LTr, 2011. p. 154.

32 MORAES, Rafael José Stanziona. A Igreja Católica e o Estado Laico. In: MARTINS FILHO, Ives Gandra da Silva. *O Estado laico e a liberdade religiosa*. São Paulo: LTr, 2011. p. 57.

33 RHONHEIMER, Martin. Democracia moderna, Estado laico e missão espiritual da Igreja. In: MARTINS FILHO, Ives Gandra da Silva. *O Estado laico e a liberdade religiosa*. São Paulo: LTr, 2011. p. 76.

34 TOFFOLI, Dias. *Voto do Ministro Dias Toffoli na ADIN 4.439 impetrada pela Procuradoria Geral da República*. Disponível em: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4439votoDT.pdf>. Acesso em: 02 jul. 2018.

35 MELLO, Celso de. *Voto do Ministro Celso de Mello na na ADIN 4.439 impetrada pela Procuradoria Geral da República*. Disponível em: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4439mCM.pdf>. Acesso em: 02 jul. 2018.

estatal, nos termos do art. 19, I, da Constituição Brasileira e do Tratado Brasil-Santa Sé, em que as altas partes contratantes reafirmam a adesão ao princípio da liberdade religiosa.

A respeito do termo, Cunha[36] informa que se preferiu "acordo" a "concordata" pela abrangência dos temas, sendo este utilizado para os tratados de maior alcance de matérias e de caráter mais solene. Outrossim, por conta de sua especificidade, "mais por questões de ordem política institucional que por ordem técnico-jurídico-canônica"[37].

Gervásio Fernandes de Queiroga, então assessor jurídico-canônico da presidência da CNBB e membro da Comissão Especial de Normatização das Relações Igreja Estado, assim se dirigiu ao episcopado nacional, por ocasião da 29ª Assembleia Geral da CNBB de 1991:

> Não é de forma alguma o retorno à era das Concordatas com regimes autocráticos, em que a Igreja devia ceder parte de seus direitos e liberdade, para conquistar determinados privilégios [...] O Acordo a que se quer chegar não é uma Concordata, nem vai criar um estatuto privilegiado, só para a Igreja Católica. As demais Igrejas terão facilitada a via para conseguir igual reconhecimento de seus direitos[38].

As tratativas oficiais se iniciaram em 1953, por postulação da CNBB, que apoiava um primeiro projeto de acordo, de iniciativa do Ministério das Relações Exteriores do Brasil, sem êxito, porém[39]. Em 1989, a CNBB deu início ao estudo de todos os aspectos pertinentes ao acordo entre o Estado brasileiro e a Igreja, "no que tange à sua personalidade jurídica e, necessariamente, aos direitos inerentes ao seu *status*"[40].

Pinheiro e Abrantes[41] entendem que a história do acordo pode ser dividida em dois grandes momentos, a saber, primeiro período, que vai desde a formação da Comissão Especial de Normatização das Relações Igreja Estado, pela CNBB, e seu período de atividades intensas até o momento em que praticamente é cessada a sua função (1990-1996) e, segundo período, quando foram retomadas, por iniciativa do novo Núncio, Dom Lorenzo Baldisseri, as conversações em torno do assunto até a assinatura do Acordo (2002-2008).

Por escopo, o tratado visou:

> [...] constituir um único instrumento jurídico, que recolhesse normas esparsas existentes no ordenamento jurídico do Brasil concernentes à Igreja Católica, muitas vezes de conteúdo consuetudinário, inspirado na legislação canônica, no intuito de facilitar uma mais profícua e efetiva colaboração entre as instituições interessadas. Nesse sentido, o subtítulo "Estatuto Jurídico da Igreja Católica no Brasil" tem sua relevância e os preceitos do direito interno ganham força redobrada em virtude da aquisição da dimensão internacional[42].

No dia 13 de novembro de 2008, deu-se a assinatura do Acordo entre a Santa Sé e a República Federativa do Brasil, na sala dos Tratados do Palácio Apostólico do Vaticano, em presença do Presidente do Brasil e do Secretário de Estado do Vaticano.

Como conclusão do procedimento, o Congresso Nacional Brasileiro emitiu a ratificação, no dia 07 de outubro de 2009, tendo-se dado a promulgação, pelo Presidente do Brasil, aos 11 de fevereiro de 2010 (Decreto n. 7.107), e a Troca dos Instrumentos de Ratificação no Vaticano aos 10 de dezembro do mesmo ano, ato que tornou o documento vigente internacionalmente.

No bojo do Acordo, além do reconhecimento inequívoco, por parte do Estado brasileiro, do ordenamento interno da Igreja, fundamentado no Direito Canônico, está a reafirmação da personalidade jurídica não somente da Santa Sé, mas, também, de todas as instituições que compõem a Igreja Católica (art. 3º, *caput*).

A afirmação pelo Estado Brasileiro da autonomia da

36 CUNHA, Cleones. *Relações Igreja-Estado*: a Igreja e o Estado, a liberdade religiosa, o Estado Laico, a Igreja e as relações internacionais e o Acordo Brasil-Santa Sé. São Paulo: Fons Sapientiae, 2016.

37 CUNHA, Cleones. *Relações Igreja-Estado*: a Igreja e o Estado, a liberdade religiosa, o Estado Laico, a Igreja e as relações internacionais e o Acordo Brasil-Santa Sé. São Paulo: Fons Sapientiae, 2016. p. 151.

38 CONFERÊNCIA NACIONAL DOS BISPOS DO BRASIL. *Comunicado Mensal:* Privativa de 06 de maio de 1992. Ata n. 03, n. 6 e 7. Brasília: CNBB, 1992. p. 632.

39 BALDISSERI, Lorenzo. *Diplomacia Pontifícia*: Acordo Brasil-Santa Sé: intervenções. São Paulo: LTr, 2011. p. 93.

40 PINHEIRO, Alcyvania Maria C. de Brito; ABRANTES, Renato Moreira de. A legalidade do Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao estatuto jurídico da Igreja Católica no Brasil. *Revista Expressão Católica*, Quixadá, v. 1, n. 1, jun. 2012. Disponível em: <http://publicacoesacademicas.fcrs.edu.br/index.php/rec/article/view/1291/1054>. Acesso em: 20 maio 2018. p. 4.

41 PINHEIRO, Alcyvania Maria C. de Brito; ABRANTES, Renato Moreira de. A legalidade do Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao estatuto jurídico da Igreja Católica no Brasil. *Revista Expressão Católica*, Quixadá, v. 1, n. 1, jun. 2012. Disponível em: <http://publicacoesacademicas.fcrs.edu.br/index.php/rec/article/view/1291/1054>. Acesso em: 20 maio 2018. doi:http://dx.doi.org/10.25190/rec.v1i1.1291.

42 BALDISSERI, Lorenzo. *Diplomacia Pontifícia*: Acordo Brasil-Santa Sé: intervenções. São Paulo: LTr, 2011. p. 61.

Igreja Católica no Brasil está presente, explicitamente, em diversos momentos do AcordoAssim, por exemplo, nos considerandos faz-se referência à supremacia que exerce a Santa Sé com relação à Igreja Católica, ao seu ordenamento jurídico interno, que é o direito canônico, bem como às relações históricas entre a Igreja Católica e o Brasil e às suas respectivas responsabilidades, cada qual em seu âmbito, a serviço da sociedade e do bem integral da pessoa humana.

Ainda, as Altas Partes Contratantes reconheceram-se, cada uma na própria ordem, autônomas, independentes e soberanas, bem como o Estado Brasileiro afirmou que a Santa Sé baseia-se nos documentos do Concílio Vaticano II e no Código de Direito Canônico e consignou a sua adesão ao princípio da liberdade religiosa.

Tal liberdade religiosa implica o "direito de desempenhar sua missão apostólica" (art. 2º), tendo-lhe sido reafirmada "a personalidade jurídica da Igreja Católica e de todas as Instituições Eclesiásticas que possuem tal personalidade em conformidade com o direito canônico" (art. 3º).

Dentre as instituições eclesiásticas que, *ipso iure*, possuem personalidade jurídica canônica está a diocese, nos termos do cânon n. 373, do Código de Direito Canônico (doravante "CDC"). Como pessoa jurídica canônica, subordina-se, naquilo que toca diretamente à sua gestão interna, exclusivamente ao ordenamento canônico, vedada qualquer ingerência estatal, observado o sistema constitucional e as leis brasileiras.

Estabelecida, pois, a autonomia da Igreja Católica e de suas entidades, importa, agora, verificar a estruturação econômico-financeira à luz do Código de Direito Canônico.

3. A organização econômico-financeira da Igreja Católica à luz do ordenamento canônico

Fundamento da capacidade interna de gerir seus bens é a personalidade jurídica de que goza a Igreja Católica, que não nasce necessariamente com as concordatas ou, no caso do Brasil, com o Acordo.

Desde o Império Romano, por influência do cristianismo, a figura da personalidade jurídica da entidade religiosa era conhecida. No Baixo Império, as fundações pias e beneficentes tiveram capacidade jurídica ampliada, tornando-se, com Constantino, destinatária de doações, sendo-lhes permitido testar em favor das Igrejas Católicas em Roma. E, em sendo sujeita de direitos e deveres, pode a Igreja adquirir bens[43].

No Brasil, desde o descobrimento até a independência, as relações com a Santa Sé se deram com o Reino de Portugal. Pela Constituição de 1824, promulgada "em nome da Santíssima Trindade", o catolicismo continuou a ser a religião oficial do Império, tendo as outras permissões para o culto doméstico ou particular em casas para isso destinadas, sem que pudessem ter templos para o culto público (art. 5º).

O Decreto n. 119-A, de 07 de janeiro de 1890, promulgado nos primeiros clarões da República, reconheceu a personalidade jurídica de todas as Igrejas e confissões religiosas, incluindo, no rol de direitos, a possibilidade de adquirir e administrar bens. O reconhecimento da personalidade jurídica da Igreja Católica foi afirmada no Código Civil de 1916, art. 16, I, e no Código Civil de 2002, art. 44, IV.

O Decreto n. 7.107/2010 reafirmou o reconhecimento da personalidade jurídica da Igreja Católica (no Acordo representada pela Santa Sé) e de todas as Instituições Eclesiásticas[44], as quais, além de poderem desenvolver suas próprias atividades, gozarão de todos os direitos, imunidades e benefícios atribuídos às entidades filantrópicas, de assistência social ou de solidariedade (art. 5º). Outrossim, os bens da Igreja Católica e das Instituições Eclesiásticas, cuja propriedade é reconhecida pelo Estado Brasileiro, tornaram-se objeto de interesse comum, para fins históricos, culturais e artísticos.

Ao Poder Público, fica vedado negar reconhecimento ou registro do ato de criação às pessoas jurídicas assim constituídas canonicamente (art. 3º, § 2º). Ou seja, a lei proíbe ao Estado criar embaraços ao funcionamento da Igreja, sendo o ato de criação dependente unicamente das normas de direito canônico, cumpridas as forma-

43 VENOSA, Sílvio de Salvo. *Direito Civil*. 7. ed. São Paulo: Atlas, 2007.

44 No Acordo nominalmente citadas, a saber Conferência Episcopal, Províncias Eclesiásticas, Arquidioceses, Dioceses, Prelazias Territoriais ou Pessoas, Vicariatos e Prefeituras Apostólicas, Administrações Apostólicas, Administrações Apostólicas Pessoais, Missões *Sui Iuris*, Ordinariado Militar e Ordinariados para os Fieis de Outros Ritos, Paróquias, Institutos de Vida Consagrada e Sociedades de Vida Apostólica (art. 3º).

lidades do Direito interno nacional[45].

Assim, considerando-se que a legislação brasileira reconhece o direito canônico como ordenamento próprio da Igreja Católica e das Instituições Eclesiásticas, a gestão dos bens eclesiásticos, no âmbito interno, é normatiza pelo Livro V, do Código de Direito Canônico, intitulado "Dos bens temporais da Igreja". Dentre os cânones 1254 a 1310, regulamenta-se a aquisição e administração dos bens, os contratos, dentre eles a alienação, as vontades pias (um tipo de ato jurídico canônico) em geral e, dentre elas, as fundações pias.

A esse respeito, o CDC estabelece que a Igreja Católica, por direito nativo, independentemente do poder civil, pode adquirir, possuir, administrar e alienar bens temporais, para a consecução de seus fins próprios (cân. 1254, § 1), que são a organização do culto divino e o conveniente sustento do clero, e praticar obras de apostolado e de caridade, principalmente em favor dos pobres (cân. 1254, § 2).

Outrossim, o ordenamento interno da Igreja determina que a Igreja universal e a Sé Apostólica, as Igrejas particulares e qualquer outra pessoa jurídica canônica têm capacidade jurídica de adquirir, possuir, administrar e alienar bens temporais, de acordo com o direito (cân. 1255), sendo o domínio dos bens, sob a suprema autoridade do papa, pertencente à pessoa jurídica que os tiver adquirido legitimamente (cân. 1256).

Administrador supremo e dispensador de todos os bens eclesiásticos é o Romano Pontífice (cân. 1273), mas ao Bispo cabe supervisionar, cuidadosamente, a administração de todos os bens pertencentes à diocese (cân. 1276, § 1), sempre considerando os direitos, os legítimos costumes e as circunstâncias, dentro dos limites do direito universal – o direito canônico — e particular — as instruções especiais por ele emanadas (cân. 1276, § 2).

Para praticar atos de administração de maior monta, o Bispo diocesano é obrigado a ouvir o conselho econômico[46] da diocese e o colégio de consultores[47]. Para praticar atos de administração extraordinária, necessita do consentimento desses conselhos, cabendo à conferência episcopal de cada País estabelecer quais seriam os atos de administração extraordinária (cân. 1277)[48].

A respeito da alienação, o cân. 1291 pontifica que, para alienar validamente bens que constituem o patrimônio de uma pessoa jurídica pública, como uma diocese ou paróquia, e cujo valor supera a soma definida pelo direito, requer-se a licença da autoridade juridicamente competente, nos termos do cân. 1292[49]. Assim, quando o valor da alienação está entre a quantia mínima e a quantia máxima, o Bispo diocesano carece do consentimento do conselho econômico e do colégio de consultores da diocese (cân. 1292, § 1).

Caso o valor da alienação supere a quantia máxima, ou se refira a coisas preciosas por seu valor artístico ou histórico, além do consentimento dos conselhos citados, deve o Bispo, para fins de validade jurídica do negócio, contar com a licença da Santa Sé (cân. 1292, § 2). Em todos os casos, sempre, o dinheiro recebido pela alienação deve ser cuidadosamente investido em favor da Igreja, ou então prudentemente empregado de acordo com as finalidades da alienação (cân. 1294, § 2).

Excluem-se da alienação de bens eclesiásticos da diocese, salvo com licença escrita da autoridade competente (a Santa Sé), o próprio Bispo ou seus parentes, até o quarto grau de consanguinidade ou afinidade (cân. 1298).

A respeito das doações, o cân. 1261 normatiza que os fiéis são livres de doar bens temporais em favor da

45 ANDRADA, José Bonifácio Borges de. O Acordo Brasil-Santa Sé. Anotações sobre alguns aspectos. In: MARTINS FILHO, Ives Gandra da Silva (Org.). *O Estado laico e a liberdade religiosa*. São Paulo: LTr, 2011. p. 147.

46 De constituição obrigatória, nos termos do cân. 492, é presidido pelo Bispo diocesano — ou por um seu delegado — e composto por ao menos três fieis nomeados pelo Bispo, realmente peritos em economia e direito civil e distintos pela integridade.

47 Também de constituição obrigatória, nos termos do cân. 502, é presidido pelo Bispo diocesano e é composto por entre seis e dozes sacerdotes, escolhidos pelo Bispo dentre os membros do conselho presbiteral. Funciona como um "senado" do Bispo e tem a função precípua de escolher o Administrador Diocesano no caso de vacância (transferência ou morte do Bispo).

48 No Brasil, a CNBB, em sede de legislação complementar ao Código de Direito Canônico, com relação ao cân. 1277, determinou que configuram atos de administração extraordinária: 1. A alienação de bens que constituem o patrimônio da diocese; 2. Outras alienações em que a situação patrimonial da diocese ficar pior ou cujo valor econômico exceder a quantia mínima indicada no cân. 1292, § 1 (cem vezes o salário mínimo); 3. Reformas que superam a quantia mínima indicada no cân. 1292, § 1; 4. Arrendamento de bens por prazo superior a um ano, ou com cláusula de renovação automática, sempre que a renda anual exceder a quantia mínima indicada no cân. 1292, § 1.

49 Também em sede de legislação complementar ao CDC, a CNBB fixou como quantia máxima o valor de três mil vezes o salário mínimo vigente em Brasília/DF e a quantia mínima, como expresso na nota de rodapé precedente, o valor equivalente a cem vezes o mesmo salário mínimo.

Igreja, uma vez que devem concorrer para as necessidades da Igreja. Cabe ao Bispo diocesano, não somente lembrar aos fiéis desta sua obrigação (cân. 1261, § 2), bem como, em comunhão com os demais Bispos da província[50] a que estiver vinculada a sua diocese determinar as ofertas por ocasião da administração dos sacramentos (cân. 1264, 2°).

As ofertas feitas aos administradores de qualquer pessoa jurídica eclesiástica, mesmo em caráter privado, presumem-se feitas à própria pessoa jurídica (cân. 1267). As feitas pelos fieis, para um fim determinado, não podem ser destinadas senão para tal fim (cân. 1267, § 3).

Quanto às causas pias, ou seja, "qualquer ato de disposição dos bens temporais para obras de religião ou de beneficência cristã"[51], no que tange às disposições *mortis causa* em favor da Igreja, as formalidades do direito civil devem ser observadas (cân. 1299), devendo o dinheiro e os bens móveis ser, sem demora, depositados em lugar segundo, a juízo do Bispo, a fim de que sejam protegidos (cân. 1305).

Na diocese que lhe foi confiada, segundo o cân. 381, compete ao Bispo diocesano todo o poder ordinário, próprio e imediato que se requer para o exercício de seu ofício, aqui incluído o governo. A ele, cabe representar a diocese em todos os negócios jurídicos (cân. 393), incluídos os civis.

Verifica-se, portanto, que a administração dos bens eclesiásticos no Brasil (monetários, móveis ou imóveis), em virtude da reconhecida autonomia, independência e soberania, cabe à própria Igreja Católica, por meio de seus administradores, observados os ditames do ordenamento canônico e suas conexões com o ordenamento civil de cada País. No Brasil, as normas acima apontadas têm plena vigência para os Bispos diocesanos, que não podem se furtar de cumprir as determinações do direito eclesiástico e devem observar o direito civil.

Eventuais ilícitos canônicos, por descumprimento de quaisquer normas canônicas, sem conexão, ligação ou repercussão com as normas do direito não canônico, devem ser investigados e punidos, seja administrativa, seja judicialmente, pela autoridade competente em foro específico, qual seja o canônico.

Os agentes estatais, a partir do momento em que adentram indevidamente a órbita da persecução e punição de delitos administrativos e penais que não estão previstos no ordenamento jurídico pátrio (não canônico), agem ilícita e abusivamente. Cumpre-nos, pois, verificar os limites de atuação do Estado diante do cometimento de delitos estritamente canônicos.

4. Os limites de atuação do Estado diante do cometimento de delitos canônicos

Como Instituição autônoma e soberana, a Igreja Católica, em seu ordenamento jurídico próprio, dispõe de normas cujas transgressões configuram delitos, os quais ensejam a aplicação de uma sanção ao infrator. Para Orsi, "a Igreja pode agir assim, porque o direito penal faz parte do ordenamento da Igreja [...] que sempre observa a ordem moral a qual sempre se reporta e inclui o direito divino, seja natural ou positivo"[52]. Vale dizer, "a Igreja tem direito nativo e próprio de punir com sanções penais os fiéis delinquentes" (cân. 1311).

Barros[53] define o delito, na Igreja, como "a violação externa e gravemente imputável da lei, que leva anexa uma pena canônica", definição esta em sintonia com o cân. 1321, § 1 ("ninguém é punido, a não ser que a violação externa da lei ou do preceito, por ele cometida, lhe seja gravemente imputável por dolo ou culpa") e que delimita os três elementos integrantes do delito.

Primeiro elemento é o objetivo, a violação externa, não interna, da lei, que se dá por meio de ato comissivo ou omissivo, excluídos os atos internos da consciência, cuja punibilidade, enquanto não exteriorizados, não se verifica. Tem-se, pois, que, espiritual e canonicamente falando, "todo delito é pecado, mas nem todo pecado é delito"[54]. O pecado que não é delito (pois há pecados que são delitos) tem repercussão na esfera moral, mas não no direito penal canônico.

Segundo elemento é o legal, a lei. No ordenamento canônico vigora o princípio da legalidade, segundo o

50 A província eclesiástica é uma agrupação de dioceses vizinhas.

51 HORTAL, Jesus. Comentários ao Código de Direito Canônico. In: JOÃO PAULO II. *Código de Direito Canônico*. 22. ed. São Paulo: Loyola, 2017. p. 570.

52 ORSI, João Carlos. *Direito Penal Canônico.* São Paulo: LTr, 2009. p. 27.

53 BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006. p. 25.

54 BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006. p. 25.

qual *nullum crimen, nulla poena sine lege poenali praevia*. Portanto, ninguém poderá ser punido se não houver uma ação antijurídica tipificada expressamente na lei da Igreja, à qual se comina uma pena, seja emanada pela autoridade suprema (o papa), seja pela autoridade competente (conferência episcopal, bispo diocesano etc.), com a finalidade de tutelar os direitos dos fiéis e o bem comum dos membros da Igreja, os batizados.

Terceiro elemento é o subjetivo, a imputabilidade, pelo que se atribui um ato delituoso a um autor, considerando-se sua liberdade e consciência. Neste artigo, refere-se à imputabilidade jurídico-penal, uma vez que, a imputabilidade de um delito penal, ou seja, de um pecado, diz respeito à esfera moral, de não interesse da legislação penal, enquanto não exteriorizado. "Tendo sido violada a ordem moral, o culpável é o pecador, que responde apenas perante Deus; tendo sido violada a ordem jurídico-social, o culpado é o delinquente, que responde perante Deus e a Igreja"[55].

A Igreja qualifica as penas, nos termos do cân. 1312, como medicinais (ou censuras, pelas quais se priva o delinquente de certos bens espirituais até que abandone a sua contumácia)[56], ou expiatórias (cuja finalidade é a expiação do delito, de tal maneira que a sua remissão não depende da cessação da contumácia)[57]; podem ser, ainda, *ferendae sententiae*, não atingindo o réu a não ser depois de afligida, e *latae sententiae*, quando nela se incorre pelo simples fato de praticar o delito, ou se a lei ou o preceito assim o estabelecem expressamente (cân. 1314)[58].

Para fins de verificação da culpabilidade do delinquente, leva-se em conta o dolo, a vontade deliberada de violar a lei, ou a culpa, e "a omissão da devida diligência também em conhecer a lei como em impedir que da ação que se realiza derivem efeitos proibidos pela lei"[59].

Para a verificação da transgressão da lei canônica, da identificação do delinquente e da punição a ser aplicada, o Bispo (ou a autoridade competente imediatamente superior ao Bispo, a saber o papa) dispõe de duas possibilidades processuais, o processo penal administrativo (a via administrativa) e o processo penal judicial (a via judicial).

O primeiro, que envolve o poder executivo do Bispo, é o conjunto de atos administrativos que visa irrogar ou declarar uma pena, mediante um decreto, e somente pode substituir o processo penal judicial em causas justas. O segundo, que envolve o poder judiciário do Bispo, é o conjunto de atos judiciários, conduzido por um juiz eclesiástico, que visa irrogar ou declarar uma pena, mediante uma sentença judicial.

Quanto ao foro competente, o direito canônico adota critérios para a distribuição das causas entre os diversos tribunais, quais sejam lugar, poder, órgão, matéria e território, de modo que se considera incompetente um juiz ou tribunal que, por exemplo, invade a esfera reservada à jurisdição de outro para julgar determinadas causas.

O exercício do poder judiciário do Bispo que, em virtude do sacramento da ordem, é juiz nato na sua diocese, pode ser delegado a um tribunal, cuja composição se dá de forma singular (juiz único) ou de forma colegial (um tribunal propriamente dito). Alguns tribunais são denominados especiais, os quais, em razão da dignidade de certas pessoas e da gravidade de certas matérias, são competentes para julgar causas reservadas à própria pessoa do papa[60], ou ao Tribunal Apostólico da Rota Romana[61] ou a Congregação para a Doutrina da Fé[62].

55 BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006. p. 27.

56 Exemplos de penas medicinais, ou censuras, são a excomunhão (cân. 1331), o interdito (cân. 1332) e a suspensão (cc. 1333 e 1334).

57 O cân. 1336 enumera exemplificativamente as penas expiatórias: 1º proibição ou obrigação de morar em determinado lugar ou território; 2º proibição de um poder, ofício, encargo, direito, privilégio, faculdade, graça, título ou insígnia; 3º proibição de exercer o que é mencionado no n. 2, ou proibição de exercer em determinado lugar ou também fora de determinado lugar; 4º transferência penal para outro ofício; 5º demissão do estado clerical.

58 Típica sanção *latae sententiae* é a da excomunhão por aborto realizado livre e conscientemente (cân. 1398).

59 BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006. p. 27.

60 Nos termos do cân. 1405, § 1, compete ao papa julgar, entre outros, os Cardeais, os Núncios Apostólicos, os Bispos e as causas que ele tiver avocado a seu juízo.

61 O Tribunal Apostólico da Roma Romana, ou simplesmente Rota Romana, julga, nos termos do cân. 1405, § 3, 2º e 3º, os abades primazes ou o abade superior de congregação monástica e o moderador supremo de instituto religioso de direito pontifício, bem como as pessoas eclesiásticas físicas não revestidas do caráter episcopal que não têm superior abaixo do Romano Pontífice, como os prelados de prelazias pessoais. Ainda, em grau de recurso (3ª instância), a Rota julga as causas de nulidade matrimonial.

62 A Congregação para a Doutrina da Fé julga, nos termos da Constituição Apostólica *Pastor Bonus*, de João Paulo II, os delitos contra a fé (apostasia, heresia e cisma), bem como os delitos mais graves cometidos tanto contra a moral (delito contra o sexto mandamento do decálogo cometido por um clérigo com uma pessoa menor de 18 anos), como os cometidos na celebração dos sacramentos (contra a santidade do Santíssimo Sacramento —roubar ou re-

Dentre os delitos canônicos que podem ser cometidos por um Bispo está a alienação ilegal de bens eclesiásticos, conforme amplamente exposto anteriormente. Compreenda-se por alienação a transferência radical do domínio de uma pessoa a outra ou, conforme o cân. 1295, qualquer negócio em que a situação patrimonial da pessoa jurídica fica em condição pior, ou agravada. Barros[63] elenca os tipos de negócio que podem prejudicar o patrimônio de uma diocese: a venda, a doação, a hipoteca, a redenção do cânon enfitêutico[64], a assunção de dívidas.

Para a realização desses negócios, requer-se a licença da autoridade competente, nos termos da legislação canônica. O Bispo diocesano, por exemplo, que não tiver o consentimento do conselho econômico e do colégio de consultores (nos negócios cujo valor se situe entre cem e três mil salários mínimos), e a licença da Santa Sé (nos negócios cujo valor supere três mil salários mínimos ou de doações à Igreja ou de coisas preciosas por seu valor artístico ou histórico) realiza um negócio jurídico ilícito, no primeiro caso e, também, nulo, no segundo caso.

Configura-se tal improbidade como delito canônico, o qual se materializa quando é efetuado qualquer contrato

> [...] que efetivamente prejudique a situação patrimonial de uma pessoa jurídica pública eclesiástica ou qualquer outra submetida à autoridade eclesiástica ou por ela dirigida, feito sem a licença da autoridade competente descrita pelo Direito[65].

Na hipótese em análise, temos um delito que, praticado por um Bispo, poderia ser qualificado como abuso específico de função pública. Pena cominada para esse delito é a "justa pena", nos termos do cân. 1377 ("quem aliena bens eclesiásticos sem a licença prescrita, seja punido com justa pena"), obrigatoriamente *ferendae sententiae*, preceptiva e indeterminada, haja vista o arbítrio e o malferimento dos limites do próprio seu ofício.

Ferendae sententiae, como dito alhures, por atingir o delinquente tão somente após um processo penal, administrativo ou judicial; preceptiva, por ser aplicada por um superior (no caso do Bispo, que tem prerrogativa de foro, pelo papa, nos termos do cân. 1405, § 1); indeterminada, pois não se determina a qualidade ou a duração da pena, mas remete esta decisão ao superior juiz.

Ainda, a Carta Apostólica em forma de Motu Próprio, *Como uma Mãe Amorosa*, do papa Francisco, é clara, porém, em normatizar que o Bispo que provocou dano ao patrimônio de uma diocese pode ser punido com a pena de demissão:

> Art. 1º, § 1. O Bispo diocesano [...] pode ser legitimamente removido do seu encargo, se tenha, por negligência, feito ou omitido atos que tenham provocado um dano grave a outros, seja tratando-se de pessoas físicas, seja tratando-se de uma comunidade no seu conjunto. O dano pode ser físico, moral, espiritual ou patrimonial[66].

4.1. A ingerência estatal na diocese de Formosa

A partir do que já se expôs, pode-se deduzir que o caso a que nos propomos analisar, a saber, a prisão do Bispo da diocese de Formosa, Dom José Ronaldo Ribeiro, denunciado que foi pelo Ministério Público de Goiás, incurso nos arts. 168, § 1º, III (apropriação indébita), 288 (associação criminosa) e 299 (falsidade ideológica), todos do Código Penal Brasileiro, está afetado pela ingerência estatal.

O que se pode concluir, com base em notícias veiculadas na mídia nacional e na denúncia feita pelo MPGO, é o suposto cometimento de delitos canônicos, cuja investigação já estava em curso junto à Santa Sé, que havia nomeado, aos 10 de março de 2018, Dom Paulo Mendes Peixoto, Arcebispo de Uberaba, Visitador Apostólico, "com a finalidade de examinar a situação pastoral e de avaliar o governo do Bispo, Sua Excelência Dom José Ronaldo Ribeiro"[67].

ter para fins sacrílegos as espécies consagradas — e do Sacramento da Penitência — absolvição de cumplice em pecado contra o sexto mandamento do decálogo, solicitação e violação direta do sigilo sacramental.

63 BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006.

64 Dá-se a redenção do cânon enfitêutico "quando alguém, tendo o direito real, alienável e transmissível aos herdeiros, que lhe confere o pleno gozo de um imóvel mediante a obrigação de não o deteriorar e de pagar um foro anual, em numerário ou em frutos, resgata para si definitivamente este imóvel". BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006. p. 164.

65 BARROS, José Francisco Falcão. *Delitos e crimes na Igreja Católica*. 2. ed. Aparecida: Santuário, 2006. p. 165.

66 FRANCISCO. *Carta Apostólica em forma de Motu Proprio*: como uma mãe amorosa. Brasília: Edições CNBB, 2016.

67 CONFERÊNCIA NACIONAL DOS BISPOS DO BRASIL. *Comunicado da Nunciatura Apostólica no Brasil sobre a situação da Diocese de Formosa, emitido aos 21 de março de 2018*. Disponível em: <http://www.cnbb.org.br/comunicado-da-nunciatura-apostolica-sobre-a-situacao-da-diocese-de-formosa-em-goias/>. Acesso em: 20 maio

Com a prisão do Bispo de Formosa, e ficando esta Sé impedida, a Santa Sé nomeou Dom Paulo Peixoto Administrador Apostólico *sede plena* da Diocese de Formosa *ad nutum Sanctae Sedis*, conferindo-lhe todas as faculdades para governar a circunscrição eclesiástica e para realizar, contemporaneamente, a Visita Apostólica, precedentemente ordenada.

A respeito da acusação de apropriação indébita, haja vista o aumento de despesas na casa episcopal e a suposta aquisição de uma casa lotérica e de uma fazenda de gado, assim se expressou Dom Paulo Peixoto:

> 'Ainda estamos investigando, mas parece-nos, até agora, que uma fazenda para criação de gado e uma casa lotérica que, conforme as denúncias, teriam sido compradas com dinheiro desviado da contribuição do dízimo, na realidade foram adquiridas pelo padre da paróquia de Posse com recursos recebidos de herança', disse o administrador apostólico. Com relação ao excesso de gastos na residência episcopal, as investigações de d. Paulo Peixoto e de d. José Aparecido levam a crer que as despesas aumentaram pelo fato de d. Ronaldo ter acolhido ex-dependentes de drogas e dois jovens que criou e o chamam de padrinho[68].

A acusação de desvio de dinheiro que não é público, mas privado, por pertencer a uma entidade eclesiástica, no caso a Diocese de Formosa, que está sob a gerência de um Bispo, parece desproporcional ao sentido da norma estabelecida por comum acordo (República Federativa do Brasil e Santa Sé), que aponta para o Código de Direito Canônico como sendo a base normativa da Igreja Católica e para os seus procedimentos administrativo e judicial de aferição de culpa e de responsabilidade, bem como de aplicação de pena.

A aferição de crimes, no caso, parece não ser possível, muito menos da alçada do Ministério Público, haja vista a aparente inexistência de crime previsto no ordenamento jurídico brasileiro. Em havendo ato merecedor de investigação e punição, isto é, de competência da Igreja Católica, diante da possibilidade de delito canônico previsto nesse ordenamento. Ou seja, ingerência estatal, por meio de denúncia do Ministério Público do Estado de Goiás, nas questões administrativas internas da diocese de Formosa.

A inobservância do Acordo Brasil-Santa Sé (Decreto n. 7.107/2010), por parte dos agentes estatais, significa não somente uma agressão ao tratado internacional celebrado por dois entes soberanos e independentes, mas, também, ao Bispo de Formosa, à dignidade de seu ofício e de sua pessoa, haja vista a ilegal privação de sua liberdade, a acarretar-lhe danos os mais variados.

5. Considerações Finais

O Estado, no exercício de sua soberania, encontra limitações na idêntica soberania dos que, no plano internacional, estão no mesmo nível. A Santa Sé, pessoa jurídica de direito público internacional, situa-se na comunidade das nações como entidade representativa da Igreja Católica, cuja missão, tal qual o Estado, é a promoção do bem comum, além da salvação das almas.

As relações que a Igreja, ao longo dos séculos, estabelece com os diversos povos e sua representação política, permitem-lhe ser denominada "perita em humanidade". Sem aspirar imiscuir-se na política dos Estados, ela pretenderia, por sua vocação genética, colocar-se à disposição para colaborar com o desenvolvimento integral da família humana. E disso ela não pode se furtar, pois os dois milênios de experiência acumulada a tornam ciente de sua responsabilidade.

Por outro lado, cabe ao Estado, na pessoa de seus agentes, compreender que laicidade não significa animosidade religiosa, mas, sim, isenção de direcionamentos que privilegiem esta ou aquela vivência religiosa, em detrimento de outras. Ainda que laicidade implica não ingerência do Estado na organização e administração internas da instituição religiosa. A paz social, em sendo uma das metas do Estado, somente será atingida a partir do envolvimento dos diversos atores sociais, entre os quais se insere a Igreja Católica.

O reconhecimento da soberania da Igreja em nada afeta o princípio da laicidade, mas, pelo contrário, reforça-o, pois, estabelecer relações diplomáticas com outro ente político implica reconhecer que este não faz parte daquele. Com a Igreja, o nível de relacionamento abrange, igualmente, o reconhecimento ao ordenamento jurídico, o direito canônico.

A ingerência do Estado, ou seja, a intromissão em assuntos que não são de sua alçada, configura-se não

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68 MAYRINK, José Maria. *Igreja reage a acusações de desvios e sai em defesa de bispo em Goiás*. Disponível em: <http://brasil.estadao.com.br/noticias/geral,igreja-reage-a-acusacoes-de-desvios-e-sai-em-defesa-de-bispo-preso-em-goias,70002271007>. Acesso em: 20 maio 2018.

somente como agressão à laicidade estatal (e, portanto, à democracia), mas, também, ao que se estabeleceu formalmente nos tratados internacionais em que figuram como parte contratante a Santa Sé e o Estado ingerente. Se houver delito canônico que, por sua natureza, também importe em crime ou ilícito penal ou civil, previsto no ordenamento estatal, como no caso do abuso sexual de menores por clérigos, naturalmente as duas ordens — canônica e estatal — devem ser aplicadas e seus infratores reprimidos duplamente. O crime de pedofilia, por exemplo, inexistente no direito penal brasileiro, mas previsto no ordenamento canônico[69], é uma hipótese que pontua as convergências de interesses, no que tange à persecução criminal, entre os dois ordenamentos jurídicos.

No Brasil, a denúncia contra o Bispo de Formosa, ao que nos consta, reveste-se da ingerência do Estado, ao desconsiderar a legislação eclesial e ao equivocar-se, confundindo delitos canônicos com crimes puníveis pela ação estatal. Necessário, pois, corrigir tais desmandos, com o fito de evitar futuras e maiores intromissões.

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69 Motu Proprio Sacramentum sanctitatis tutela, do papa João Paulo II, e as Normae de gravioribus delictis, art. 6º, § 1º.

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A more targeted approach to foreign direct investment: the establishment of screening systems on national security grounds

Uma abordagem mais específica ao investimento estrangeiro directo: o estabelecimento de sistemas de triagem fundamentados na segurança nacional

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A more targeted approach to foreign direct investment: the establishment of screening systems on national security grounds*

Uma abordagem mais específica ao investimento estrangeiro directo: o estabelecimento de sistemas de triagem fundamentados na segurança nacional

Carlos Esplugues Mota**

Abstract

The process of liberalization of international trade and of Foreign Direct Investment (FDI) has constituted a broadly accepted trend during the last few decades and FDI inflows have expanded constantly since the end of the 1980's. However, signs of a certain crisis of the positive and one-way attitude towards international trade and FDI exist nowadays. The increase in the flux of FDI coming from developing and emerging countries to developed economies, the sudden relevance of foreign sovereign investors, the changing environment for national security or the quest to protect technologies and sectors of the economy considered vital for the host country, its sovereignty and competitiveness are creating a new reality that impacts on both, the global fluxes of FDI and its regulation. Tension exists between the commitment towards freedom of FDI and the right of the state to ensure that certain legitimate public interests and goals can be fully implemented. This may lead to the protection of certain strategic sectors of the economy of the country or flagship firms from foreign investment on national security or related grounds. The current revision of the great paradigms on which FDI, and its legal framework, stand is ascertainable in the growing recourse by states to the development of some measures devoted to prevent the entrance of FDI in the country under certain circumstances.

Keywords: Foreign Direct Investment (FDI). Foreign investment and national security. Freedom of Investment. Control of FDI. Barriers to foreign investment. Screening systems of control. Restrictions to foreign investment.

Resumo

O processo de liberalização do comercio internacional e do investimento direto estrangeiro (FDI) tem constituído um assunto amplamente aceito durante as últimas décadas e o fluxo do FDI tem sido expandido constantemente desde finais dos anos 1980´s. Porém, existem atualmente sinais de certa crise da atitude positiva sobre o comércio internacional e FDI. O aumento do fluxo de IED proveniente de países emergentes e em

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desenvolvimento para economias desenvolvidas, a súbita relevância de investidores soberanos estrangeiros, o ambiente em transformação para a segurança nacional ou a procura da proteção de tecnologias e setores da economia considerados vitais para o país anfitrião, sua soberania e competitividade estão criando uma realidade que afeta tanto os fluxos globais de IDE quanto sua regulamentação. Existe uma tensão entre o compromisso com a liberdade do IDE e o direito do Estado de assegurar que certos interesses públicos legítimos possam ser plenamente implementados. Isso pode levar à proteção de certos setores estratégicos da economia do país ou de firmas emblemáticas do investimento estrangeiro em segurança nacional ou áreas relacionadas. A atual revisão dos grandes paradigmas sobre os quais o FDI e seu arcabouço legal, se encontra é verificável no crescente recurso dos Estados ao desenvolvimento de algumas medidas destinadas a impedir a entrada do FDI no país sob certas circunstâncias.

Palavras-chave: Investimento estrangeiro direto (FDI). Investimento estrangeiro e segurança nacional. Controle do FDI. Barreiras ao investimento estrangeiro. Sistema de controle. Restrições ao investimento estrangeiro.

1. Introduction

The process of liberalization of international trade and of Foreign Direct Investment (FDI) has constituted a broadly accepted trend during the last few decades.[1] In contrast with other periods of time in history, since the beginning of 1990s FDI is, as a matter of principle, welcomed in most countries.[2] National entry conditions for MNEs have been liberalized, the operation of foreign affiliates once established in the host country has been facilitated and measures of all kinds to attract FDI have been implemented, for instance, the establishment of investment promotion agencies.[3]

FDI inflows have expanded constantly since the end of the 1980's. World FDI flows averaged around US$50 billion at the beginning of the 1980s. They jumped to US$ 200 billion by 1990 and 25 years later, reached US$1.23 trillion in 2014,[4] two thirds of its 2007 pick.[5] In 2016, Global FDI flows decreased flows decreased by 7 per cent to US$ 1 625 billion compared to 2015.[6]

However, signs of a certain crisis of the positive and one-way attitude towards international trade and FDI exist today. Nowadays emerging economies are in many cases major players in the world economy and play a leading role in the field of FDI.[7] The increase in the flux

1 GOLUB, Stephen S. *Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries*. Paris: OECD, 2003. p. 1. (Economic Department Working Papers, No. 357, OECD Publishing). p. 1.

2 The growth of FDI has traditionally been considered an element for stability and peace that is much stronger than trade or portfolio investment. As an example of the implementation of the theory of self-enforcing cooperation, the greater the exposure of one country to FDI coming from another country is, the conflict with that country is less possible. ROSECRANCE, Richard; THOMPSON, Peter. "Trade, Foreign Investment, and Security". *Annual Review of Political Science*, v. 6, p. 390-391, 2003. At the same time, the more trade a country has with another country, fewer possibilities to enter into conflicts with that country exist because the mutual dependence makes conflict more costly, see DIXIT, Avinash. "International Trade, Foreign Direct Investment, and Security". *The Annual Review of Economics*, v. 3, p. 191, 2011.

3 SAUVANT, Karl P. FDI Protectionism Is on the Rise, Policy Research Working Paper 5052, The World Bank Poverty Reduction and Economic Management Network, International Trade Department World Bank, Washington, September 2009. p. 3. Around 8 000 different FDI promotion agencies are said to exist worldwide. ECONOMOU, Persephone; SAUVANT, Karl P. "Recent Trends and Issues in Foreign Direct Investment 2010". *Yearbook on International Investment Law & Policy*, v. 3, p. 1, 2010-2011. And the number of members of the World Association of Investment Promotion Agencies (WAIPA) —the Association of Investment Promotion Agencies which was established in 1995- increases constantly and it has today 170 members from 130 countries (Note World Association of Investment Promotion Agencies, <http://waipa.org/> accessed 11 November 2017). At the same time and with the final goal of fostering the competitiveness of national firms, many countries also support outwards FDI by national investors by, for example, providing them with information about investment opportunities, helping them to obtain feasibility studies, offering insurance for outwards FDI projects or concluding bilateral treaties for the protection and promotion of FDI.

4 For an analysis of the development of flows, note OECD. *FDI in Figures*. April 2017. 1-2. Available in: <http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2017.pdf>. Access on: 13 Jul. 2018.

5 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPEMENT. *World Investment Report 2015*. Reforming International Investment Governance. New York and Geneva: United Nations, 2015. p. 25; OECD. *Roundtable on Freedom of Investment 20*. 19 March 2014 Summary of Roundtable discussions by the OECD Secretariat. Paris: OECD, 2014. p. 3.

6 ORGNISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *FDI in Figures*. April 2017. 1-2. Available in: <http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2017.pdf>. Access on: 27 Nov. 2017.

7 But some countries show a certain inability to accept this reality; they still have difficulties to admit the "new kids on the block", see SAUVANT, Karl P. "Is the United States Ready for FDI from China? Overview". In: SAUVANT, Karl P. (Ed.). *Investing in the United States Is the US Ready for FDI from China, Studies in International Invest-*

of FDI coming from developing and emerging countries to developed economies, the sudden relevance of foreign sovereign investors or the increasingly negative attitude of the population towards globalization and the socioeconomic effects of Mergers and Acquisitions (M&As) of domestic firms by foreigners. As well as the changing environment for national security or the quest to protect technologies and sectors of the economy considered vital for the host country, its sovereignty and competitiveness are creating a new reality that will necessarily affect both, the legal framework and the global fluxes of FDI.

All these facts, among others, have a direct impact in the assessment of free trade and free flows of FDI in many states, especially developed ones, and leads to the implementation of mechanisms of control of FDI on national security or related grounds in particular countries of the world. Liberalization of FDI constitutes a strong trend that will probably continue in the future. However some signs of "backlash against FDI"[8] exist that make the regulatory framework less welcoming in certain countries as regards foreign investments or, at least, as regards foreign investments coming from certain countries, sovereign-driven FDI or FDI directed to certain areas of the economy. A trend that, in any case, may favour a more targeted approach towards FDI flows in the near future.

2. Globalization, free trade and free flows of FDI in the spotlight

The phenomenon of globalization is directly related to the liberalization of international trade and international investment.[9] They are simultaneously the cause and manifestation of this fact. The three sets of FDI determinants -economic conditions, the regulatory framework and investment promotion-[10] have lined up favourably during the last few decades. And FDI has grown steadily due to the combination of certain factors of a varied and differing nature ranging from the connectivity revolution and the technological developments that facilitate the managing of international business systems in an integrated manner, the changing pattern of Competition Law, the procedure of deregulation undertaken in many economies, the process of integration developed in several parts of the world, the increasing liberalization of international trade or of FDI policies by national states.[11]

However, globalization has an increasingly negative understanding for many people in some countries as does free trade in many sectors of the population, and this has a direct and growing influence on the approach to FDI by some national governments. The idea of globalization and international trade, and consequently that of free flows of FDI, being under siege is spreading rapidly all over the world. The traditionally rather innocuous area of investment law is nowadays under pressure, not only in relation to inwards FDI (IFDI) but also as regards to outwards FDI (OFDI).[12] More and more some developed countries are starting to feel disquiet with respect to the FDI regime that they have helped construct for decades.[13] And the contradictions and tensions that have traditionally accompanied FDI are now superseded by the rising mistrust towards globali-

ment. Edward Elgar: Cheltenham/Northampton, 2009. p. 2.

8 SACHS, Lisa E.; SAUVANT, Karl P., "BITs, DTTs, and FDI Flows: An Overview", In: SAUVANT, Karl P.; SACHS, Lisa E. *The Effect of Treaties on Foreign Direct Investment*: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows. Oxford: OUP, 2009. p. xxvii & lix, xxx.

9 LEAL-ARCAS, Rafael. "Towards the Multilateralization of International Investment Law". *The Journal of World Investment & Trade*, v. 10, p. 865-866, 2009; SALACUSE, Jeswald W. *The Three Laws of International Investment*. National, Contractual and International Frameworks for Foreign Capital. Oxford: OUP, 2013. p. 351-2; FONTAGNÉ, Lionel. *Foreign Direct Investment and International Trade*: Complements or Subtitutes? Paris: OECD Science, Technology and Industry Working Papers, 1993/03, OECD Publishing, 1993. p. 5.

10 SAUVANT, Karl P. "The FDI recession has begun". In: SAUVANT, Karl P. et al. *FDI Perspectives Issues in International Investment*. New York: Vale Columbia Center on Sustainable International Investment, Columbia University, 2011. p. 7.

11 BITZENIS, Aristidis. Globalization and Foreign Direct Investment. In: BITZENIS, Aristidis, VLACHOS, Vasileios A.; PAPADIMITRIOU, Pyrros. (Ed.). *Mergers and Acquisitions as the Pillar of Foreign Direct Investment*. New York: Palgrave McMillan, 2012. p. 10; FONTAGNÉ, Lionel. *Foreign Direct Investment and International Trade*: Complements or Subtitutes? Paris: OECD Science, Technology and Industry Working Papers, 1993/03, OECD Publishing, 1993. p. 9; SACHS, Jeffrey D. "Foreign Investment and the Changing Global Economic Reality". In: ALVAREZ, José E. et al. (Ed.). *The Evolving International Investment Regime Expectations*. Oxford: Realities, Options, OUP, 2011. p. xlvii-xlix; LEE, Yong-Shik. Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development? *Journal of World Trade*, v. 39, n. 4, p. 701, 2005. p. 701, 702.

12 ALVAREZ, José E. "Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?" *Alabama Law Review,* v. 609, p. 943-970, 2009.

13 ALVAREZ, José E. "Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?" *Alabama Law Review,* v. 609, p. 972-975, 2009.

zation and free trade that is arising in certain countries.[14]

This combination of factors favours a rapid change in the approach to FDI in many states, which takes place in an atmosphere of growing prevention as regards some of the consequences arising out of globalization is rapidly favouring protectionism and creating a new element of pressure on the freedom of FDI. Foreign ownership of national firms is negatively approached by citizens, both in developed and emerging countries.[15] But not only IFDI is under scrutiny, also OFDI may be affected by the current reality in many places.

FDI is more intrusive than trade because it involves the entire range of issues related to the process of production.[16] In fact, the increase in the flux of FDI has been one of the factors that have led to a big transformation in the industrial structure of many modern economies.[17] Developed economies originally produced most of their products at home, but because of the costs, production and plants have been increasingly diverted abroad.[18] In the 1980s Japanese companies produced around 5 per cent of their products overseas and it is projected to rise to 24.2 per cent in 2020.[19] In the case of the US, in 2013 around 53 per cent of manufacturing companies took advantage of offshore outsourcing and more than two million jobs were outsourced.[20]

It is not only that certain areas of the economy should be preserved from foreign investment for the national interest or on national security grounds, it is also that national corporations should be deterred in certain cases and sectors of the market from investing abroad in so far as this is deemed to potentially cause a haemorrhage of jobs, knowledge and standing for the country.

3. A MORE TARGETED APPROACH TOWARDS FDI FLOWS

FDI is increasingly subject to changes. FDI both inwards and outwards is not as welcome as before.[21] Liberalization of trade and investment is approached by some countries and social groups as dangerous in so far as, and among other reasons, the country may rely too much on foreign importations or some key sectors of the economy or industries may be controlled by foreigners or foreign countries. Tension exists between the commitment towards freedom of FDI and the right of the state to ensure that certain legitimate public interests and goals can be fully implemented. This may lead to the protection of certain strategic sectors of the economy of the country or flagship firms from foreign investment on national security, national essential security interests or related grounds.

This leads to the existence of a strong trend to provide governments with broader powers to decide what FDI they want, and which one they don't. These objectives are ensured and reached through different mechanisms and policies fixed by the state itself. And it may lead governments, now also from developed countries, to pay more attention, among other things, to some competing objectives like the safeguard of special national interests or of essential security interests, the promotion of national champions or the protection of certain national industries and critical infrastructures.[22].

14 SAUVANT, Karl P. "Driving and Countervailing Forces: A Rebalancing of National FDI Policies". *Yearbook on International Investment Law & Policy*, p. 215-234, 2008.

15 SAUVANT, Karl P. "Driving and Countervailing Forces: A Rebalancing of National FDI Policies". *Yearbook on International Investment Law & Policy*, p. 244-262, 2008.

16 FDI can compensate trade immobility insofar as FDI former exporters can produce and sell abroad even when high tariffs to trade are introduced. Note, ROSECRANCE, Richard; THOMPSON, Peter. "Trade, Foreign Investment, and Security". *Annual Review of Political Science*, v. 6, p. 394, 2003.

17 SAUVANT, Karl P. "The Rise of International Investment, Investment Agreements and Investment Disputes". In: SAUVANT, Karl P.; WITH CHISWICK-PATTERSON, Michael. (Ed.). *Appeals Mechanism in International Investment Disputes*. New York: OUP, 2008. p. 11.

18 Additionally, manufacturing has shifted to services in many modern developed economies ROSECRANCE, Richard; THOMPSON, Peter. "Trade, Foreign Investment, and Security". *Annual Review of Political Science*, v. 6, p. 384-385, 2003.

19 CABINET OFFICE, ECONOMIC AND SOCIAL RESEARCH INSTITUTE. *FY2015 Annual Survey of Corporate Behavior*. Press Release, Tokio, 26 June 2016. Available in: <http://www.esri.cao.go.jp/en/stat/ank/h27ank/h27ank_press.pdf>. Access on: 13 Jul. 2018.

20 STATISTIC BRAIN. *Job Overseas Outsourcing Statistics*. Available in: <http://www.statisticbrain.com/outsourcing-statistics-by-country/>. Access on: 13 Jul. 2018. In the last US presidential election of 2016, the issue of delocalization and outwards FDI and their influence on the loss of jobs was one of the issues of major relevance.

21 WAYMOUTH, Crispin. "Is 'Protectionism' a Useful Concept for Company Law and Foreign Investment Policy? An EU Perspective". In: BERNITZ, Ulf; RINGE, Wolf-Georg. (Ed.). *Company Law and Economic Protectionism New Challenges to European Integration*. Oxford: OUP, 2010. p. 35-6.

22 These policies are based on a comprehensive approach to security risk management and respond in many cases to the broad understanding of the ideas of national security or essential secu-

No state has ever granted unrestricted entry to foreign investors and some limits to them have always existed. But nowadays some states and political actors are starting to think of whether they have relinquished "too much 'policy space'" in signing International Investment Agreements (IIAs) that through their interpretation by international arbitration panels may cast a "regulatory chill" over domestic measures that are considered to be needed to achieve legitimate, non-investment policy objectives, not only in the economic field but also as regards other ambits like health and safety policy objectives, or national security as well as human rights or environmental protection.[23] They also wonder whether it is acceptable that key elements of the economy or prominent industries become controlled by foreign investors, some of them sovereign driven investors belonging to countries that do not always fully share their social, economic or democratic ideas.

The rapid industrialization of some emerging countries has raised additional concerns about the access to energy and to scarce raw materials. The protection of technologies considered vital to national sovereignty and competitiveness has also become a relevant issue to be taken into account. The control of these areas has now become a political issue with a strong connection to the area of FDI and to the national security of the host state.[24] Also terrorism, the changing global geostrategic environment and the current atmosphere of securitization have generated additional concerns as regards FDI and have also favoured a change in the way FDI regulation is approached in certain countries. It is not only a question of preventing foreign firms from controlling strategic industries or firms, or playing a key role in the national economy, of protecting national cultural identity or avoiding national security concerns.[25] It is said to be more than that: it is an issue of fear of transference of R&D departments, a sell-out of national resources, unfair subsidising, a lowering of environmental standards, industrial espionage, insufficient protection of intellectual property or loss of jobs in developed countries.[26]

Fears increase further when the investment is undertaken by MNEs belonging to emergent countries, some of them with a high participation of foreign governments in their control, governance and determination of their final aims.[27] There are growing concern by states and public opinion about the compatibility of FDI, or at least of FDI coming from certain countries and targeting certain areas of the economy, with the protection and safeguarding of some values, policies and objectives of the host state in certain areas.[28]

3.1. Potential national security threats generated by FDI

In addition to certain purely social and economic problems related to the potential change of domicile of the acquired enterprise, the loss of jobs that it can imply or the change in its management, some particular fears specifically related to national security issues

rity interests. Vid., OECD. *Building Trust and Confidence in International Investment*. Report by countries participating in the "Freedom of Investment" Process March 2009. Paris: OECD, 2009. p. 10. This means new rules on FDI or more rigorous enforcement of existing ones; a greater degree of conditionality attached to regulatory approval mechanisms in the host state; or reference to a more expansive notion of strategic industries, the national interest and national security. THOMSEN, Stephen; MISTURA, Fernando. *Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index OECD Global Forum on International Investment*. Paris: OECD, 2017. p. 1. Sometimes, the mere disapproving pronouncements by the government or fears of a popular backlash are enough to stop a potential cross-border investment in its tracks. Vid. also, SAUVANT, Karl P.; ORTINO, Federico. *Improving the International Investment Law and Policy Regime*: Options for the Future. Helsinki: Ministry for Foreign Affairs of Finland, 2013. p. 38.

23 SPEARS, Suzanne A. "The Quest for Policy Space in a New Generation of International Investment Agreements". *Journal of International Economic Law*, v. 13, n. 4, p. 1037-1040, 2010. Also consider, OECD. *Interim report approved by the OECD Investment Committee at the fourth OECD Roundtable on Freedom of Investment*. National Security and "Strategic" Industries on 30 March 2007 (reproduced in OECD, International Investment Perspectives: Freedom of Investment in a Changing World. Paris: OECD, 2007. p. 55.

24 ORGNISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Interim report approved by the OECD Investment Committee at the fourth OECD Roundtable on Freedom of Investment*. National Security and "Strategic" Industries on 30 March 2007 (reproduced in OECD, International Investment Perspectives: Freedom of Investment in a Changing World. Paris: OECD, 2007. p. 54.

25 SAUVANT, Karl P. "Driving and Countervailing Forces: A Rebalancing of National FDI Policies". *Yearbook on International Investment Law & Policy*, p. 233, 2008.

26 HEINEMANN, Andreas. 'Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism? Control of Cross-Border M&A'. *Journal of International Economic Law*, v. 15, n. 4, p. 843, 863, 2012.

27 Note, SAUVANT, Karl P.; GOVITRIKAR, Vishwas P.; DAVIES, Ken. *MNEs from Emerging Markets:* New Players in the World FDI Market. New York: Vale Columbia Center, 2011. p. 1ff.

28 OECD. *Novel Features in OECD Countries' Recent Investment Agreements*: An Overview. Paris: OECD, 2005. p. 4 at No. 11; VADI, Sara. "Fragmentation or Cohesion? Investment versus Cultural Protection Rules". *Journal of World Investment and Values*, v. 10, p. 573, 2009.

exist in relation to FDI. Authors speak of at least three threats of diverse kinds potentially generated by FDI: the dominance of supply that penalizes the host country, the transfer of technology that harms host country interests, and the possibility of engaging in sabotage or espionage.[29]

1) The first potential damage to national security arising out of a foreign M&As refers to the possibility that the country where the acquired firm is located, becomes dependent on a foreign controlled supplier of goods or services which are crucial to the normal functioning of the host country. And this dependence can finally imply a delay, denial or the placement of conditions on the provisions of such goods or services by the foreign acquired firm.[30] Nevertheless, for this threat of dependence to be credible, the industry should be tightly concentrated with a limited number of close substitutes and high switching costs.[31] And in the evaluation of the competition among alternative suppliers not the local market but the global market must be considered.[32]

2) The second category of threats refers to those M&As that can imply transfer of certain technology or expertise to a foreign controlled entity that could be deployed by this entity, or its government, in a manner harmful to that country's national interests.[33] The assessment of this threat also depends on how broadly available the additional production or managerial expertise is involved, as well as the impact of the acquisition on those who seek its output.[34]

3) Finally, a third category of threats are those arising out of M&As that would allow the insertion of a certain capability for infiltration, surveillance or sabotage into the provision of certain services or goods which are deemed crucial to the normal functioning of the economy of the host country: telecommunications is one of them.[35]

In any case, taking these three different threats into account and leaving aside the potential political and media impact of some of the M&As undergone in recent times, it is necessary to differentiate when approaching particular FDI proposals between genuine threats and generic which in some cases may be just excuses for the host state to adopt hidden protectionist measures.

3.2. Factors of potential danger to be taken into account by host states

A double-edged attitude towards FDI is growing nowadays in many parts of the world. As a matter of principle most states encourage FDI, but at the same time many of them are increasingly beginning to adopt a more selective approach in relation to it. That finally means that FDI is welcomed as a general rule, but some FDI or some kinds of FDI are not that welcome in certain cases or as regards particular targets. National security, national essential security interests or similar terms are some of the grounds used to protect the host state from undesired FDI.

FDI legislation reflects the balance between the benefits that host and home countries expect from foreign

29 MORAN, Theodore H., 'Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries?'. In: DRABEK, Zdenek; MAVROIDIS, Petros C. (Ed.), *Regulation of Foreign Investment Challenges to International Harmonization. Singapore World Scientific, World Studies in International Economics*. New York: Columbia University, 2013. v. 21. p. 372-373. Also, DOBSON, Wendy. "China's State-Owned Enterprises and Canada's Foreign Direct Investment Policy". *Canadian Public Policy,* v. 43, 2017. p. S28, S41; HANEMANN, Thilo; ROSEN, Daniel H. *China Invests in Europe Patterns, Impacts and Policy Implications*. New York: Rhodium Group, 2012. p. 60-1.

30 MORAN, Theodore H. *Chinese Foreign Direct Investment in Canada*: Threat or Opportunity?. Ottawa: Canadian Council of Chief Executives/Conseil Canadien des Chiefs d'Enterprise, 2012. p. 5-6.

31 MORAN, Theodore H., 'Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries?'. In: DRABEK, Zdenek; MAVROIDIS, Petros C. (Ed.), *Regulation of Foreign Investment Challenges to International Harmonization. Singapore World Scientific, World Studies in International Economics*. New York: Columbia University, 2013. v. 21. p. 373.

32 MORAN, Theodore H., 'Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries?'. In: DRABEK, Zdenek; MAVROIDIS, Petros C. (Ed.), *Regulation of Foreign Investment Challenges to International Harmonization. Singapore World Scientific, World Studies in International Economics*. New York: Columbia University, 2013. v. 21. p. 385.

33 MORAN, Theodore H. *Chinese Foreign Direct Investment in Canada*: Threat or Opportunity?. Ottawa: Canadian Council of Chief Executives/Conseil Canadien des Chiefs d'Enterprise, 2012. p. 6.

34 MORAN, Theodore H., 'Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries?'. In: DRABEK, Zdenek; MAVROIDIS, Petros C. (Ed.), *Regulation of Foreign Investment Challenges to International Harmonization. Singapore World Scientific, World Studies in International Economics*. New York: Columbia University, 2013. v. 21. p. 378.

35 MORAN, Theodore H. *Chinese Foreign Direct Investment in Canada*: Threat or Opportunity?. Ottawa: Canadian Council of Chief Executives/Conseil Canadien des Chiefs d'Enterprise, 2012. p. 6. Note to this respect, INTELLIGENCE AND SECURITY COMMITTEE. Foreign involvement in the Critical National Infrastructure The implications for national security (Chairman: The Rt. Hon. Sir Malcolm Rifkind, MP) Presented to Parliament by the Prime Minister on behalf of Her Majesty, Cm 862, June 2013. 11 ff.

capital and the potential risks that FDI has for them.[36] And it is increasingly under pressure, especially in many western countries, which are currently re-evaluating the cost-benefit trade-off of certain types of FDI. Consequently, in certain places not all FDI is considered welcome but only some types of FDI and different instruments and devices are used to control it. The acceptance of FDI is not full and becomes increasingly qualified and made dependent on factors such as the sector or specific industry targeted by the investment, its nature –either greenfield or through M&A of an already existing undertaking, its condition –purely private or sovereign driven- or its origin.

Reference to these concepts opens the question of determining which foreign investment can be dangerous for the host state, in other words, to specify against "what" or against "whom" is protection sought. And this is done by every state on its own. Any of these four factors, alone or a combination of some of them, activate in most cases the national system of evaluation of FDI on national security or related grounds. For instance, the origin of the investment and the quality of the investor are relevant in order to assess its potential conflict with national security. But also the political and investment climate of the host country is very relevant in the process of evaluating the potential risk of the operation in a specific moment, in a certain country and as regards a particular area of the economy. FDI may generate different concerns when it refers to nuclear power energy or to solar energy, or when the investment is proposed by a Canadian corporation or a Russian one. Even when the investor is controlled by a state, different perception stems from different places whether a Norwegian Sovereign Wealth Fund (SWF) or a Chinese one and this perception varies depending on the place where the investment is made too.[37]

3.2.1. Origin of the investment

The origin of the FDI constitutes an essential element in the current security related discourse towards foreign investment. Against whom is protection sought? The primary response to this question is: against certain investors who come from individual countries, those which are perceived as hostile or with which the host country has an unfriendly relationship.[38]

FDI has been traditionally considered "foreign" because of the nationality of the investor. This principle is also present in the vast majority of IIAs that choose nationality as the distinctive element to determine foreignness.[39] Nevertheless, this rule poses some problems in relation to private individuals and raises many questions as regards corporations. The issue of the origin of FDI may be sometimes rather problematic because it is not always easy to actually verify its real provenance. Not only because of the intrinsic difficulty in determining the nationality of a firm but, also and increasingly, because of the structure of international trade and investments.[40]

3.2.2. The nature of the investment: Sovereign--driven investment

Western developed economies have traditionally been, and are, open to FDI. However, the financial crisis and the appearance of new economic actors worldwide have made them generate a certain degree of prevention as regards FDI or, at least, as regards some FDI; one coming from certain specific countries and/or directed towards certain firms or areas of the economy. The nature of FDI constitutes an additional element of concern and potential control. Many cases of acquisitions of existing firms by some SWFs and, mostly by, State Owned Enterprises (SOEs)[41] since the beginning

36 SAUVANT, Karl P. "Driving and Countervailing Forces: A Rebalancing of National FDI Policies". *Yearbook on International Investment Law & Policy*, p. 233, 2008.

37 In 2007 Statoil, the Norwegian State Owned Enterprise which happened to be the world´s biggest one of this kind, bought North American Oil Sands Corp. (NAOSC) and no special concerns were raised in Canada (*Statoil's $2 bln Canadian Oil Sands Deal Approved*, *Reuters* (on line), 26 June 2007, <http://uk.reuters.com/article/statoil-naosc-approval-idUKL2668735420070626> accessed 13 December 2017). Whereas two years earlier state owned CNOOC was forced to drop its bid for US based oil producer UNOCAL due to national security concerns and alleged violation of fair trade rules created by this operation (*Chinese Drop Bid to Buy U.S. Oil Firm*, *The Washington Post* (on line), 3 May 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080200404.html>. Access on: 29 Nov. 2017.

38 Note UNCTAD. *The Protection of National Security in IIAs*. UNCTAD Series on International Investment Policies for Development. New York/Geneva: UNCTAD/DIAE/IA/2008/5, UNCTAD, 2009. p. 17.

39 DIMOPOULOS, Angelos. *EU Foreign Investment Law*. Oxford: OUP, 2011. p. 22; DOLZER, Rudolf; SCHREUER, Christoph. *Principles of International Investment Law*. 2 ed. Oxford: OUP, 2012. p. 32.

40 DIMOPOULOS, Angelos. *EU Foreign Investment Law*. Oxford: OUP, 2011. p. 33-6.

41 GILLIGAN, George; BOWMAN, Megan; O'BRIEN, Justin. The Global Impact of State Capital, The University of New South Wales School of Law, Centre for Law, Markets and Regulation,

of the financial crisis in 2007 have been published.[42] This growing role played by SWFs and SOEs in recent times, and the wide potential for influence over their objectives and activities by foreign governments directly or indirectly owning or controlling them, has created certain concerns in host states regarding the real purpose of the investment to be made: whether it is purely commercial or it primarily responds to some political and geo-strategic reasons.

The increase of FDI, especially in the form of M&As coming from emergent economies, of different political ideologies, geographical regions or levels of development, generates doubts about the current internal structure and management standards of these SCEs, and also as regards the implementation of their activities in accordance with the basic rules of fair competition and free economy in so far as they may, for instance, have access to funding by state-owned financial institutions at a lower rate of return on their invested capital than private investors,[43] thus impairing free competition in the global market.

This move comes together with a change in the pattern of its development that may also affect its future. M&A has now become the dominant form of FDI and FDI by private equity and hedge funds, as well as SCEs, mainly SWFs and SOEs is gaining relevance.[44] In addition to the origin, foreign investors who are owned or controlled by foreign states constitute an autonomous category of investors that are considered as such in many countries irrespective of their nationality or of the target of the particular FDI project.[45]

The global threat perception has increased steadily in the last few years and national security concerns are affecting the development of international trade and of FDI. This becomes especially manifest as regards the protection of certain strategic industries and of some critical infrastructures.[46] The changing origin of FDI and the possibility of certain areas of the economy to be dominated by foreigners have raised national security anxieties in many western economies as well as have fostered economic nationalism.[47] This dissatisfaction increases in relation to sovereign driven FDI.

For instance, sovereign driven foreign investment has constituted a hot topic for a long time in Australia. Already in 2009, the Australian Senate Economics References Committee launched a public enquiry on SOEs and afterwards issued a Report which got a response from the Government at the end of that year.[48] The Senate welcomed and praised works undertaken by certain international organisations in order to regulate SOEs but added that the Committee "believes that the best way for Australia to regulate the conduct of foreign investors (be they SWF, SOE or private commercial operator), is through developing robust domestic legislation".[49] Nevertheless, the Senate finally considered that the Australian regulatory framework was sufficient.[50] Australia finally modified its regulation in 2008 to include a new policy on sovereign FDI. Currently, the process of evaluation of FDI proposals in Australia is made directly dependent on the nature of

CLMR Research paper series, *Working Paper*, n. 13-2, Sydney, July 2013. p. 16.

42 Note JOST, Thomas. "Sovereign Wealth Funds and the German Reaction". In: SAUVANT, Karl P.; SACHS, Lisa E. SCHMIT JONGBLOED, Wouter P.F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 453.

43 Note GÖKGÜR, Nilgün. "Are Resurging State-Owned Enterprises Impeding Competition Overseas?". In: SAUVANT, Karl P.; REIMER, Jennifer. (Ed.). *FDI Perspectives*: Issues in International Investment. 2. ed. New York: VCC, 2012. p. 26.

44 SAFARIAN, A. Edward, "The Canadian Policy Response to Sovereign Direct Investment". In: SAUVANT, Karl P.; SACHS, Lisa E.; SCHMIT JONGBLOED, Wouter P. F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 431.

45 These actors are the consequence of the process of globalization undergone by the economy as well as a reflection of the more proactive "state-led investment capitalism" that characterizes the global economy nowadays. See, GILLIGAN, George; BOWMAN, Megan; O'BRIEN, Justin. The Global Impact of State Capital, The University of New South Wales School of Law, Centre for Law, Markets and Regulation, CLMR Research paper series, *Working Paper,* Sydney n. 13-2, July 2013. p. 12.

46 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPEMENT. *The Protection of National Security in IIAs*. UNCTAD Series on International Investment Policies for Development. New York/Geneva: UNCTAD/DIAE/IA/2008/5, UNCTAD, 2009. p. 14.

47 MALAWER, Stuart S. "Global Mergers and National Security". *Virginia Lawyer Magazine*, p. 33-34, Dec. 2006.

48 Several parliamentary reviews of the FDI review system have taken place during the last few years, noted GOLDING, Greg. "Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move towards Xenophobia or Greater Openness?" *Seattle University Law Review*, v. 37, p. 533-546, 2014.

49 THE SENATE, ECONOMIC REFERENCES COMMITTEE. *Foreign investment by state-owned entities*. Canberra, September 2009. Available in: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/firb_09/report/index>. Access on: 15 Jul. 2018.

50 THE SENATE, ECONOMIC REFERENCES COMMITTEE. *Foreign investment by state-owned entities*. Canberra, September 2009. Available in: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/firb_09/report/index>. Access on: 15 Jul. 2018.

the foreign investor. Any investment proposal made by state-owned or controlled foreign corporations aimed at acquiring a direct interest in Australia -usually 10 per cent or the ability to influence, participate in or control it-, to initiate a new business or gaining an interest in Australian land are always subject to scrutiny and prior acceptance by the administration, regardless of the value of the investment.[51] Other reforms in this same sense have taken place around the world.[52]

SWFs and SOEs are state-controlled investors with enormous amounts of capital available and with a dual personality as public actors performing, at least in theory, private activities with not always clearly private –in the sense of purely commercial- objectives. SOEs and SWFs do not constitute new realities in the economy nor in the FDI arena.[53] SWFs and SOEs have existed for some decades but they have gained major relevance in the last twenty years generating mixed attitudes towards them. The active role that they have played in the world economy has raised concerns regarding the nature of their activity and their potential control of, and influence on, key sectors of the economy, mostly in developed countries.[54] It is considered that not all countries share the same values and behaviour and that their companies may act in accordance with political or ideological ideas and not only on a purely commercial basis. Host countries are eager to receive FDI but they fear their non-commercial use and want to protect themselves against this potential use and the consequences for their national security or their economy arising out of it.

Emerging economies have traditionally invested their surplus of foreign exchange reserves in low-risk assets such as US Treasury notes.[55] However the growth of surpluses in certain economies during the last two decades has fuelled a shift of excess reserves to higher--risk operations aimed to facilitate the diversification of accumulated reserves and to gain a higher-return investment.[56] SCEs are nowadays broadening their investment worldwide affecting highly sensitive industries and economic areas of host states such as energy and mining, network technology, critical infrastructures management or banking and finance, in which, additionally, some national champion industries of the host state may be involved.[57]

3.2.3. The target of the investment

In addition to the origin and/or the nature of the investment, the particular sector where it is to be made

51 THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. 5. Additionally, some exceptions that apply to non-government foreign investors are not applicable to foreign government investors. Specific exemptions for foreign government investors include, for instance, the acquisition of residential land to be used for diplomatic purposes (Ibid, 6). Note also GOLDING, Greg. "Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move towards Xenophobia or Greater Openness?" *Seattle University Law Review*, v. 37, p. 552, 2014.

52 MUCHLINSKI, Peter T. *Multinational Enterprises & the Law*. 2 ed. Oxford: OUP, 2007. p. 201.

53 Resemblance to the British East India Company, the Hudson Bay Company or the Dutch East India United Company, founded during XVII Century have been stressed. Note GILLIGAN, George; BOWMAN, Megan; O'BRIEN, Justin. The Global Impact of State Capital, The University of New South Wales School of Law, Centre for Law, Markets and Regulation, CLMR Research paper series, Working Paper No. 13-2, Sydney, July 2013. p. 10.

54 Nevertheless, SWFs enjoyed a sudden upgrade in their reputation in the period between March 2007 and June 2008 when SWFs injected US$59 billion into western financial institutions, including high-profile equity purchases of Barclays, Citigroup Inc., Credit Suisse, Merrill Lynch, Morgan Stanley or UBS. In fact, in 2007 a bunch of SWFs owned by Singapore, Kuwait or South Korea, 2007 provided much of the US$21 billion needed by Merrill Lynch and Citicorp to avoid bankruptcy, note DREZNER, Daniel W. "Sovereign Wealth Funds and the (In)security of Global Finance". *Fall/Winter Journal of International Affairs,* v. 62, p. 115, 2008; PISTOR, Katharina. "Sovereign Wealth Funds and Global Finance". In: SAUVANT, Karl P.; SACHS, Lisa E.; SCHMIT Jongbloed, Wouter P. F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 145; WEISS, Martin A. *Sovereign Wealth Funds: Background and Policy Issues for Congress*. CRS Report for Congress, Congressional Research Service, RL34336, Washington 3 September 2008. p. 1-2; GILSON, Ronald; MILHAUPT, Curtis. "Sovereign Wealth funds and Corporate Governance: A Minimalist Response to the New Merchantilism". *Standford Law Review*, v. 60, p. 1345-1348, 2008. Nevertheless, the participation of SWF, many from emergent countries in global financial players has existed since long.

55 GILSON, Ronald; MILHAUPT, Curtis. "Sovereign Wealth funds and Corporate Governance: A Minimalist Response to the New Merchantilism". *Standford Law Review*, v. 60, p. 1347, 2008; ROSE, Paul. "Sovereigns as Shareholders". *North Carolina Law Review,* v. 87, p. 101-105, 2008.

56 WEISS, Martin A. *Sovereign Wealth Funds: Background and Policy Issues for Congress*. CRS Report for Congress, Congressional Research Service, RL34336, Washington 3 September 2008. p. 2; GILSON, Ronald; MILHAUPT, Curtis. "Sovereign Wealth funds and Corporate Governance: A Minimalist Response to the New Merchantilism". *Standford Law Review*, v. 60, p. 1348, 2008. This is not a new reality because the same happened with Japan during the late 1980's, note ROSE, Paul. "Sovereigns as Shareholders". *North Carolina Law Review,* v. 87, p. 102, 2008.

57 GILSON, Ronald; MILHAUPT, Curtis. "Sovereign Wealth funds and Corporate Governance: A Minimalist Response to the New Merchantilism". *Standford Law Review*, v. 60, p. 1348, 2008.

or the specific firm targeted constitute a landmark for the evaluation and acceptance of FDI proposals. For different reasons, the host country may wish to retain control over certain key areas of its economy or to prevent "flagship" companies falling under the control of foreigners, even if they come from friendly countries.[58]

The determination of these specific sectors and firms underlie the increasing introduction of screening systems on national security and related grounds in some countries of the world. In 2005 France identified certain sectors where FDI would be subject to review,[59] in 2007, the US increased the number of transactions subject to revision by the Committee on Foreign Investment in the US (CFIUS),[60] also in 2009 Canada and Germany introduced all-sectors national security review mechanisms.[61] In Australia, special attention is devoted to foreign investment in land,[62] a highly critical sector for Australian economy and the "nation´s psyche".[63] Australian land includes "*agricultural and commercial land, mining and production tenements, and residential land*".[64] In relation to agricultural land[65] the threshold for evaluation was reduced drastically in March 2015 from AUD252 million to AUD15 million.[66] But, as a general rule all foreign persons acquiring vacant commercial land[67] or an interest in residential real estate[68] must obtain approval regardless of its value.[69] As a matter of principle, services tend to be more restricted than manufacturing as regards the acceptance of FDI.[70] In many cases services

58 UNCTAD. *The Protection of National Security in IIAs*. UNCTAD Series on International Investment Policies for Development. New York/Geneva: UNCTAD/DIAE/IA/2008/5, UNCTAD, 2009. p. 18.

59 Décret n° 2005-1739 du 30 décembre 2005 réglementant les relations financières avec l'étranger et portant application de l'article L. 151-3 du code monétaire et financier [Decree No 2005-1739 of 30 governing foreign financial relationships and applying article L. 151-3 of the Monetary and Financial Code] (France) JO, 31 December 2005. Note also, Décret n° 2014-479 du 14 mai 2014 relatif aux investissements étrangers soumis à autorisation préalable [Decree No 2014-479 of 14 May 2014 on foreign investment submitted to premiliminary registration] (France) JO, 15 May 2014 and Décret n° 2017-932 du 10 mai 2017 portant diverses mesures de simplification pour les entreprises [Decree No 2017-932 of 10 May 2017 on measures of simplification for enterprises] (France) JO, 11 May 2017.

60 Foreign Investment and National Security Act of 2007 (FINSA), Pub.L. 110–49, 121 Stat. 246.

61 Respectively, Investment Canada Act (ICA) R.S.C. 1985, c. 28 (1st Supp.), Part IV.1 and Außenwirtschaftsgesetz [Foreign Trade and Payments Act] (Germany) 6 June 2013, BGBl I, 1482, reformed by the Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung [Ninth Ordinance amending the AWV] (Germany) 14 July 2017, BAnz AT 17 July 2017 V1.

62 In accordance with S. 4 of the Foreign Acquisitions and Takeovers Act 1975 ('FATA'), Act No. 92 of 1975, s 4, Australian land "means agricultural land, commercial land, residential land or a mining or production tenement". Note THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. Annex 1, 15.

63 SANYAL, Kali. *Foreign investment in Australian agriculture, Parliament of Australia*. Department of Parliamentary Services, Research Paper, Parliament of Australia, Canberra 18 February 2014. 15; GILLIGAN, George; BOWMAN, Megan; O'BRIEN, Justin. The Global Impact of State Capital, The University of New South Wales School of Law, Centre for Law, Markets and Regulation, CLMR Research paper series, Working Paper No. 13-2, Sydney, July 2013. p.

66. Significantly, a vast majority of Australians are favorable to FDI but rising opposition exists -63 per cent in 2014- as regards foreign investment in agriculture, as well as in ports and airports. OLIVER, Alex. *The Lowy Institute Poll 2014*. Lowy Institute for International Policy. Sydney, 2014. Available in: <https://www.lowyinstitute.org/sites/default/files/2014_lowy_institute_poll_0.pdf>. Access on: 15 Jul. 2018. 3-4 & 11.

64 In accordance to the Australia's Foreign Investment Policy 2016 (<https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf> accessed 29 November 2017). Note, The Treasurer, above n 51, 4.

65 In accordance to s 4 '*FATA*', agricultural land means, "land in Australia that is used, or that could reasonably be used, for a primary production business."

66 Note THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. p. 4, regarding the threshold for investors coming from Chile, New Zealand and the US. This move is in line with the large opposition -81 per cent in 2012- against the Australian government allowing foreign companies to buy Australian farmland to grow crops or farm livestock (and 63 per cent saying they are strongly against), see HANSON, Fergus. *Australia and New Zealand in the World Public Opinion and Foreign Policy*. Lowy Institute for International Policy. Sydney. 2012. Available in: <https://www.lowyinstitute.org/publications/lowy-institute-poll-2012-public-opinion-and-foreign-policy>. Access on: 14 Jul. 2018.

67 In accordance to s 4 '*FATA*', this notion means "land in Australia or the seabed of the offshore area, other than land: (a) used wholly and exclusively for a primary production business; or (b) on which there is at least one dwelling (except commercial residential premises); or (c) on which the number of dwellings (except commercial residential premises) that could reasonably be built is less than the number prescribed by the regulations for the purposes of subparagraph (a)(ii) of the definition of *residential land* in this section."

68 In accordance to s 4 '*FATA*', residential land "(a) means land in Australia if: (i) there is at least one dwelling on the land; or (ii) the number of dwellings that could reasonably be built on the land is less than the number prescribed by the regulations; and (b) does not include land: (i) used wholly and exclusively for a primary production business; or (ii) on which the only dwellings are commercial residential premises."

69 This rule is subject to international commitments acquired by Australia, note THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. p. 4.

70 GOLUB, Stephen S. *Measures of Restrictions on Inward Foreign Di-*

are considered strategic or sensitive for the country, therefore the discrimination that may exist against foreign ownership is not based, or at least is not only based, on economic or commercial reasons but also on national security or national essential security interests grounds and, in certain cases, on economic nationalism or protectionist ideas.[71]

3.2.4. Thresholds

In addition to the origin or nature of the foreign investment and to the target of the investment, also the amount of the investment or the future degree of involvement of the foreign investor in a specific firm is relevant. Thresholds for invoking national security concerns are usual fixed in some FDI review systems on national security grounds. It is important to specify how much involvement a foreign investor must have in a specific firm in the host state before it is considered to be a risk for its national security. If it is necessary for the foreign investor to fully own the firm in order to become a risk for the host state or whether it is enough when an effective control or just certain voting rights exist, and how this is actually determined. All these elements are for states to determine and different responses to them are found worldwide.[72] For instance, in Australia, as a general rule, and in relation to non-land proposals,[73] foreign entities[74] must notify, and get acceptance, before acquiring a substantial interest –at least 20 per cent-[75] in, or the control of, an Australian business valued AUD252 million or more.[76] To enter into such an acquisition without giving prior notification and obtaining a statement of approval by the government constitutes an offence.[77]

4. Mechanisms to control FDI ex ante on national security or related grounds

Acquisitions of national corporations by foreign investors either private or public coming on many occasions from emerging markets and targeted at different sectors of the economy or firms of the host state has spread social alarm and regulatory reactions against FDI in many places of the world, or at least against FDI coming from certain countries or that which is targeting certain areas of the national economy. This refers to developing countries –the extractive industry is a good example of that- but also increasingly to developed ones. Developed countries fear they will lose control of strategic sectors of the economy and national cham-

rect Investment for OECD Countries. Paris: OECD Economic Department Working Papers, 2003. p. 16. (No. 357, OECD Publishing).

71 GOLUB, Stepehn S. "Opennes to Foreign Direct Investment in Services: An International Comparative Analysis". *The World Economy*, p. 1245, 2009. p. 1245, 1246.

72 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPEMENT. *The Protection of National Security in IIAs*. UNCTAD Series on International Investment Policies for Development. New York/Geneva: UNCTAD/DIAE/IA/2008/5, UNCTAD, 2009. p. 24-5.

73 This threshold is elevated to AUD1 094 million for investors coming from Chile, Japan, South Korea, New Zealand and the US, when the investment is made in non-prescribed sensitive sectors. The usual threshold of AUD252 million remains when the investment is made in prescribed sensitive sectors in accordance with s 26 '*FATA*'. See THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. p. 3.

74 Note s 4 '*FATA*' as regards the meaning of 'foreign person': '(a) an individual not ordinarily resident in Australia; or (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or (c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or (d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or (e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or (f) a foreign government; or (g) any other person, or any other person that meets the conditions, prescribed by the regulations.' See THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. p. 3.

75 That is, in those cases when a single person has 20 per cent or more, or several foreign persons have 40 per cent or more, of the issued shares, issued shares if all rights were converted, voting power, or potential voting power, of a corporation. THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. p. 3 & s 4 '*FATA*'. Regarding the way to calculate this participation, note Golding, above n 48, 547.

76 Some exemptions from the need to seek foreign investment approval are foreseen in certain circumstances, note THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018. p. 6.

77 GOLDING, Greg. "Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move towards Xenophobia or Greater Openness?" *Seattle University Law Review*, v. 37, p. 547, 2014.

pions in favour of foreign corporations coming in many cases from geopolitical or economic competitors.[78]

In this scenario it is indispensable to distinguish between the protection of the state and its economic and social viability, through the reference to terms like national security or essential security interests and the protection of the economic interests of the state, of its economic development or any other critical objective which may or may not be linked to the previous idea of national security and that in certain cases may even run against the notion of the free market. The line between protecting legitimate public policy objectives and protectionism is very fine and not always easy to be determined.[79]

The study of FDI has been traditionally very much linked to the analysis of IIAs, especially of Bilateral Investment Treaties (BITs) and, consequently, to the dimension of its protection *ex post*; once the specific investment project has already been implemented in the host country. Only some isolated BITs, mostly those entered into by the US and Canada and more recently Japan,[80] cover both the pre-establishment and the post--establishment phase of FDI.[81] Habitually, the majority of them, irrespective of their bilateral and multilateral dimension, basically include rules referring to the traditional dimension of the promotion and protection of FDI.[82]

Nevertheless, this traditional *ex post* approach linked to the IIAs entered into worldwide is now combined in many states with an increased focus on the phase previous to the actual implementation of the investment in the host country. The goal to balance the commitment towards the free circulation of FDI with the preservation of certain areas of the national economy and firms from control by foreign investors has not -always or only- given place to broader areas where access of FDI is not allowed, but to the establishment of mechanisms aimed to control *ex ante* foreign investment in certain fields or coming from certain countries on national security or national interests' bases.[83] Some countries have now introduced changes in their legislations on FDI. And some of these changes relate to the introduction of control systems on the entry of FDI into their economies.[84] The final consequence is that the state is granted the power to regulate and to stop some FDI proposals, at least those that, according to it, pose national security concerns.[85]

Despite the generally positive attitude maintained as regards FDI flows a truly "open door policy" towards foreign investment does not seem to exist, or to have ever existed, anywhere. No country accepts foreign capital, irrespective of its origin, to enter its economy with total freedom and to be freely invested in any area of the country.[86] In fact when UNCTAD analysed the legislative changes on FDI implemented between 1990 and 2009 it stressed the incidence of the promotion and liberalization of FDI during this period: between 1992 and 2009 UNCTAD reported 2 748 legislative changes worldwide with 89 per cent favouring FDI.[87] However,

78 SAUVANT, Karl P. "Driving and Countervailing Forces: A Rebalancing of National FDI Policies". *Yearbook on International Investment Law & Policy*, p. 240-243, 2008.

79 Additionally, the "fuzziness" of the terms used "inevitably" creates the risk of abuse for protectionist purposes. SAUVANT, Karl P. FDI Protectionism Is on the Rise, Policy Research Working Paper 5052, The World Bank Poverty Reduction and Economic Management Network, International Trade Department World Bank, Washington, September 2009. p. 14.

80 Consider, MUCHLINSKI, Peter T. "Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order". *Oñati Socio-Legal Series,* v. 1, n. 4, p. 3, 2011. p. 3-4.

81 Also the OECD Code of Liberalization of Capital Movements (OECD, Paris, 2013) and the OECD Code of Current Invisibles Operations (OECD, Paris, 2013) consider the pre-establishment phase, note YANNACA-SMALL., Katia, Essential Security Interests under International Investment Law, in: OECD. *International Investment Perspectives*: Freedom of Investment in a Changing World, Paris: OECD, 2007. p. 94.

82 Note TRAKMAN, Leon E.; RANIERI, Nicola W. "Foreign Direct Investment: A Historical Perspective". In: TRAKMAN, Leon E.; RANIERI, Nicola W. (Ed.). *Regionalism in International Investment Law*. Oxford: OUP, 2013. p. 19.

83 This has fostered for instance the establishment of screening systems of FDI projects on national security or related grounds in many countries of the world. See, SAUVANT, Karl P. "Is the United States Ready for FDI from China? Overview". In: SAUVANT, Karl P. (Ed.). *Investing in the United States Is the US Ready for FDI from China, Studies in International Investment.* Edward Elgar: Cheltenham/Northampton, 2009. p. 10.

84 As well as, significantly, to the promotion and incentives of FDI, note SUMNER, Andrew. "Foreign Direct Investment in Developing Countries: Have We Reached a Policy 'Tipping Point'?". *Third World Quarterly,* v. 29, n. 2, p. 239-242, 2008.

85 VANDUZER, J. Anthony; SIMONS, Penelope; MAYEDA, Graham. *Integrating Sustainable Development into International Investment Agreements*: A Guide for Developing Countries (prepared for the Commonwealth Secretariat by the authors, London, 2012. p. 39-224; UNCTAD. *Investment Policy Framework for Sustainable Development, Doc.* Geneva: UNCTAD/DIAE/PCB/2015/5, UNCTAD, 2015. p. 8.

86 SALACUSE, Jeswald W. *The Three Laws of International Investment*. National, Contractual and International Frameworks for Foreign Capital. Oxford: OUP, 2013. p. 87.

87 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPEMENT. *World Investment Report 2010*. Investing in a

and despite the maintenance of this global trend in favour of the liberalization of FDI, many of these national regulations that include provisions aimed to enhance the entrance of FDI and which usually grant investors many benefits and guarantees, now increasingly vest at the same time in host states the possibility to control FDI and to prevent it from entering their economy or some firms on certain different grounds.

Most states have retained the power to control and prevent international M&As under national law and, in many cases, also in accordance with international agreements entered into by them. Limits to FDI in certain specific sectors like the military or infrastructures or general references to national security or public policy are introduced into their regulations in different ways.[88] In some cases the final consequence is that the investment policy of the country and its investment law are becoming increasingly considered and treated as an additional tool to foster national security policies amid an increasingly securitized world.[89] In fact, the OECD already stated in 2006 that "(I)ssues of security and other strategic concerns have moved to the forefront of domestic and international investment policy making",[90] and recently warned of the rise of "hidden protectionism" and protectionism abuse based, among other factors, on national security and related grounds.[91]

No specific rules controlling the entrance of foreign investment on national security, national essential security interests and related grounds existed for a long time in many countries.[92] But this has changed in the last few decades and now more and more specific rules on FDI govern this issue in many countries. States are nowadays fully concerned about the problems that FDI may cause to them in some cases and special relevance is being given to sovereign FDI. Even countries that are investing abroad are progressively aware of the national security aspects of FDI. Governments are increasingly eager to screen, and in some cases even restrict, condition or block foreign investment implemented through takeovers of already existing domestic corporations on grounds of national security or related grounds. FDI is still wanted and encouraged as a general rule, and policies in favour of attracting FDI are implemented almost worldwide. But this fact does not supersede the increasing desire of many states to preserve certain areas of their economies or firms from foreign control or, in a less invasive way, to control certain FDI of a particular nature –basically sovereign driven FDI-, coming from certain countries or targeting particular firms or sectors of the national economy.

According to the World Bank's Survey Investing Across Borders in 2010, a fifth of the 87 countries analysed require foreign companies to go through a foreign investment approval process before proceeding with investment in certain areas of their economy. And almost 90 per cent limit foreign companies' ability to participate in some specific sectors of their economies, with stricter limits to their participation in services.[93] Different measures may be adopted by the host state to protect itself –*ex ante*- from foreign investment on national security or similar grounds.[94]

4.1. Market access measures

Prohibiting, fully or partially, foreign investment in particularly sensitive sectors is the most obvious *ex ante* restriction to FDI. National governments may foresee exclusive national ownership in certain sectors that are considered strategic on different grounds and therefore ban FDI in several areas of the economy.[95]

Low-Carbon Economy. New York and Geneva: United Nations, 2010. p. 76-7.

88 CHAISSE, Julien; CHAKBABORTY, Debashis; MUKHERJEE, Jaydeep, "Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies". *Journal of World Trade,* v. 45, n. 4, p. 837-854, 2011.

89 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Protection of "Critical Infrastructure" and the Role of Investment Policies Relating to National Security*. Paris: OECD, 2008. p. 9.

90 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *International Investment Perspectives.* Paris: OECD, 2006. p. 32.

91 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Roundtable on Freedom of Investment 20 (19 March 2014) Summary of Roundtable discussions by the OECD Secretariat*. Paris: OECD, 2014. p. 9.

92 SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment*. 3ª ed. Cambridge: CUP, 2010, p. 97.

93 INVESTMENT CLIMATE ADVISORY SERVICES WORLD BANK GROUP. *Investing Across Borders 2010*. Indicators of foreign direct investment regulation in 87 economies. Washington: World Bank, 2010. p. 8.

94 For instance, imposition of other emergency measures, forced disinvestment, denial of benefits based on the existence of a clause in the agreement, see UNCTAD. *The Protection of National Security in IIAs*. New York/Geneva: UNCTAD Series on International Investment Policies for Development, UNCTAD/DIAE/IA/2008/5, 2009. p. 30-3.

95 See POLLAN, Thomas. *Legal Framework for the Admission of FDI*. Utrecht: Eleven International Publishing, 2006. p. 58-61.

The state has the right to protect its "essential security interests",[96] and practice shows that the "most heavily restricted sectors" are those considered "highly sensitive to national security or national sovereignty considerations".[97] However, a total ban of FDI is almost unrealistic nowadays. Habitually, the prohibition refers to certain specific areas of the economy or industries and affects both developed and developing countries.[98] In fact, this limited prohibition constitutes a rather habitual measure usually drafted "in grandiose, but vague terms".[99]

Full or partial foreign ownership restrictions usually exist in the defence industry (both production of weapons and war materials); air and maritime cabotage services and air traffic control or the purchase of real estate by foreigners in border areas or near other sensitive sites.[100] Border restrictions, for instance, constitute the most obvious example of limitation of ownership which has existed for a long time in many countries of the world. Foreigners are prevented –or face limitations- from owing real estate near territorial borders or in areas of strategic significance. Additionally restrictions may also concern electricity power grids and exchanges, seaport or airport management, or oil and gas extraction activities.[101] However, these potential restrictions may have different degrees.

The reservation of certain specific sectors from FDI has been used by developing countries to protect some indigenous industries from foreign control, on the basis of arguments like the 'infant industry' and 'crowding out'.[102] Nevertheless, also developed countries include these sorts of restrictions in certain key network sectors such as energy and transport. The OECD, in 2008, considered transport to be the sector with the highest number of discriminatory measures.[103] The different discriminatory measures adopted by the several members of the OECD, their broadness and specific targets, render a final map with many differences among countries as regards the admission of FDI in sectors of the economy and infrastructures considered critical.[104] These differences increase further when the FDI proposal is made by corporations controlled or owned by foreign countries. The sectoral pattern of restrictions tends to be rather similar in both advanced and emerging economies. However, the degree of restrictiveness is generally higher in the latter group of countries.[105] In some cases no explicit rule exists and a more subtle position is maintained.[106]

In addition to this ban, either total or sectoral, of foreign ownership in certain areas of the economy, also the number of foreign investors admitted into a certain sector of the economy can be limited by certain states.[107]

4.2. Maintenance of state's monopolies

Another way of preserving some strategic sectors of the economy from foreign investment is through the

96 JACKSON, James K. *Foreign Investment and National Security*: Economic Considerations, Congressional Research Service, 7-5700, RL34561, Washington, 4 April 2013. p. 6.

97 GOLUB, Stephen S. *Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries*. Paris: OECD Economic Department Working Papers, 2003. p. 24). (No. 357, OECD Publishing).

98 KURTZ, Jürgen. "A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment". *University of Pennsylvania Journal of International Economic Law,* v. 243, n. 3, p. 713, 2002.

99 SALACUSE, Jeswald W. *The Three Laws of International Investment*. National, Contractual and International Frameworks for Foreign Capital. Oxford: OUP, 2013. p. 94. See also, MUCHLINSKI, Peter T. *Multinational Enterprises & the Law*. 2nd ed. Oxford: OUP, 2007. p. 179-180.

100 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *World Investment Report 2016*. *Investor Nationality*: Policy Challenges. New York and Geneva: United Nations, 2016. p. 97-8.

101 UNITED NATIONS CONFERENCE ON TRADE DEVELOPMENT. *World Investment Report 2016*. *Investor Nationality*: Policy Challenges. New York and Geneva: United Nations, 2016. p. 98.

102 MUCHLINSKI, Peter T. *Multinational Enterprises & the Law*. 2. ed. Oxford: OUP, 2007. p. 183-4.

103 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Protection of "Critical Infrastructure" and the Role of Investment Policies Relating to National Security*. Paris: OECD, 2008. p. 7.

104 A comparative table may be found at OECD. *Protection of "Critical Infrastructure" and the Role of Investment Policies Relating to National Security*. Paris: OECD, 2008. p. 10-1.

105 THOMSEN, Stephen; MISTURA, Fernando. *Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index OECD Global Forum on International Investment*. Paris: OECD, 2017. p. 6.

106 In Canada, for instance, the health care sector is considered to be de facto closed to FDI because private hospitals and clinics may not receive payments from provincial health insurance funds, which are deemed critical for the financial viability of operators in the sector. Vid. INVESTMENT CLIMATE ADVISORY SERVICES WORLD BANK GROUP. *Investing Across Borders 2010*. Indicators of foreign direct investment regulation in 87 economies. Washington: World Bank, 2010. p. 98.

107 KURTZ, Jürgen. "A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment". *University of Pennsylvania Journal of International Economic Law,* v. 243, n. 3, p. 725, 2002.

maintenance of state monopolies in particularly sensitive sectors usually linked to the provision of basic public services and communications in a certain state; railway transport and infrastructure maintenance, landline telecommunications, oil and gas transportation, or electricity and water transmission are usual examples of them.[108]

4.3. Equity limitation

In addition to the previous measures some countries have also introduced the requirement of joint ventures or equity restrictions in certain areas of their economy. In fact, it is said to be one of the most common forms of discrimination against foreign investors, although their effectivity is, once again, under question.[109]

The amount and final transcendence of the FDI implemented in the host state can be controlled in order to ensure local control of the sector or firm affected. For example, national governments can limit the share of companies' equity capital in a specific sector that non-residents are allowed to own,[110] limit FDI to a certain level of voting control in an enterprise in a specific given sector or impose the involvement of local participants, irrespective of their public or private condition, in the FDI project.[111] For instance, the Open Air Agreement between the EU and USA of 2007 explicitly limits the possibility of foreign ownership, even by an EU citizen or corporation, of US airlines to no more than 25 per cent of the corporation´s voting equity.[112] Similar limitations in other areas of the economy like banking, natural resources and energy,[113] nuclear energy and mining and mineral leases or telecommunications exist in many countries of the world.[114]

In some countries the possibility of golden shares to prevent the acquisition of local firms, usually privatized firms, by unwanted foreign investors also exists.[115] This is a possibility that, for instance, exists in the UK where golden shares exist in certain enterprises. Hence, the British Government has golden shares in BAE Systems, Rolls-Royce or National Air Traffic Services. In fact, the government has exercised its golden share rights to prevent unwanted takeovers in some cases.

108 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *World Investment Report 2016*. *Investor Nationality*: Policy Challenges. New York and Geneva: United Nations, 2016. p. 98.

109 THOMSEN, Stephen; MISTURA, Fernando. *Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index OECD Global Forum on International Investment*. Paris: OECD, 2017. p. 4.

110 GOLUB, Stephen S. Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries, OECD. *Economic Department Working Papers, No. 357*. Paris: OECD Publishing, 2003. p. 7; MUCHLINSKI, Peter T. *Multinational Enterprises & the Law*. 2. ed. Oxford: OUP, 2007. p. 184-191.

111 MUCHLINSKI, Peter T. *Multinational Enterprises & the Law*. 2. ed. Oxford: OUP, 2007. p. 192-201.

112 REFERENCE "ANNEX 4: *Concerning Additional Matters Related to Ownership, Investment and Control*. Article 1: Ownership of Airlines of a Party. 1. Ownership by nationals of a Member State or States of the equity of a U.S. airline shall be permitted, subject to two limitations. First, ownership by all foreign nationals of more than 25 percent of a corporation's voting equity is prohibited. Second, actual control of a U.S. airline by foreign nationals is also prohibited. …". Note also, United States Government Accountability Office, Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Sovereign Wealth Funds. Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes, GAO-09-608 (Washington DC, 05.2009), p. 15 and Appendix II.

113 Note GRAHAM, Edward M.; MARCHICK, David M. U.S. *National Security and Foreign Direct Investment Institute for International Economics*. Washington, 2006. p. 13-4.

114 In the case of Canada statutory ownership restrictions exist as regards certain sectors of the economy. Basically in the transportation sector -domestic and international air transportation sectors, foreign participation is limited to a maximum share of 49 per cent- and telecommunications -total direct and indirect foreign ownership in the telecommunications sector (fixed-line and mobile/wireless infrastructure and services) and in the television broadcasting sectors is limited to 46□ per cent-. INVESTMENT CLIMATE ADVISORY SERVICES WORLD BANK GROUP. *Investing Across Borders 2010*. Indicators of foreign direct investment regulation in 87 economies. Washington: World Bank, 2010. p. 98. Regarding the origins of this limitation, GRAHAM, Edward M.; MARCHICK, David M. U.S. *National Security and Foreign Direct Investment Institute for International Economics*. Washington, 2006. p. 11-3. In the US no Federal Laws completely prohibit foreign investment in a specific sector. On the contrary they limit and place additional requirements in certain particular sectors as regards foreign investors, like nuclear energy or airline industries (United States Government Accountability Office, Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Sovereign Wealth Funds. Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes, GAO-09-608 (Washington DC, 05.2009), p. 14; CHALAMISH, Efraim. "Global Investment Regulation and Sovereign Funds". *Theoretical Inquiries in Law,* v. 13, n. 2, p. 645-651, 2012.

115 See POLLAN, Thomas. *Legal Framework for the Admission of FDI*. Utrecht: Eleven International Publishing, 2006. p. 61-2; HEINEMANN, Andreas. "Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism? Control of Cross-Border M&A". *Journal of International Economic Law*, v. 15, n. 4, p. 852, 2012.

4.4. Screening systems of evaluation on national security grounds

Screening mechanisms of FDI on national security, national essential interests or related grounds are the rising star in this area. Screening and notification procedures constitute mechanisms to control the flux of FDI that are becoming very popular nowadays around the world. Many countries, both developing and developed states, are aware of the need to protect some industries and areas of their economy from certain FDI or FDI coming from certain countries and are progressively referring to this kind of device.[116] And states are increasingly designing this kind of instruments which provide the host state administration with the ability to evaluate FDI proposals and decide upon their acceptability or rejection.

These mechanisms are based either on the nature of the specific sector where the FDI project is envisaged, on the existence of a certain threshold or on the nature of the investor, among other potential grounds. States are certainly sovereign to control FDI flows in an absolute manner. However, authors cast some doubts as regards the all-embracing scope of this power and subject the validity of these potential measures to the fact that they are adopted on rational grounds.[117] A case-by-case evaluation of proposed FDI projects by the government of the host country or by a specialized –and, in some cases, independent- body is undertaken with the goal of establishing whether the project is in accordance with the very basic economic or social policies of the host state or runs against its national security.

As a matter of principle, the development of a screening system does not in many cases hamper the openness of the country that designs it towards FDI. At least most developed countries and many emerging economies are clearly aligned with the free movement of FDI. Nevertheless, as practice shows, these kinds of systems have also in many cases the tangential effect of dissuading potential FDI projects that are abandoned by their promotors after some concerns are expressed by public authorities.[118]

4.5. Compulsory registration and check and balance mechanisms

In addition to the previous systems and not always fully independent of them, the host government can also subject the acceptance of the proposal to the meeting of certain specific conditions for its future implementation. These conditions can be independent of the existence of a screening systems or be included in a prospective conditionality agreement reached as a consequence of the evaluation of the FDI project on national security or related grounds.

Through these mechanisms, host states may try to maximise the benefits of FDI or to control FDI flows by imposing on the investor some performance requirements, although their effectiveness is still a controversial issue.[119] Specific measures can be very different and vary from country to country.

1) States may subject the acceptance of the prospective FDI operation with a previous disclosure of the characteristics and nature of the FDI project to be implemented to a specific government agency. In the US, for instance, foreign investors in agricultural land upon purchase of more than 10 acres of agricultural land must file a disclosure report to the Department of Agriculture.[120] Also in Australia, under the Register of

116 As regards developing and emerging countries, note MUCHLINSKI, Peter T. *Multinational Enterprises & the Law.* 2nd ed. Oxford: OUP, 2007. p. 202-205; MUCHLINSKI, Peter T. "Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order". *Oñati Socio-Legal Series,* v. 1, n. 4, p. 51, 2011.

117 The screening of foreign investments and the subsequent eventual prohibition on grounds of, for instance, not being beneficial to the economy of the host state would constitute a rational economic ground and therefore not considered to be wrongful. This rationality would also be admitted in those cases in which the discrimination is based on national security grounds, see SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment.* 3ª ed. Cambridge: CUP, 2010. p. 137.

118 HEINEMANN, Andreas. "Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism? Control of Cross-Border M&A". *Journal of International Economic Law*, v. 15, n. 4, p. 851, 2012.

119 LONG, Guoquiang. "China's policies on FDI: review and evaluation". In: MORAN, Theodore H.; GRAHAM, Edward M.; BLOMSTRÖM, Magnus. (Ed.). *Does foreign direct investment promote development?* Washington: (Institute for International Economics, 2005. p. 315.

120 United States Government Accountability Office, Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Sovereign Wealth Funds. Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes, GAO-09-608 (Washington DC, 05.2009), p. 16, 25 and

Foreign Ownership of Agricultural Land Act 2015, foreign persons (including foreign government investors) holding interests in agricultural land must also register those interests with the Australian Taxation Office, regardless of the value of that land. New interests need to be registered within 30 days.[121]

2) States can also subject FDI proposals to the imposition of certain conditions as regards local collaboration, capitalisation requirements, export targets, local equity or its direction and management: presence and/or number of nationals or residents in the board of directors, employment of nationals and so on.[122] National legislations tend to include some check and balance mechanisms aimed to mitigate any potential misconduct by the foreign investor once the investment –performed either by a purely private or a state driven investor- has been implemented.[123]

Thus, certain countries may permit equity investment with no limits as a general rule while restricting future activities to be undertaken by the enterprise in a certain sector. Again in the US these restrictions apply in the sectors of banking,[124] as well as in relation to defence and aviation and maritime transportation and they are usually drafted on security considerations.[125] For instance, in the US defence sector, non US citizens and companies under foreign ownership, control, or influence are generally not eligible for access to classified information. Whereas in the transportation sector, for instance, vessels that are more than 25 per cent foreign owned cannot carry cargo or passengers between US Ports. The same limitation applies to aircrafts that are more than 25 per cent foreign owned and that are prohibited to transport passengers or cargo between two US cities.[126] Airlines are considered strategic assets with a potential national security dimension.[127]

Whether these measures are adopted to preserve some sectors of relevant national interests from foreign control in general or from certain investors coming from particular countries or with the hidden goal of safeguarding particular areas of the economy from competition is something to be determined on case by case bases. However, and generally speaking, all those countries endorsing these kinds of measures on security related grounds share the challenge of ensuring that these security-related objectives are duly achieved at the same time that unnecessarily restrictive measures are not endorsed.[128]

5. Screening systems on national security, national essential security interests or related grounds and their foundations

Rules on market access or ownership limitation certainly remain in some countries, and mechanisms to control the future activity and functioning of foreign acquired national firms are also designed in some places. But, as stated, the very novelty nowadays is the growing development of screening systems of FDI on national security or related grounds by developed and emerging countries which, as a matter of principle and due to their limited scope, do not limit the full support of many of these countries to the idea of free movement of investment. National states may impose conditions on the entrance of aliens and they can also impose conditions on the entrance of FDI.[129] All these screening

Appendix II.

121 THE TREASURER. *Australia's Foreign Investment Policy Our Approach*. July 1st, 2016. Available in: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>. Access on: 15 Jul. 2018.

122 GOLUB, Stephen S. Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries, OECD. *Economic Department Working Papers, No. 357*. Paris: OECD Publishing, 2003. p. 8; SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment*. 3ª ed. Cambridge: CUP, 2010 p. 92-115.

123 CHALAMISH, Efraim. "Global Investment Regulation and Sovereign Funds". *Theoretical Inquiries in Law,* v. 13, n. 2, p. 653, 2012.

124 Which goes back to 1869. See GRAHAM, Edward M.; MARCHICK, David M. U.S. *National Security and Foreign Direct Investment (Institute for International Economics.* Washington, 2006. p. 14.

125 Most of them go back to World War I, note GRAHAM, Edward M.; MARCHICK, David M. U.S. *National Security and Foreign Direct Investment (Institute for International Economics.* Washington, 2006. p. 13ff.

126 United States Government Accountability Office, Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Sovereign Wealth Funds. Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes, GAO-09-608 (Washington DC, 05.2009), p. 16 and Appendix II. Consider, 49 USC § 40102(a)(15)(C).

127 See MAMOUNAS, Joseph, "Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependent World". *Law and Business Review of the Americas*, v. 13, p. 381-395, 2007.

128 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Building Trust and Confidence in International Investment*. Report by countries participating in the "Freedom of Investment" Process March 2009. Paris: OECD, 2009. p. 10.

129 SORNARAJAH, Muthucumaraswamy. The International Law on Foreign Investment. 3ª ed. Cambridge: CUP, 2010. p. 105.

systems stand on different grounds but share the same idea of providing the state with a tool to protect certain industries or areas of the economy from FDI that either because its nature or origin can potentially generate threats to the national security of the host state.

Screening systems are usually mechanisms with a rather limited scope: the control of those particular FDI proposals that can threaten the national security of a specific host country. Because of their own nature they do not target all FDI and they habitually do not put under question the validity of the premise in favour of the free movement of FDI. They only refer to some specific FDI projects that encompass certain traits and that therefore are subject to evaluation on national security grounds by the public authorities of the host state. Which traits those are varies from country to country as does the philosophy on which the evaluation is undertaken and its results do too.

Screening mechanisms of evaluation of FDI on national security grounds are becoming rather popular worldwide. And their popularity poses certain issues as regards the principles and grounds on which they must be drafted for them to be compatible with the freedom of movement of capital and investment. Thus, the OECD identifies four key principles to be taken into account in relation to the development of any evaluation system of FDI on grounds of safeguard of national security interests, public order or related notions: non-discrimination,[130] transparency and predictability of the system developed,[131] proportionality,[132] and accountability.[133]

Following the path of the US, with CFIUS, and despite the fear of international retaliation that the creation of this Committee implied,[134] other countries have now replicated this move and are increasingly introducing clearance mechanisms to control FDI on a national security basis: in Australia the review is performed by the Foreign Investment Review Board (FIRB), in other countries like Canada, France or Germany this evaluation is undertaken by the Government through a specific Ministry. The approval of the FDI proposal will either come through an administrative act or by way of a contract or agreement between the host government administration and the foreign investor.[135]

The final relevance of the screening system designed by a particular country will depend on the grounds and goals on which the system stands and on the flexibility of its application. Usually, either specific industries or all sectors of the economy in relation, habitually, to FDI projects over certain thresholds are subject to review by an entitled authority.[136] But many possibilities and combinations exist and the revision, like in the US, may also be done simple on grounds of national securi-

These pre-entry requisites are drafted in very many different ways and in any case will be subject to the network of treaties binding the host country in which the evaluation is undertaken. As a matter of principle and from a purely unilateral approach the evaluation by the competent agency or branch of the administration of the government of the host State should be made with the goal of ascertaining whether the FDI projected "brings tangible benefits" to it.

130 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security C(2009)63*. Paris: OECD, 2009. Annex 1.

131 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Accountability for Security-Related Investment Policies*. Paris: OECD, 2008. p. 4.

132 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security C(2009)63*. Paris: OECD, 2009. Annex 3.

133 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Accountability for Security-Related Investment Policies*. Paris: OECD, 2008. p. 4. Four additional principles are mentioned by the World Bank Guidelines on the Treatment of Foreign Direct Investment: 1) Firstly, that the burden of proof should fall on those calling for restricting access to national markets and not the other way round; that is, on the host state. 2) Secondly, that SWFs – as well as SOEs- do not constitute a homogeneous category and that these kinds of actors may vary deeply in major issues like size, funding, objectives, investment styles or sophistication. 3) Thirdly, that instead of stigmatizing the whole category of SWFs –and SOEs- by referring globally to all of them as negative FDI actors and subjecting all their FDI proposals to controls, only those SCEs that actually misbehave should be subject to control and evaluation. And, 4) Fourthly, in addition to all these requirements the World Bank recognizes the right of every state to draft legislation to govern the admission of FDI and the possibility of drafting a restricted list of investments. WORLD BANK. *Guidelines on the Treatment of Foreign Direct Investment*. No. II(3). Available in: <https://www.italaw.com/documents/WorldBank.pdf>. Access on: 15 July 2018.

134 CONNELL, Paul; HUANG, Tian. "An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States". *The Yale Journal of International Law*, v. 39, p. 131-150, 2014; CARROLL, James F. F., "Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security". *Emory International Law Review,* v. 23, p. 167-197, 2009.

135 SALACUSE, Jeswald W. *The Three Laws of International Investment*. National, Contractual and International Frameworks for Foreign Capital. Oxford: OUP, 2013. p. 109.

136 CLODFELTER, Mark A.; GUERRERO, Francesca M. S. « National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level ». In: SAUVANT, Karl P.; SACHS, Lisa E.; SCHMIT Jongbloed, Wouter P. F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 175-7.

ty implications of the FDI proposal without taking into account the final amount of the investment foreseen or the sector of the economy targeted. Or combine thresholds and other requirements like the need for the FDI proposals to render "net benefit to Canada" in the case of FDI targeting this country.[137] The case of Japan, for instance, is significant of this trend. Article 27(3)(i) (a) & (b) of the Foreign Exchange and Foreign Trade Act allows the Minister of Finance to screen any FDI that may potentially impair "*national security*", disturb the maintenance of "*public order*", hinder the protection of "*public safety*" or have an adverse effect on the "*smooth management of the Japanese economy*". None of these very broad and vague terms are defined and a large amount of discretion is granted to the government to evaluate the acceptance or not of the FDI project. It is finally for it to balance its positive stance towards FDI and its desire to have enough flexibility to stop non-desired FDI.

Also Australia has developed a system of case by case evaluation of foreign investment proposals to acquire a "*substantial interest*"[138] or a "*controlling*" interest in an Australian corporation above a certain size or value, or an interest in Australia "urban land".[139] The system stands on the acceptance of the freedom of FDI in Australia with the limitations set forth by the existing regulation.[140] Foreign investment is generally welcomed in Australia, traditionally "a capital hungry country".[141] But at the same time it is said that the "community must have confidence that this investment is coming in on our terms and for our nation's benefit."[142] The goal of the system is to determine whether the investment may run contrary to the "*national interest*" of Australia; those FDI proposals that are contrary to the "*national interest*" of the country are disallowed. What "national interest" actually means is not defined and a case-by-case evaluation is requested.[143] This provides the government with considerable power in approving or disallowing FDI proposals.

Remarkable differences exist among the several screening systems designed. In some cases the screening system is solely designed to protect the national security of the country against potential harmful FDI; this would be the case of the US. On the contrary, other states refer to broader goals, such as the protection of "national interest", like in Australia.[144] Or require the investment to be of "the net benefit" of the host country, as happens in Canada. In other nations, like France, the freedom of movement of capital and of investment coexist with the existence of some ideas of "economic patriotism" applied to filter some FDI projects. Some countries, like Germany do not have any special rule as regards sovereign driven FDI, whereas this kind of FDI is subject to a particular treatment in countries like Canada or the US. Also the designation of specific independent organisms in some countries –CFIUS in the US- contrasts with the broad powers granted to the go-

137 CLODFELTER, Mark A.; GUERRERO, Francesca M. S. « National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level ». In: SAUVANT, Karl P.; SACHS, Lisa E.; SCHMIT Jongbloed, Wouter P. F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 178-9.

138 s 9 '*FATA*'. That means the acquisition of an interest of 15 per cent or more in an Australian business or corporation. Note BATH, Vivienne. "Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China". *Sydney Law Review,* v. 5, n. 34, p. -7, 2012; BOWMAN, Megan; GILLIGAN, George; O'BRIEN, Justin. "Foreign Investment Law and Policy in Australia: A Critical Analysis". *Law and Financial Markets Review,* v. 8, n. 1, p. 65-66, 2014; AUSTRALIAN GOVERNMENT. *Foreign Investment Review Board, Foreign Investment Review Board*. Annual Report 13/14, Commonwealth of Australia, Canberra, 2015. p. 54.

139 See 5 '*FATA*'. Any land in Australia that is not devoted to primary production, note BOWMAN, Megan; GILLIGAN, George; O'BRIEN, Justin. "Foreign Investment Law and Policy in Australia: A Critical Analysis". *Law and Financial Markets Review,* v. 8, n. 1, p. 66, 2014.

140 FDI is welcomed but at the same time the State has the right and the duty to "impose conditions and rules on how different stakeholders within its borders interact KALFADELLIS, Paul; GRAY, Judy; FREEMAN, Susan. *The 'National Interest' and the Screening of Foreign Direct Investment in Australia, Monash University Business and Economics*. Melbourne: Working Paper 14/06, 2006. p. 8.

141 O'BRIEN, Justin; GILLIGAN, George; GREENACRE, Jonathan. *The Great Game Rebooted or the Long March to Acceptance?* The Legal and Policy Impediments to Chinese Investment in Australian Corporations and Business Opportunities, The University of New South Wales School of Law, Centre for Law, Markets and Regulation, CLMR Research paper series, Working Paper No. 12-4, Sydney, November 2012. p. 17.

142 AUSTRALIAN GOVERNMENT. The *Treasury, Government tightens rules on foreign purchases of agricultural land*. Joint media release with The Hon Tony Abbott MP, Prime Minister and The Hon Barnaby Joyce MP, Minister for Agriculture, Canberra. 05.2015. Available in: <http://jbh.ministers.treasury.gov.au/media-release/005-2015/>. Access on: 12 Jul. 2018.

143 FRIGON, Matthieu. *The Foreign Investment Review Process in Canada*. Publication No. 2011-42-E12 July 2011 Revised 21 July 2014. Ottawa: Background paper, Library of Parliament/Bibliothèque du Parlament, 2014. p. 9.

144 COBAU, John, "Legal Developments in U.S. National Security Reviews of Foreign Direct Investment (2006–2008)'. In: SAUVANT, Karl P.; SACHS, Lisa E.; SCHMIT Jongbloed, Wouter P. F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 107.

vernment in some other systems –Australia, Germany, France or the UK- in order to implement the process of evaluation of FDI on national security or related grounds.[145]

The legal basis referred to for this evaluation on national security grounds varies from country to country too; reference to competition law as a mechanism to control FDI on national security grounds in some countries –in the PRC- is in contrast with the enactment of special rules as regards this issue –US, Germany, France, Australia or, Canada-. These systems are envisaged in certain countries as a last resort instrument only applicable when no other legal device is available –the US-. As a matter of principle these tools should be considered as last resort mechanisms usually dependent on the application of other provisions and systems foreseen in the host state to monitor the market or some specific areas of it. The 2009 OECD Recommendation on Guidelines for Recipient Country Investment Policies Relating to national security explicitly supports this point. They should then be avoided when there are other existing measures adequate and appropriate to address national security concerns.[146] Consequently, any system designed to control the entrance of foreign capital into the country should then come into play only when those other systems designed to monitor the normal activity of the market –free competition, transparency of the financial market…- have already been applied and not previously or in addition to them, as if it were a fully independent system applicable at the same time and level than the other ones.

But this is not the case in many other countries in which the system interplays in different ways with other legal mechanisms designed in the host country. For instance, on the one hand FDI in companies' shares that are listed on a stock or security exchange system will usually be subject to specific regulations and some conditions may be imposed to them. Additionally they may be subject to other applicable rules like those of competition law which are used to prevent dominant firms –national and, in this case, foreign- to enter the market of the host country,[147] or in the case of greenfield FDI the request for the investment to be made only through joint-ventures. They can also be submitted to the existing legislation on the privatization of certain formerly public owned enterprises which may bar certain FDI from state controlled enterprises or allow it only after approval by certain institutions or those that create a certain kind of shares with no sufficient voting rights to control the enterprise object of the investment.[148] As a matter of fact, only when these rules have been implemented should national systems on control of FDI become applicable. However, reality seems to be rather different. For instance, the rejection in 2011 of the bid by the Singapore Exchange Ltd. to acquire a major interest in the Australian Stock Exchange, both of them private entities, was made not only on the basis of the '*FATA*' but also taking into account that the *Corporations Act 2001*[149] limits ownership by a person in the Australian Stock Exchange to a maximum of 15 per cent unless a special regulation is passed to increase this threshold.[150]

In addition to the existence of different bases and goals in the designation of the several existing national screening systems, as well as relevant disparities as regards their institutional structures, also the concept of national security or security related industries on which they habitually stand varies from country to country; from narrow definitions to broader interpretations that extend investment review procedures to critical infrastructure and strategic industries. Countries do not provide a "clear-cut definition" of national security in relation to foreign investment. Instead, in some cases only a number of sectors or activities that may potentially pose national security-related threats from a national securi-

145 JACKSON, James K. *The Committee on Foreign Investment in the United States (CFIUS)*. Congressional Research Service, 7-5700, RL33388, Washington, six March 2014. p. 30; UNCTAD. *World Investment Report 2016*. Investor Nationality: Policy Challenges. New York and Geneva: United Nations, 2016. p. 94ff.

146 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security C, (2009)63* . Paris: OECD, 2009. Annex 3.

147 SORNARAJAH, Muthucumaraswamy. *The International Law on Foreign Investment*. 3 ed. Cambridge: CUP, 2010. p. 92.

148 SALACUSE, Jeswald W. *The Three Laws of International Investment*. National, Contractual and International Frameworks for Foreign Capital. Oxford: OUP, 2013. p. 121-2; UNCTAD. *The Protection of National Security in IIAs*. UNCTAD Series on International Investment Policies for Development. New York/Geneva: UNCTAD/DIAE/IA/2008/5, UNCTAD, 2009. p. 14.

149 *Corporations Act 2001*, No. 50, 2001 s 850B.

150 Note, *Singapore finally walks from ASX bid*, *The Sydney Morning Herald* (on line), 8 April 2011 <http://www.smh.com.au/business/singapore-finally-walks-from-asx-bid-20110407-1d6o4.html> accessed 16 December 2017. See BATH, Vivienne. "Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China". *Sydney Law Review,* v. 5, n. 34, p. 8, 2012.

ty stand-point are identified.[151] Finally, the content and depth of the screening procedure and the degree and amount of information required from the investor is different from jurisdiction to jurisdiction.[152] In addition to these factors, potential consequences for investments considered to be problematic from a national security perspective vary and include full or partial investment prohibitions and the possibility of final approval under certain –present or future- conditions.

Screening systems developed by national legislators have mainly focussed in relation to M&As proposals, mostly in the infrastructure, telecommunications, finance and energy sectors, with special intensity in those cases in which the foreign acquirer is controlled or owned by a foreign state.[153] As figures of the practical implementation of national screening systems show, these systems should not "strike terror into the hearts of foreign direct investors"[154]. However, and despite existing statistics, they are said to play an additional subtle role as regards potential foreign direct investors in so far they both foster the self-constraint and control by foreign investors as regards the goals and conditions of their prospective investment operations, as well as their willingness to enter potential agreements with the administration of the host country.[155]

States are increasingly imposing national security or related conditions on the entrance of foreign investment into their territory on specific areas of the economy or firms, or coming from certain countries or investors. Theoretically speaking these mechanisms should combine procedural fairness with the protection of sensitive information, and to ensure a level of flexibility which is enough to offer protection from investments that generate legitimate concerns at the same time that avoid political interference.[156] However, and significantly, the different screening systems introduced usually correspond with each other in the lack of clear definitions of some relevant notions on which they stand -national essential security interests, national security, control, critical infrastructure…-, in the use of some very vague guidelines or criteria to assert whether the investment is acceptable or not, and in the granting of a broad power to the administration in order to perform the requested evaluation.[157]

The drafting of these screening systems has taken place in an atmosphere of liberalization of investment and their introduction has finally constituted a sort of exception to it. Consequently, any security related condition imposed on foreign investment or any system designed to evaluate it on national security grounds should be narrowly-tailored, focussing only on really genuine national security risks.[158] And their use as an excuse to impose hidden limitations to free trade and investment should be prevented. Therefore, it is not the potential benefits for the host country arising out of the FDI project but the risks for the host state that it may generate that should finally be taken into account by these sorts of schemes of evaluation of FDI proposals. However, the peril of politicisation of these kinds of instruments

151 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *World Investment Report 2016*. Investor Nationality: Policy Challenges. New York and Geneva: United Nations, 2016. p. 94-5.

152 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *World Investment Report 2016*. Investor Nationality: Policy Challenges. New York and Geneva: United Nations, 2016, p. 99-100.

153 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPEMENT. *Interim report approved by the OECD Investment Committee at the fourth OECD Roundtable on Freedom of Investment*. National Security and "Strategic" Industries on 30 March 2007 (reproduced in OECD, International Investment Perspectives: Freedom of Investment in a Changing World. Paris: OECD, 2007. p. 55.

154 ZARING, David. "CFIUS as a Congressional Notification Service". *Southern California Law Review,* v. 83, p. 81-106, 2009, as regards the US screening system.

155 ZARING, David. "CFIUS as a Congressional Notification Service". *Southern California Law Review,* v. 83, p. 106-109, 2009 or BELLINGER, John B. III and Townsend, Nicholas L., "Inside 'the CFIUS': US National Security Review of Foreign Investments". *Global Trade and Customs Journal*, v. 1, n. 6, p. 1-2, 2011.–stating certain operations that failed because of CFIUS- also as regards the US screening system. In the particular case of the US, the delays derived from a CFIUS investigation and the potentially negative publicity that can be associated to such an investigation have negatively affected some operations and have led the investor to withdraw them. See JACKSON, James K. *The Exon-Florio National Security Test for Foreign Investment*. Congressional Research Service, 7-5700, RL33312, Washington, 29 March 2013. p. 10-14 providing some examples.

156 VANDERMEULEN, Jackie; TREBILCOCK, Michael J. "Canada´s Policy Response to Foreign Sovereign Investment: Operationalizing National Security Exceptions". *Canadian Business Law Journal*, v. 47, p. 392-394, 2009.

157 VANDERMEULEN, Jackie; TREBILCOCK, Michael J. "Canada´s Policy Response to Foreign Sovereign Investment: Operationalizing National Security Exceptions". *Canadian Business Law Journal*, v. 47, p. 394, 2009; SAFARIAN, A. Edward, "The Canadian Policy Response to Sovereign Direct Investment". In: SAUVANT, Karl P.; SACHS, Lisa E.; SCHMIT JONGBLOED, Wouter P. F. (Ed.). *Sovereign Investment*. Oxford: Concerns and Policy Reactions, OUP, 2012. p. 446.

158 *Statement of the European Union and the United States on Shared Principles for International Investment* of April 2012 <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> accessed 13 December 2017.

exists and the potential negative consequences derived from a broad interpretation of the notion of national security remain.[159]

6. Some final ideas: A "long and winding" future to come

Practice currently shows the changing landscape of FDI and the existence of some new attitudes maintained by certain countries as regards it that can finally affect the existing situation and its future developments, as well as the position and rights of current and prospective foreign investors. The empowerment of states in relation to FDI may finally end up creating some short-circuits with the idea of liberalization of FDI, mostly when certain positions in favour of the control or limitation of FDI on different grounds by host states generalize and could lead to a new wave of economic nationalism.[160] It is necessary to build up a new equilibrium among the need for freedom of FDI, the right of states to ensure the preservation of certain policies or the satisfaction of some goals in their territory and the necessity for foreign investors to enjoy a clear and stable legal framework and a minimum level of protection for their investments.

The financial crisis, the change in the origin of the FDI derived from the new geo-strategic reality arising out of the crisis, the growing participation of SCEs in international trade or the terrorism fear, amongst other reasons, have led many countries to set forth mechanisms to evaluate FDI proposals before they are implemented and not once they have been developed.[161] As a matter of principle the protection of national security would invite states to explore the temptation of adopting an isolationist stance towards FDI, although economic reality makes this possibility highly unrealistic nowadays.[162]

This recognition should not impair the rights and expectations of investors by reducing the predictability, transparency, and enforceability of the national and international investment framework. And this implies that when restrictive FDI measures are considered necessary to protect national security or to ensure certain security-related policy goals, states should ensure that these measures are adopted on a non-discriminatory basis and that they respect the principles of transparency, proportionality and accountability.[163]

Even today it is not possible to speak of a global trend towards restrictiveness of FDI. Perhaps the liberalization of FDI momentum has stopped but no evidence exists that states have become significantly more restrictive since the emergence of the global financial crisis in 2007.[164] No sign of backtracking of investment policy reforms exists so far. On the contrary a continued reform impetus in countries which traditionally have been the most restrictive remains. Nevertheless, the development of screening mechanisms in many countries of the world usually on national security, essential national interests or similar grounds could provide the future tool for this backtracking should the notion of national security be broadly interpreted as to encompass economic strategic areas or firms. Sta-

159 Thus, the White House statement on the US-China economic relations of 2015, explicitly states that, "*The United States and China commit to limit the scope of their respective national security reviews of foreign investments (for the United States, the CFIUS process) solely to issues that constitute national security concerns, and not to generalize the scope of such reviews to include other broader public interest or economic issues. The United States and China commit that their respective national security reviews apply the same rules and standards under the law to each investment reviewed, regardless of country of origin*…." (The White House. Office of the Press Secretary, *Fact Sheet: U.S.-China Economic Relations*, Washington D.C., 25 September 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-us-china-economic-relations> accessed 22 November 2017).

160 UNCTAD. *Investment Policy Developments in G-20 Countries, Division on Investment and Enterprise*. New York/Geneva: UNCTAD, 2009. p. 7.

161 Since 2006, at least eight different economies have introduced or reformed their legislation on national security based screening of FDI. (ie Canada (2009), China (2011 and 2015), Finland (2012), Germany (2017), Italy (2012), the Republic of Korea (2006), Poland (2015), and the Russian Federation (2008)). See UNCTAD. World Investment Report 2016. Investor Nationality: Policy Challenges. New York and Geneva: United Nations, 2016, p. 95-6. On another level, this move comes together with efforts by certain countries to recalibrate existing or future investment agreements amid a trend to enhance the regulatory power of governments and to lessen the rights of investors. ALVAREZ, José E. "Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?" *Alabama Law Review,* v. 609, p. 970, 2009.

162 MAMOUNAS, Joseph, "Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependent World". *Law and Business Review of the Americas*, v. 13, p. 382, 2007.

163 OECD. *Building Trust and Confidence in International Investment*. Report by countries participating in the "Freedom of Investment" Process March 2009. Paris: OECD, 2009. p. 10.

164 THOMSEN, Stephen; MISTURA, Fernando. *Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index OECD Global Forum on International Investment*. Paris: OECD, 2017. p. 1-2.

tes, mostly developed ones, are increasingly concerned about the potential non-economic goals of sovereign FDI and of the lack of reciprocity in the country of the investor. Additionally, MNEs may face limitations on outbound investment by their home states. No global restriction trend seems to exist today, but the future is not free of dangers: "complacency" in this area should be avoided.[165]

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165 THOMSEN, Stephen; MISTURA, Fernando. *Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index OECD Global Forum on International Investment*. Paris: OECD, 2017. p. 6.

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IV. RESENHAS

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Direito Internacional em Perspectiva Transcivilizacional de Yasuaki Onuma*

Arthur Roberto Capella Giannattasio**

A obra em questão se trata da primeira versão em português do curso **A Transnational Perspective on International Law** ministrado em 2000 na Academia de Direito Internacional da Haia pelo Prof. Onuma Yasuaki, da Universidade de Tokio. A tradução foi realizada pelo Grupo de Estudos do BRICS (GEBRICS) da Faculdade de Direito da Universidade de São Paulo, sob a coordenação acadêmica do Professor Titular Paulo Borba Casella e do Professor Dr. Masato Ninomyia e se refere a uma versão do texto que foi atualizada alguns anos depois próprio autor após a realização do curso nos Países Baixos.

A reflexão proposta pela obra de Onuma Yasuaki parece ter por objetivo apresentar uma desconstrução abrangente das linhas mestras do Direito Internacional tradicionalmente estudado, ensinado e pesquisado nas Universidades brasileiras e em todas aquelas que insistem em seguir um pensamento jurídico não-crítico. Se analisado ao lado de manuais tradicionais de Direito Internacional, percebe-se que o autor destaca série de fissuras nos principais temas usualmente abordados nestes textos: (i) sujeitos de Direito Internacional, (ii) fontes do Direito Internacional, (iii) papel do Direito Internacional, (iv) relação entre Direito e Poder - especialmente a relação com a visão realista das relações internacionais, (v) História do Direito Internacional, e (vi) Direito Internacional dos Direitos Humanos.

Em outras palavras, pode-se dizer que, capítulo a capítulo, o autor parece conduzir ao desvelamento dos limites do pensamento jurídico internacional tradicional. Dessa forma, dialogando implicitamente com as perspectivas críticas mais conhecidas, mas dentro de uma orientação por ele denominada transcivilizacional, o autor parece torna evidentes as condições de dominação da ordem jurídica internacional: estadocêntrica, eurocêntrica, capitalista, laica e machocêntrica.

Entre os diferentes aspectos abordados pela obra, três parecem ser os mais relevantes para compreender a centralidade do pensamento do autor: (i) condição transcivilizacional do Direito Internacional, (ii) funções do Direito Internacional, e (iii) controle epistemológico puro e aplicado do Direito Internacional.

No que se refere à condição transcivlizacional do Direito Internacional, Onuma Yasuaki argumenta que a forma jurídica das relações entre os povos não pode ser mais entendida como exclusivamente internacional. Ao lado desta, haveria ainda as dimensões transcional e transcivilizacional.

Dessa forma, o autor aponta que (i) a leitura internacional das relações entre os povos evidencia a atuação intergovernamental entre Estados e entre estes e Organizações Internacionais - incluindo, aqui, a proteção internacional dos seres humanos pelo Direito Internacional dos Direitos Humanos. Ao mesmo tempo, o autor indica que (ii) a leitura transnacional das relações entre os povos ressalta a dinâmica relacional desenvolvida por empresas transnacionais e Organizações não-Governamentais (ONGs) como rele-

* ONUMA, Yasuaki. Direito Internacional em Perspectiva Transcivilizacional. Belo Horizonte: Arraes, 2016.

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vantes atores transfronteiriçoes - inclusive para a vida jurídica. Por outro lado, (iii) a leitura transcivilizacional seria um diagnóstico da insuficiência das visões anteriores, na medida em que centraliza suas preocupações em compreender restrições à circulação de símbolos sociais originados de culturas - e de culturas jurídicas - não centrais nas relações entre povos.

Neste particular, note-se que, para o autor, a dimensão transcivilizacional tornaria evidente, assim, a necessidade de retomada da legitimidade simbólica do Direito Internacional. Assim, os estudos jurídicos nessa área deveriam, segundo o argumento de Onuma Yasuaki, abrir-se a considerações de caráter religioso e a contribuições reconstrutivas da cultura global e da cultura jurídica transfronteiriça originadas de formações populacionais não-centrais e não necessariamente vinculadas a Estados-nação.

Ainda neste aspecto, o autor sugere em sua obra uma reflexão ainda mais instigante. Não apenas a condição internacional das relações entre os povos deixou de fazer sentido com o final da Segunda Guerra Mundial, seguido do advento das Organizações Internacionais e dos seres humanos como atores internacionais. Na verdade, ela nunca teria feito sentido na história do Direito "Internacional"- ou ainda, do Direito das relações entre os diferentes povos.

Com efeito, entendida como acidente histórico no percurso da humanidade, a cetralidade da unidade estatal na condução das relações internacionais teria sido uma criação do Ocidente Europeu Moderno em um discurso tradicional pós-Paz de Westphalia (1648) e progressivamente imposto pela Europa durante os séculos XVIII e XIX. Nesse sentido, defender que apenas após o final da Segunda Guerra mundial os Estados deixaram de ser os únicos atores internacionais em virtude da ascensão de Organizações Internacionais e seres humanos (Direito Internacional dos Direitos Humanos) seria também uma ilusão: afinal tratar-se-ia de outra forma de recair no erro do ocidentocentrismo e ignorar as experiências jurídicas entre povos anteriores ao surgimento da forma jurídico-política do Estado.

No que se refere às formas de atuação do Direito Internacional, o autor salienta 7 (sete) funções: (i) **função comportamental**: dirigir as condutas dos Estados; (ii) **função avaliativa**: ser um marco (régua) de comparação da distância da ação dos Estados em relação aos parâmetros jurídico-normativos internacionais; (iii) **função adjudicatória**: ser base de ação judicial perante mecanismos de solução de controvérsias internacionais; (iv) **função organizacional**: criar (a) Organizações Internacionais, para vigiar os Estados no cumprimento de suas obrigações internacionalmente assumidas, e (b) mecanismos de solucão de controvérsias internacionais, a fim de garantir força normativa das normas jurídicas internacionais; (v) **função legitimadora**: operar como parâmetro de legitimação das ações estatais em sua Política Externa; (vi) **função linguística**: estabelecer um léxico comum para todos os atores internacionais deterem como ponto de partir um repertório mínimo para o diálogo; e (vii) **função constitutiva**: enquanto fonte de linguagem comum, o Dirieto Internacionai teria a funcão de constituir a realidade das relações internacionais a partir da gramática comum estabelecida para as discussões.

Ao fazer o levantamento das 7 (sete) funções acima do Direito Internacional, o autor tem o objetivo de afastar 3 (três) visões simplistas do Direito Internacional:

(i) **adjudicativismo**: Onuma Yasukai aponta que a vida jurídica internacional não se reduz a dimensão estritamente adjudicativa - isto é, que o Direito Internacional é experienciado (criado, aplicado e modificado) também fora de Tribunais Internacionais;

(ii) **estadocentrismo**: salientar que, por isso mesmo, há criação e recriação de normas jurídicas globalmente válidas em outros atores internacionais (empresas transnacionais, ONGs, Organizações Internacionais) fora de uma chave de compreensão estadocêntrica; e

(iii) **realismo**: demonstrar a insuficiência da leitura oferecida pela Escola Realista das Relações Internacionais, uma vez que a vida internacional é regida juridicamente e de maneira efetiva, mesmo contra a vontade dos Estados, por diferentes espaços jurídico-normativos transfronteiriços.

Por fim, no que se refere ao controle epistemológico puro e aplicado do Direito Internacional, o autor reitera o argumento de que o Direito Internacional foi constituído como mecanismo de reafirmação de uma supremacia do Ocidente Europeu Moderno sobre o restante do globo - e, para tanto, além de fatos recentes, o autor recorre a argumentos históricos que remontam aos embates entre as civlizações islamocêntricas, sinocêntricas e eurocêntricas. Todavia, o autor inova nessa argumentação, na medida em que frisa a importância de reconhecer os limites cognitivos do Direito Inter-

nacional atualmente aprendido, ensinado e pesquisado nas Universidades e aplicado pelos diferentes atores interanacionais. E, para isso, é importante lembrar as duas últimas funções do Direito Internacional - linguística e constitutiva.

Para o autor, a linguagem de base que constitui o atual léxico jurídico das relações entre os povos deteria uma origem nos parâmetros civlizatórios que se afirmaram desde Westphalia, em 1648, e que se consolidaram no final do século XIX: os do legado do Ocidente Europeu Moderno. Dito de outro modo, o Direito teria sido utilizado como instrumento de dominação pela visão de mundo ocidental, não apenas no que se refere ao aparato regulatório originado dos interesses e das imposições coercitivas (*hard power*: força e economia) pela Europa e pelos Estados Unidos da América. Mais do que isso, o controle das maneiras de pensar sobre o Direito Internacional também seria uma forma de exercício de Poder (*soft power*) pelo Ocidente Europeu Moderno: todo o discurso jurídico sobre o Direito Internacional teria sido desenvolvido, disseminado e replicado globalmente de acordo com a visão de mundo ocidentocêntrica.

Por esse motivo, Onuma Yasuaki evidencia que o Direito Internacional contemporâneo sustenta - e é sustentado por - um conjunto de fatores que ele chama de Poder substantivo (militar e econômico) e Poder ideacional (estruturas cognitivas) que favorecem a posição do Ocidente Europeu Moderno sobre as demais perspectivas possíveis. Não apenas o repertório jurídico em si teria sido construído e reproduzido em seu favor, como também a sua interpretação (compreensão e aplicação) teria sido reafirmado no sentido de reforçar a posição dominante de Europa e Estados Unidos da América ao redor do globo.

Além desse aspecto, o controle epistemológico do Ocidente Europeu Moderno sobre o Direito Internacional se manifestaria por outra condição: no impedimento velado - ainda que não de má-fé - à ascensão discursos alternativos originados de comunidades epistêmicas não-centrais. Isso seria realizado, por exemplo, (i) pela exigência de pagamento de valores em dólares para a submissão de artigos para periódicos; (ii) pela necessidade de domínio perfeito do idioma dos países centrais (principalmente inglês e francês) para a submissão e para a divulgação de artigos e palestras sobre temas em Direito Internacional; (iii) pela ordem de citação de autores-chave de países centrais dentre os referenciais teóricos de artigos submetidos aprovados como condição de publicação; (iv) pela aceitação informal apenas de artigos originados de determinados centros epistêmicos estadunidenses e europeus pelos top-five periódicos em Direito Internacional; e (v) pelo desconhecimento da produção jurídica internacional desenvolvida em centros epistêmicos localizados fora do eixo ocidentocêntrico.

Dessa forma, Onuma Yasuaki pretende promover uma desconstrução, não tanto do repertório jurídico-normativo positivo vigente. Mais do que isso, preocupado em reconstituir a legitimidade do Direito Internacional contemporâneo pela vocalização das diferentes culturas jurídicas em pé de desigualdade nas relações internacionais, o autor aponta para a necessidade de retrabalhar as estruturas cognitivas basilares do Direito Internacional. E, para isso, Onuma Yasuaki indica ser necessário estar alerta para o exercício do Poder ideacional, de maneira que se possa mitigá-lo. Apenas deste modo discursos alternativos poderiam ser canalizados no sentido de reconfigurar as maneiras de agir e de pensar o Direito Internacional contemporâneo para fora de uma chave de leitura estadocêntrica, eurocêntrica, capitalista, laica e machocêntrica.

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Resenha do livro *Space, Global Life: The Everyday Operation of International Law and Development*, de Luis Eslava

Matheus Gobbato Leichtweis

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Resenha do livro *Space, Global Life: The Everyday Operation of International Law and Development*, de Luis Eslava*

Matheus Gobbato Leichtweis**

Resumo

O objetivo desta resenha é apresentar ao público brasileiro o livro Local Space, Global Life. The Everyday Operation of International Law and Development, de Luis Eslava. Com foco nas recentes transformações urbanas ocorridas na cidade de Bogotá, Local Space, Global Life busca compreender de que maneira as prescrições normativas do direito internacional, em conjunto com o projeto internacional de desenvolvimento, operam e se materializam, hoje, no nível das jurisdições locais, reconstituindo os espaços urbanos e influenciando o dia a dia das populações urbanas periféricas, principalmente do Terceiro Mundo. Nesse contexto, a presente resenha tem por escopo apresentar os principais argumentos veiculados ao longo do livro, com enfoque para o inovador método (antropológico e etnográfico) desenvolvido pelo autor para abordar a recente expansão do direito internacional na direção de múltiplas camadas da vida social e material das grandes cidades. Por fim, diante da constatação de que a obra apresenta um novo olhar sobre o direito internacional (um olhar menos institucional e estadocêntrico, e mais comprometido com a vida real, subjetiva e material das pessoas comuns), a resenha busca destacar a relevância da obra para a crítica contemporânea do direito internacional, especialmente a crítica veiculada a partir do Terceiro Mundo.

Palavras-chave: Direito internacional. Desenvolvimento. Descentralização. Jurisdições locais. Bogotá.

Abstract

The aim of this review is to present the book *Local Space, Global Life. The Everyday Operation of International Law and Development, by Luis Eslava,* to the Brazilian readership. Focusing on the recent urban transformations of the city of Bogotá, *Local Space, Global Life* seeks to understand the ways in which the normative prescriptions of international law, together with the international development project, are, today, being materialized at the level of local jurisdictions, recreating the urban spaces and influencing the everyday lives of peripheral urban residents, particularly in the Third World. In this context, the review presents the main arguments advanced in the book, with a special emphasis on the method developed by Eslava to understand the recent expansion of international law towards multiple realms of social and material life: the anthropological and ethnographic approach to international law. Finally, the review concludes that Eslava's new method (a more grounded approach to the subject, less institutionalized and state-centric

* ESLAVA, Luis. Local space, global life: the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015

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and more committed to the real, material and subjective lives of ordinary people), represents a real innovation in terms of a Third World critique to international law.

Keywords: International law. Development. Decentralization. Local jurisdictions. Bogotá.

1. Introdução

Professor da *Kent Law School*, Luis Eslava se destaca como um dos mais prestigiados acadêmicos da nova geração de estudos críticos do direito internacional. Esse papel de destaque foi consolidado a partir da publicação, no ano de 2015, do livro *"Local Space, Global Life. The Everyday Operation of International Law and Development",* fruto dos estudos de PhD do autor na *Melbourne Law School*, que rendeu ao autor os prêmios *"Hart Socio-Legal Book Prize"* e o *"Prize for Early Career Academics"*, conferidos pela Socio-legal Studies association (SLSA), *"in recognition of outstanding socio-legal scholarship"*.

Com foco nas recentes transformações urbanas ocorridas na cidade de Bogotá, o livro objeto desta resenha busca compreender, com base em uma perspectiva antropológica e etnográfica, de que maneira as prescrições normativas do direito internacional, em conjunto com o projeto internacional de desenvolvimento, operam e se materializam no nível das jurisdições locais, reconstituindo os espaços urbanos e influenciando o dia a dia das populações urbanas periféricas, principalmente do Terceiro Mundo. O livro lida com dois problemas fundamentais relacionados à ordem legal, política e econômica global contemporânea: por um lado, explora as implicações do aumento da relevância das cidades (jurisdições locais) no cenário internacional (um fenômeno que é reflexo da crise do estado-nação e da ascensão de novos atores internacionais no contexto da globalização, bem como da recente tendência à descentralização dos esforços de desenvolvimento no terceiro mundo); e, por outro lado, se dedica à elaboração de um método adequado para compreender o complexo processo de formação global — que se dá, hoje, não somente em nível internacional (no âmbito das relações interestatais, das instituições e das normas internacionais), mas também em nível local, na medida em que as legislações nacionais e municipais tendem a incorporar os preceitos e ideais da globalização para a construção de seus espaços urbanos e para significação dos sujeitos que os habitam. É por entender que a obra possui, conforme se pretende demonstrar, extrema relevância para o estudo crítico do direito internacional (sobretudo no âmbito da crítica de Terceiro Mundo da disciplina, ainda incipiente na academia brasileira), que a presente resenha tem por escopo apresentar a obra "Local Space, Global Life" ao público brasileiro.

2. Desenvolvimento

2.1. Argumento principal e objetivos

Em *Local Space, Global Life*, Luis Eslava apresenta os resultados de uma década de pesquisa acerca da relação entre direito internacional e o projeto de desenvolvimento. Em suma, o livro procura compreender como o direito internacional (suas instituições, normas e discursos associados à ideia de desenvolvimento) se expandiu nos últimos anos — como resultado da tendência à descentralização do desenvolvimento no Terceiro Mundo — na direção de múltiplas camadas da vida social e material, bem como de múltiplos níveis de governança (nacional e, principalmente, local). Nesse sentido, busca compreender como o direito internacional passou a operar (e as aspirações globais de progresso e desenvolvimento passaram a se materializar) por meio dos processos, normas, corpos e artefatos que são comumente identificados como "domésticos", isto é, nacionais e locais, e cujo caráter internacional é invisibilizado pela Teoria Legal Tradicional. É a partir de uma abordagem antropológica e etnográfica da matéria, portanto, que Eslava procura compreender o direito internacional não somente como um construto ideológico, mas também como um fenômeno social com capacidade constitutiva, isto é, com capacidade para dar forma a distintas realidades e de operar justamente por meio dos espaços, das coisas e dos corpos que cria. Torna-se, assim, possível perceber como normas, processos, coisas, espaços e sujeitos tipicamente retratados como domésticos (cidades, cidadãos, leis urbanas, direitos, obrigações e serviços) acabam por carregar o "ethos" do direito internacional.[1]

De fato, segundo Eslava, desde o período colonial

1 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. xiv–xvi.

o direito internacional tem estado engajado na transformação das realidades e identidades dos sujeitos, *"[...] shifting people's surroundings, their perception of themselves and their livelihoods worldwide*"[2]. No contexto contemporâneo, diante do fenômeno da descentralização do desenvolvimento — que pode ser resumido como a transferência das responsabilidades governamentais e desenvolvimentistas dos governos centrais para as administrações locais — as realidades locais do Terceiro Mundo — sobretudo — continuam a ser transformadas de acordo com as prescrições normativas do direito internacional e do projeto neoliberal de governança global, que se fortaleceu a partir da década de 1990. Essa transformação, no entanto, é, agora, mediada pelas jurisdições locais (cidades, municípios e regiões metropolitanas), que passaram a exercer as funções de autoridade outrora exclusivas dos estados-nação. Apesar dessa aparente autonomia, no entanto, como demonstra o autor, as administrações locais continuam sujeitas a estruturas mais amplas de governança internacional, arcabouços normativos internacionais que são assimilados pelas autoridades locais e pela própria população e que acabam por reconfigurar os espaços urbanos, as identidades e a própria realidade das populações periféricas do Terceiro Mundo. De acordo com Eslava, inclusive, o crescente papel das administrações locais na promoção dos padrões globais de desenvolvimento constitui uma réplica do modelo imperialista de domínio indireto (*indirect rule*), idealizado pelo agente colonial britânico e membro da Comissão Permanente de Mandatos da Liga das Nações Frederick Lugard. Ao fazer tal referência, Eslava chama atenção para o uso da descentralização como mecanismo mais eficiente de controle sobre as populações periféricas.[3]

Nesse contexto, o livro demonstra como o novo sistema descentralizado de governança permitiu uma maior conexão entre as jurisdições locais e os fluxos econômicos internacionais, o sistema financeiro internacional e os padrões internacionais de desenvolvimento, implementando a prática colonial do domínio indireto no contexto da ordem jurisdicional internacional contemporânea. Assim, com foco no desenvolvimento recente de Bogotá, Eslava analisou, especificamente, como a vida global está sendo materializada no espaço urbano da cidade por meio da configuração dos seu espaços, da formação dos sujeitos, de novos arranjos administrativos regulatórios, bem como de objetos mundanos (mapas, publicidades, postes de energia elétrica, entre outros).

O ponto de partida da discussão é uma interessante reflexão proposta por Eslava a partir de um mapa da cidade de Bogotá, elaborado por uma construtora transnacional com investimentos na cidade. Eslava percebe que, no mapa, Bogotá é retratada de forma distinta da realidade. Talvez com a intenção de "encantar" passageiros (consumidores) transnacionais e, assim, expandir os ganhos financeiros da construtora, o mapa apresenta a cidade de Bogotá em um fundo branco, omitindo, por um lado, a Colômbia (esse estado falido que contrasta com o sucesso do desenvolvimento urbano recente da capital) e, de forma ainda mais problemática, as habitações ilegais que cercam a cidade. Assim, a cidade é propositalmente retratada de modo fantasioso, como isolada dos conflitos do Estado colombiano e como livre de favelas (*slum-free*). Fazendo, então, uma analogia com o passado colonial, Eslava percebe que, no lugar da brutalidade dos conquistadores de outrora, hoje a violência se dá de modo mais sutil, como, por exemplo, a partir das abstrações, distorções e omissões da realidade da cidade perpetradas pelo referido mapa. Ademais, Eslava percebe que a representação fantasiosa de Bogotá trazida pelo mapa representa um projeto de cidade de acordo com os ideais globais de desenvolvimento.[4] É a partir dessa reflexão que o autor dá início à discussão acerca da operação cotidiana do direito internacional.

2.2. Estrutura do livro e resumo dos capítulos

Local Space, Global Realities apresenta um estudo de caso acerca do processo recente de desenvolvimento urbano que vem transformando a cidade de Bogotá desde que a reforma da Constituição Colombiana de 1991 conferiu às jurisdições locais da Colômbia maior autonomia política, financeira e administrativa. Por um lado, o objetivo do livro é compreender a crescente relevância das cidades na ordem legal global e na construção de um novo modelo de *nation-building* — menos centralizado, mais dinâmico e competitivo, mais integra-

2 ESLAVA, Luis. *Local space, global life*: the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. xvii.

3 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 21.

4 ESLAVA, Luis. *Local space, global life*: the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 6.

do aos fluxos globais de comércio e de investimento e mais alinhado aos padrões globais de desenvolvimento, progresso e sustentabilidade — e de governança global. Por outro, o livro busca entender como o processo global de descentralização — que se expandiu a partir da década de 1990, principalmente no Terceiro Mundo — é exemplificado pela cidade de Bogotá, em especial pela maneira como a cidade tem lidado com seus bairros, assentamentos e moradias irregulares.[5]

O rápido processo de desenvolvimento urbano da cidade de Bogotá — desencadeado pelo movimento global de descentralização do desenvolvimento — é, portanto, usado como exemplo para demonstrar a presença do direito internacional e do desenvolvimento em cada aspecto da vida social e material local das cidades em processo de globalização — da configuração espacial à construção da identidade dos sujeitos e cidadãos. O objetivo é demonstrar que o direito internacional está, hoje, cada vez mais presente na vida administrativa diária das cidades. Para Eslava, o direito internacional é um componente ordinário para a constituição das relações sociais, particularmente naqueles lugares que foram sujeitos ao domínio colonial e são, hoje, objeto dos projetos globais de desenvolvimento: o Terceiro Mundo, ou Sul Global.[6]

O primeiro capítulo do livro (Introdução) apresenta as justificativas e objetivos do estudo, bem como a base bibliográfica utilizada para abordar a relação entre direito internacional e desenvolvimento. Em seguida, Eslava apresenta o escopo metodológico do estudo: um olhar etnográfico sobre o direito internacional e o projeto de desenvolvimento que permite perceber como ambos os fenômenos se tornaram presentes nas normas nacionais e locais, nas práticas administrativas e na "organização material e humana da vida local".[7]

O capítulo 2 (*Building the global from the local)* analisa o modo como o processo de descentralização do desenvolvimento e de internacionalização das cidades facilitou a transformação urbana da cidade de Bogotá, alterando a maneira com que a administração local lida com seus habitantes "ilegais".[8] O capítulo inicia com a análise de um discurso do ex-Secretário Geral da ONU, Kofi Annan, para o *United Cities and Local Governments Summit* (2005), no qual são discutidas as condições do processo de descentralização e o crescente protagonismo das cidades no âmbito global.[9] Eslava demonstra que esse movimento de descentralização engendra uma série de elementos que fazem parte, na realidade, de uma estratégia mais ampla de governança global, comprometida com a construção de um cenário administrativo multidimensional mais apto a integrar novos atores globais e implementar as reformas neoliberais esperadas no contexto pós-Guerra Fria. Em resumo, o processo de descentralização é apresentado a partir de quatro perspectivas: 1) como resposta aos problemas do Terceiro Mundo e aos fracassos do modelo centralizado de desenvolvimento; 2) como parte de um projeto de construção de um cenário administrativo mais apto a integrar novos atores e a implementar reformas neoliberais; 3) como mais capaz de criar um cenário institucional legal mais apto a atender as demandas e necessidades da população, que pode inclusive ser integrada aos processos de decisão; e 4) como parte de uma tendência internacional para construção de uma ordem global que esteja além dos aparatos administrativos dos estados-nação.[10]

Na sequência, o capítulo narra como a Colômbia — reconhecida como um Estado (quase) falido — adotou a descentralização a partir da reforma constitucional de 1991, e como a cidade de Bogotá, desde então, tem se desenvolvido em um ritmo impressionante.[11] Buscando dar conta de como tais transformações fazem parte de

5 Moradias irregulares (*"illegal neighbourhoods")* são entendidas ao longo do livro como construções que não estão de acordo com as regulações e planos de desenvolvimento locais ou que são construídas em áreas de proteção ambiental, por exemplo).

6 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 33.

7 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 23.

8 A nova abordagem utilizada pela administração local de Bogotá para lidar com seus habitantes "ilegais" compreende uma série de esforços por parte da administração local para controlar a expansão dos assentamentos e para regularizar os assentamos ilegais já existentes, como por exemplo, o fortalecimento institucional (instituição e cobrança de impostos), planejamento urbano, cadastro e mapeamento das populações "ilegais".

9 Conforme o referido discurso, devido à crescente urbanização do Terceiro Mundo, e à proximidade que as administrações locais têm em relação às pessoas sujeitas à sua autoridade, o papel e a responsabilidades das cidades na busca pelos objetivos globais de desenvolvimento deve ser valorizado.

10 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 68–70.

11 A partir da reforma constitucional de 1991, planejar e implementar o desenvolvimento dentro das municipalidades se tornou uma das estratégias primárias por meio da qual seria possível revitalizar o projeto de construção da nação colombiana.

uma tendência mais ampla de reconstituir a forma dos estados-nação para criar uma nova ordem global que se manifeste por meio das jurisdições locais, Eslava apresenta um interessante paralelo entre o papel das cidades no contexto colonial e no contexto contemporâneo da descentralização.[12] Para tal, retoma a já mencionada Teoria do Domínio Indireto de Lugard.[13] Por fim, refletindo acerca da distinção existente entre os habitantes legais e ilegais da cidade de Bogotá, o autor conclui que este se trata de um antagonismo produtivo, uma vez que permite à administração local a reconstrução das áreas informais da cidade e das subjetividades dos seus habitantes de acordo com os valores e objetivos globais de desenvolvimento.

Nos capítulos 3 e 4, Eslava explica como a descentralização veio a se tornar o paradigma legal e administrativo por meio do qual as responsabilidades globais e nacionais de desenvolvimento foram alocadas para o âmbito das jurisdições locais, não somente na Colômbia, mas em todo o Terceiro Mundo. O capítulo 3 (*Development and the nation-state*) apresenta um estudo completo e abrangente acerca do paradigma do desenvolvimento, desde o período pós-guerra, quando o projeto do desenvolvimento é lançado, até a década de 1980, quando o papel do estado-nação enquanto agente do desenvolvimento passa a ser questionado. O autor demonstra como o discurso técnico, "atingível" e estadocêntrico do desenvolvimento, foi utilizado, em articulação com a nova ordem institucional internacional, para construir as nações do terceiro mundo, e como se tornou, nesse período, o termo mediador das relações norte-sul e a própria língua franca das relações internacionais. Nesse contexto, as teorias de Weber, Keynes e Rostow são apresentadas como representantes desse paradigma, que encontra no aparato burocrático nacional e na centralização da autoridade suas principais características. Na sequência, o capítulo narra as condições que levaram à exaustão do discurso do desenvolvimento, que reforçaram as dúvidas em relação ao estado-nação, e que deram ensejo ao surgimento de um novo paradigma intelectual (neoliberalismo) e de novos parâmetros e marcadores da política de desenvolvimento. Dentre os fenômenos que justificaram a descentralização, ou a "virada para o local", são mencionados, dentre outros, o aumento da urbanização e a desigualdade produzida pelos modelos tradicionais (nacionais) de desenvolvimento. Por fim, o capítulo descreve como essa narrativa — da centralização à descentralização — se deu no contexto da Colômbia.

No capítulo 4 (*Development changes places*), Eslava descreve como a ideia de descentralização transformou o discurso do desenvolvimento, introduzindo as jurisdições locais como um novo nível de governança e provocando, assim, um processo global de "reterritorialização do exercício da autoridade".[14] Visando melhor compreender a dimensão global desse processo, Eslava retoma a Teoria do Domínio Indireto (*indirect rule*), de Frederick Lugard, que demonstra como os sistemas descentralizados e indiretos de governança permitiam (à metrópole) uma administração mais efetiva e eficiente dos territórios periféricos. Para Lugard, segundo Eslava, estruturas administrativas decentralizadas e mecanismos indiretos de domínio seriam uma maneira eficiente para extrair o máximo, em termos econômicos, da população nativa, enquanto as mantinham "enquadradas em estruturas internacionais mais amplas de governança".[15] Fica claro, nesse contexto, que Eslava procura traçar um paralelo entre o domínio indireto como prática colonial do imperialismo e a descentralização como uma espécie

12 Eslava demonstra como a descentralização atualizou e estendeu o papel tradicional desempenhado pelas cidades no contexto do imperialismo (do século XVI ao século XX). Em tal contexto, as cidades eram entendidas como locais para exercício da autoridade colonial, por meio dos quais as decisões das metrópoles irradiariam para toda a extensão do território colonial. Direcionando o enfoque para o contexto da Revolução Urbana de Bogotá, Eslava traça outro paralelo interessante: enquanto no período medieval europeu os muros serviam como demarcações espaciais que assinalavam a segurança e o perímetro de autoridade das cidades, excluindo desse âmbito os subúrbios e vilas que, embora fizessem parte da mesma jurisdição, mas estavam fora dos limites estabelecidos pelo muro, no contexto contemporâneo, os estatutos de desenvolvimento e de planejamento urbano, aliados aos mecanismos de controle dos perímetros municipais, passaram a desempenhar as mesmas funções outra desempenhadas pelos muros, nomeadamente: excluir parcela da população — vista como "ilegal" – do perímetro da legalidade, da segurança e da autoridade da cidade.

13 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 72.

14 A descentralização é apresentada como uma tentativa de recuperar a promessa do desenvolvimento no Terceiro Mundo, mudando o foco tradicional do crescimento econômico, produtividade e gestão macroeconômica para o âmbito do planejamento urbano, das leis administrativas, da responsabilidade fiscal, das políticas de incentivo ao mercado e ao investimento estrangeiro, de "boa governança", do respeito aos direitos humanos (sobretudo os direitos de propriedade privada e dos contratos), da proteção ambiental, entre outros).

15 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 143.

de prática neocolonial do imperialismo contemporâneo.

O capítulo 4 também apresenta a trajetória do princípio da descentralização no contexto do direito internacional e das leis nacionais da Colômbia.[16] Eslava alerta, no entanto, para o fato de que, na Colômbia, assim como no resto do Terceiro mundo, essa nova atenção política para as jurisdições locais foi acompanhada (e facilitada) pela onda de reformas neoliberais estruturais comprometidas com o desmanche dos mecanismos nacionais de controle central das economias do Terceiro Mundo, um argumento que reforça a ideia de que o processo de descentralização sob análise possui um caráter neocolonial.[17] Nesse sentido, são apresentados alguns paradoxos que resultam do processo de descentralização, que dizem respeito, sobretudo, ao aumento de responsabilidades contraditórias transferidas para as administrações locais.[18] Por fim, após demonstrar a importância internacional do planejamento espacial e territorial como uma ferramenta efetiva para materializar as aspirações e ideais de desenvolvimento no contexto local, Eslava introduz as tecnologias e regulações utilizadas pela cidade de Bogotá para promover o desenvolvimento local.[19] São apresentadas ferramentas regulatórias de planejamento espacial ("estratégia territorial") que permitem à administração local de Bogotá repensar seus espaços urbanos, reformando as realidades locais de acordo com seus objetivos de desenvolvimento.[20]

O capítulo 5 (*The making of a new Bogotá*) apresenta a situação dos residentes ilegais de Bogotá, procurando compreendê-los como sujeitos excluídos ou marginalizados que estão, todavia, envolvidos em uma dinâmica de formação que gravita ao redor de categorias legais e narrativas de desenvolvimento conectadas com um exercício administrativo global. O capítulo narra as estratégias utilizadas pela cidade para conter o avanço dos assentamentos ilegais e para integrar os assentamentos existentes na vida "oficial" da cidade. São discutidas as seguintes estratégias: o trabalho coletivo de departamentos administrativos e entidades provedoras de serviços públicos, o uso de sofisticados métodos cartográficos (como a Matriz Operativa, o banco de dados implementado pelo escritório de inspeção), novos artefatos de governança (como as normas de planejamento urbano e espacial já mencionadas), e o fortalecimento institucional, representado pelo aumento da arrecadação oriunda da formalização de territórios e da expansão da base contribuinte. A atenção especial que o projeto de reconstrução da cidade de Bogotá dedica ao controle da formação espacial da cidade, bem como da população, é apresentado como exemplo de como os compromissos globais e as prescrições normativas de desenvolvimento internacional se cristalizam no âmbito local, direcionando a vida coletiva das populações. O processo de legalização é, nesse contexto, analisado como o principal instrumento utilizado pela administração local para atualizar sua autoridade em relação à periferia, e para reconstituir a identidade desses sujeitos como habitantes "oficiais" da cidade. Como explica Eslava, os residentes das habitações ilegais incluídos no processo de legalização são objetos de um exercício pedagógico de autoridade que procura neles incutir novos tipos de valores (globais), novas responsabilidades (fiscais) e novas consciências no nível de suas subjeti-

16 Os instrumentos legais internacionais que reconhecem a importância crescente das administrações locais para o desenvolvimento o fazem no âmbito do direito urbano e do direito à cidade, fato que é sintomático dos níveis crescentes de urbanização em todo o mundo.

17 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 149.

18 Ao mesmo tempo em que devem estar comprometidas com valores democráticos, direitos humanos e proteção ambiental, as municipalidades devem também seguir princípios como sustentabilidade demográfica e financeira e planejamento integral para se tornarem economicamente dinâmicas, internacionalmente competitivas, financeiramente solventes e auto dependentes. Há, portanto, paradoxalmente, a necessidade de sincronizar um aparato burocrático mais eficiente e obrigações de disciplina econômica estrita (crescimento, disciplina fiscal e competitividade internacional) com a promoção de políticas progressistas que estejam de acordo com os novos ideais (globais) de progresso social, ambiental, cultural e fiscal.

19 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015, p. 162–163.

20 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015, p. 166–170. Os exemplos de ferramentas regulatórias de planejamento espacial apresentadas por Eslava são: o *Ordenamiento Territorial* da Constituição Colombiana, o Plano Nacional de Desenvolvimento e a Lei de Ordenamento Territorial, que dá as diretrizes para que os municípios desenvolvam seus próprios Planos de Desenvolvimento Local e Planos de Ordenamento Territorial. Além das ferramentas regulatórias mencionadas, que demonstram o papel cada vez mais importante desempenhado pelo direito na busca pelo desenvolvimento, os mapas são outro tipo de ferramenta para controle, planejamento e criação do espaço urbano apresentados por Eslava. Cabe mencionar, ainda, nesse sentido, que, após analisar o importante papel desempenhado pelos mapas na construção de impérios coloniais e de nações, Eslava analisa o papel constitutivo representado pelos mapas no contexto do planejamento urbano contemporâneo de Bogotá, principalmente as implicações da representação das áreas de habitação legais e ilegais nos mapas da cidade.

vidades (cidadania).[21] Em suma, "ser [e tornar-se] legal ou ilegal posiciona os sujeitos na escada da civilização Ocidental, da modernidade e da humanidade". Assim, o processo de legalização pode ser visto como um "rito de passagem" da ilegalidade para a legalidade, que busca "conciliar o passado e a cultura ilegal dos indivíduos com os novos padrões de civilidade definidos pela cidade, suas leis, seus recentes compromissos internacionais e aspirações de desenvolvimento". Dessa forma, Eslava demonstra de que maneira a ideia de desenvolvimento está, hoje, imbricada no conceito de legalidade: "To be lawful today means to be developed, and vice versa: to be illegal is to be underdeveloped."[22]

Importa perceber, contudo, que esse novo arcabouço normativo-administrativo não impede a urbanização ilegal, mas cria a capacidade administrativa para identificar as ilegalidades e tomar atitudes necessárias para remediar a situação. A distinção entre legais e ilegais é mantida enquanto a situação não for resolvida. Assim, se, por um lado, o processo de legalização pode ser entendido como uma importante avenida para o avanço da ordem institucional, administrativa e financeira da cidade, por outro lado, como explica Eslava, é um procedimento técnico, apolítico e burocrático que, em razão disto, acaba por suprimir o papel da política, tipicamente usado para articular as demandas e necessidades sociais, já que os residentes que desejam se legalizar devem se submeter ao processo burocrático proposto pela administração local e acabam por abandonar sua relação politizada e seus laços de solidariedade com a cidade e demais habitantes.[23]

O capítulo 6 (*The local self of international*), por sua vez, amplia o escopo da discussão, apontando, a partir dos processos administrativos locais acima descritos, os elementos da operação cotidiana do direito internacional. Contrapondo-se à Teoria do Império de Hardt e Negri (que concebe o Império contemporâneo como um fenômeno global e desterritorializado), Eslava apresenta uma visão da ordem global como "um fenômeno espacialmente e legalmente enraizado, onde as administrações locais desempenham um papel fundamental".[24] Assim, o autor identifica o surgimento de uma nova forma de disciplina internacional, que opera por meio do crescente uso da autoridade pelas administrações locais. Nesse sentido, Eslava percebe que, em função da descentralização, desencadeou-se um processo de difusão da soberania. Como resultado, esta se manifesta, hoje, de modo disperso por meio das instituições internacionais, dos Estados e dos municípios. Enfim, por meio de múltiplos regimes (públicos e privados) e níveis de governança, constituindo "um complexo conjunto normativo-jurisdicional internacional".[25]

Dessa forma, refutando a concepção tradicional — segundo a qual o "municipal" é visto como subsidiário ao nacional, além de completamente desconectado do internacional —, Eslava demonstra como o "local" e o "nacional" dialogam constantemente com o "internacional" (normas internacionais relacionadas ao processo de desenvolvimento). Eslava demonstra de que maneira ocorre a "reincorporação da autoridade internacional dentro dos corpos jurisdicionais locais e suas ações", ou, em outras palavras, como o internacional se torna doméstico. Esse fenômeno é identificado pelo autor como a "rotinização" local do internacional" (*"local routinization of the international"*), que transforma os oficiais administrativos locais em verdadeiros agentes da globalização e que deposita nos residentes locais as obrigações e ambições globais de desenvolvimento. Como resultado, prevalece uma forma de administração do território e das populações urbanas "mediada", por meio do direito, entre múltiplos níveis de governança: do local ao internacional.[26]

Após refletir acerca do papel instrumental desempenhado pelo direito na organização dos espaços e na constituição da cidadania, o capítulo aborda também o papel do direito enquanto linguagem, meio através do qual as contradições urbanas são expressas e a política ocorre. Contrapondo-se à concepção majoritária, que associa a presença do direito ao progresso, Eslava re-

21 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 50–51.

22 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 173.

23 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 233.

24 HARDT, Michael; NEGRI; Antonio. *Empire*. Cambridge: Cambridge University Press, 2000. ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 238.

25 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 248.

26 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 250–251.

lembra que, historicamente, o direito desempenhou papel central para a construção e organização dos impérios, das colônias e do mundo contemporâneo, por assim dizer. O que há de novo hoje, contudo, é que as aspirações globais do direito buscam ser efetivadas por meio das jurisdições locais, em um processo identificado como "reprodução legal paralela". Em razão desse fenômeno, Eslava afirma que "se tornou praticamente impossível distinguir onde o internacional termina e o local começa, e quando a disciplina internacional se torna local".

Em seguida Eslava aponta para o importante fato de que a ordem global e seu sistema normativo e jurisdicional opera pelo mundo em diferentes níveis de intensidade, impactando, de forma irregular, sobre a geografia global. Nas nações do Terceiro Mundo (ex-colônias que ocupam posições de dependência no sistema político e econômico global), as pressões internacionais se mostram de forma muito intensa (na forma "nacional" da suas existências pós-coloniais, nas condicionalidades impostas pelas organizações internacionais, e na pressão para desenvolver-se de acordo com os padrões globais), ao passo que as nações ricas, por outro lado, possuem mais "espaço para manobra" no que diz respeito a tais imposições globais, seja devido a sua força industrial e financeira, seja devido ao seu papel histórico na criação do sistema internacional legal. Em razão dessa incidência irregular, Eslava identifica duas consequências: o fato de que algumas parcelas da população global estão mais expostas à pressão internacional do que outras; e o fato de que, nos lugares onde a pressão internacional é sentida com maior intensidade, o "internacional" acaba por permear as normas e práticas administrativas nacionais e locais com maior facilidade.[27] Conclui-se, assim, que o Sul Global está, de fato, muito mais próximo ao "internacional", isto é, muito mais sujeito aos imperativos da globalização e à influência do direito internacional do que o Norte.[28]

Por fim, o capítulo 6 traz à tona a questão da resistência. Eslava começa explicando que as estratégias de organização territorial levadas a cabo pela administração local de Bogotá (processo de legalização) resultaram, entre outras coisas, na fragmentação das discussões políticas em termos de solidariedade de classe e de alianças entre os moradores, o que, por sua vez, acabou por despolitizar as comunidades. Nesse contexto, Eslava identifica um paradoxo trazido à tona pelo processo burocrático de legalização: ao mesmo tempo em que trouxe mais visibilidade e participação aos moradores, lhes ofereceu menos capacidade de influenciar, substancialmente, o poder público em favor de suas demandas. Isso ocorre, porque a legalização é, na realidade, um procedimento técnico e despolitizado, que não necessariamente resolve as demandas sociais ou realiza a justiça social.

Em seguida, Eslava ilustra as múltiplas formas de resistência que, nos anos recentes, têm contestado o processo de desenvolvimento de Bogotá. São apresentados três exemplos: o ativismo de base desempenhado pela *Red Popular Ambiental de Territorialidades del Distrito Capital*[29]*;* as marchas e manifestações (*rallies)* organizadas por líderes populares dos bairros e de movimentos de base[30]; e as iniciativas de desenvolvimento alternativo[31].

27 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 254–257.

28 Nesse ponto, se manifesta o engajamento da obra em análise com a crítica de terceiro mundo do direito internacional. Isto porque, além de identificar a desigualdade internacional existente entre Norte e Sul, Eslava apresenta uma interpretação da relação contemporânea entre o "local" e o "internacional" como uma maneira velada de promover nada mais do que o desenvolvimento econômico privado, em um contexto no qual a dificuldade de responsabilização das Instituições internacionais e das Corporações Transnacionais permanece uma realidade.

29 Com enfoque na promoção da justiça social e ambiental, o ativismo de base desempenhado pela *Red Popular* se insurge contra a organização espacial promovida pelo Planos de Organização Territorial de Bogotá. A resistência busca reforçar a soberania da comunidade sobre os territórios ilegais, desmistificando a tecnicidade do desenvolvimento através de ferramentas cartográficas e burocráticas oferecidas pela cidade.

30 O segundo tipo de resistência oferecida pela população Bogotana ao processo de desenvolvimento diz respeito às marchas e manifestações (*rallies),* organizadas por líderes populares de movimentos de base, inclusive da *Red Popular* que integram diversos bairros da cidade. O objetivo dessas manifestações é conscientizar os residentes de Bogotá acerca dos problemas que afetam tanto os habitantes legais quanto os ilegais e que não são solucionados pela administração da cidade. Os problemas incluem: a falta de segurança das ruas, a falta de oportunidades de emprego, as deficiências da estrutura pública de transporte, a falta de uma infraestrutura pública adequada e a violência contra determinados grupos sociais perpetradas tanto por grupos criminosos quanto por forças oficias de segurança.

31 O terceiro tipo de resistência diz respeito às tentativas de criar formas alternativas de desenvolvimento na cidade, especialmente em áreas (legais e ilegais) que ainda não foram afetadas pelo desenvolvimento da cidade. Evitando o linguajar jurídico e oficial do processo de legalização, esse tipo de resistência procura promover programas comunitários, bem como novas e variadas ideias destinadas à melhoria das condições de vida da população. O objetivo é fomentar a agência e o espírito comunitário dos residentes, enfatizando a ideia de soberania comunitária bem como projetos de micro-desenvolvimento. Eco-bairros, casas e cozinhas comunitárias,

Nesse sentido, o autor finaliza com uma importante reflexão acerca da necessidade de compreender as mecânicas locais e efeitos cotidianos do direito internacional e do desenvolvimento, bem como as formas (oblíquas) de resistência ao projeto de desenvolvimento promovidas pelos movimentos de base no âmbito local. Nas palavras de Eslava,

> [...] questions about how authority is performed and responsibility distributed in today's global order should be analysed concomitantly with questions regarding the manner in which such modes of authority and assignations of responsibility are resisted.[32]

Como explica o autor, somente com base na análise das múltiplas formas de resistência e do reconhecimento da dimensão local do direito internacional é possível compreender os efeitos negativos do processo de reorganização da jurisdição global analisado ao longo do livro, vislumbrar e fortalecer modos de resistência e, principalmente, engajar a academia do direito internacional para a mudança das condições de vida daqueles que mais precisam. Nas palavras do próprio autor,

> Only by refining our understanding of the way in which international law operates beyond its typical normative and institutional sites and modes of representation will it become possible to appreciate and contribute to the many ways in which ordinary people, like the community leaders in Bogotá, engage with the spaces, legal forms and frames produced by the international normative order.[33]

É nesse sentido que o capítulo 7 conclui o livro sob análise, reforçando a ideia da necessidade de transformar a compreensão e o estudo do direito internacional e do desenvolvimento de acordo com as necessidades materiais e a vida real das pessoas, abandonando, assim, as leituras ortodoxas, estadocêntricas e desterritorializadas desses fenômenos.

2.3. O método: um olhar etnográfico sobre o direito internacional

Um dos pontos mais importantes da obra — que representa, pode-se dizer, uma verdadeira inovação no que diz respeito à maneira de enxergar a presença diária do direito internacional nos múltiplos níveis de governo que hoje implementam o desenvolvimento — é o método antropológico-etnográfico por ele desenvolvido para compreender as complexidades da ordem legal contemporânea e as contradições implicadas no processo de descentralização. Buscando responder às provocações de Hilary Charlesworth[34] — no sentido de "refocalizar o direito internacional em questões de justiça estrutural que subjazem a vida quotidiana" e de imaginar, portanto "como seria o direito internacional da vida quotidiana" — Eslava empregou uma abordagem etnográfica para estudar a operação do direito internacional e do projeto de desenvolvimento no contexto do (crescente) interesse atual nas jurisdições locais. Dentre as razões que o levaram a optar por esse método, Eslava destaca quatro vantagens: (1) capacidade para integrar uma rica pluralidade de fontes e materiais — de materiais oficias internacionais à entrevistas com residentes e oficiais da administração local de Bogotá; (2) capacidade para identificar e problematizar a presença do direito internacional nos âmbitos nacional e local, bem como (3) para perceber como este, juntamente ao projeto de desenvolvimento está constantemente estruturando o mundo físico e social; e, por fim, (4) a capacidade que o método proporciona para engajar ética e politicamente, para repensar a prática acadêmica e para pensar modos de resistência à globalização e ao desenvolvimento.[35]

Segundo Eslava, o olhar etnográfico permite compreender o direito internacional não como um corpo de regras isolado, produzido por instituições hierarquicamente superiores ou como um conjunto de relações diplomáticas dentro de um universo estático e estadocêntrico, mas como um "sistema institucional e normativo em expansão que carrega dentro de si uma bagagem material [...] muito particular", e que, trespassando diversos níveis jurisdicionais, está constantemente engajado na estruturação das relações sociais e materiais. O método permite, assim, ver o direito internacional não como um mero projeto normativo e ideológico, mas como "um projeto que busca sua cristalização nos planos materiais e subjetivos do mundo", isto é, no dia a dia da vida das pessoas comuns.[36]

atividades culturais, jardins comunitários e grupos de ação ambiental são das iniciativas de desenvolvimento alternativo promovidas por esses grupos.

32 ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 280.

33 ESLAVA, Luis. ESLAVA, Luis. *Local space, global life:* the everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 290.

34 CHARLESWORTH, Hilary. International law: a discipline of crisis. *Modern Law Review*, v. 65, n. 3, p. 377-392, 2002.

35 ESLAVA, Luis. *Local space, global life: t*he everyday operation of international law and development. Cambridge: Cambridge University Press, 2015. p. 30.

36 ESLAVA, Luis. *Local space, global life: t*he everyday operation of

2.4. Reflexões críticas

Em um contexto no qual a vida nas cidades adquire um papel cada vez mais central na ordem legal global, *Local Space, Global Life* projeta um novo olhar sobre o direito internacional e sobre o projeto de desenvolvimento. O livro propõe uma (re)leitura do direito internacional a partir de sua realidade material, isto é, de sua operação cotidiana. No esforço intelectual para a execução dessa tarefa, o autor faz uso de uma ampla diversidade de fontes e mídias, como fotos da cidade de Bogotá e transcrições de entrevistas com residentes da cidade, o que é atípico no contexto tradicional do direito internacional. Como resultado, tem-se um livro cujo estilo é bastante singular e cuja forma é, indubitavelmente, inovadora.

Merecem menção também as analogias traçadas entre os contextos colonial e contemporâneo, sobretudo, nesse caso, as referências ao conceito de "domínio indireto" de Lugard. Tais reflexões teóricas a respeito da continuidade do colonialismo no contexto atual são de incontestável valor para as abordagens críticas do direito internacional que se dedicam ao estudo da relação entre direito internacional, colonialismo e imperialismo (principalmente as abordagens de terceiro mundo do direito internacional – TWAIL). Nesse mesmo sentido, o método antropológico e etnográfico desenvolvido por Eslava representa uma importante contribuição para a crítica do direito internacional, na medida em que contribui para uma reformulação teórica da disciplina a partir dos povos e classes oprimidos e necessitados do terceiro mundo. Mais precisamente, devido ao seu enfoque nas formas de resistência apresentadas pelos residentes de Bogotá, *Local Space, Global Life* se destaca como uma importante contribuição para repensar, nos termos de Rajagopal, o direito internacional a partir da resistência dos movimentos sociais do terceiro mundo, ou seja, para repensar o direito internacional *"from below"*.[37]

Outro aspecto de relevante interesse, principalmente para os leitores brasileiros, diz respeito ao fato de que, embora restrita ao processo de desenvolvimento urbano da cidade de Bogotá, a análise de Eslava se aplica a qualquer das (muitas) cidades do Terceiro Mundo que passam por processo semelhante de internacionalização. Os exemplos mais emblemáticos citados pelo próprio autor são: Nova Délhi, Istambul e Rio de janeiro.

Assim como em Bogotá, o problema do Rio de Janeiro em relação às habitações urbanas irregulares é histórico. Como um país de Terceiro Mundo, o processo de urbanização das principais cidades do Brasil também se deu de modo desordenado, principalmente em razão da extrema desigualdade socioeconômica dentro das cidades e, também, entre as regiões do país. Desse modo se deu a formação urbana do Rio de Janeiro, com a emblemática presença das favelas, em gritante contraste com os condomínios de luxo de alguns de seus bairros mais nobres. Assim como na Colômbia, a Constituição brasileira mais recente, também, atribuiu maior protagonismo aos municípios. Desde então, assim como Bogotá, a cidade do Rio de Janeiro tem concentrado esforços para reorganizar sua soberania em relação ao território e população. Essa tensão existente entre a vida local dos residentes ilegais da cidade e as pretensões globais de desenvolvimento se tornaram mais evidentes nos últimos anos, com a instituição das Unidades de Polícia Pacificadora (UPPs), com presença militar nas favelas e, principalmente, no contexto dos eventos internacionais sediados pela cidade. De fato, para se adequar aos padrões exigidos pelas entidades internacionais responsáveis pelos eventos que a cidade recentemente foi sede (Copa do Mundo de Futebol e Olimpíadas, em 2014 e 2016, respectivamente) a cidade do Rio de Janeiro foi objeto de uma intensa reorganização espacial de seus territórios. Por exemplo, para adequar a cidade aos padrões internacionais da FIFA (entidade responsável pela organização da Copa do Mundo de futebol), populações assentadas irregularmente em áreas tidas como estratégicas para a execução do evento, foram removidas forçadamente, como ocorreu no caso da remoção forçada de indígenas da Aldeia Maracanã, no ano de 2013. Para o jurista brasileiro, portanto, pode ser interessante tentar estabelecer um paralelo entre os efeitos da internacionalização das cidades de Bogotá e do Rio de Janeiro (bem como de muitas outras cidades brasileiras).

3. Considerações finais

Na medida em que propõe uma leitura mais mundana e aplicada do direito internacional, e que propicia um

international law and development. Cambridge: Cambridge University Press, 2015. p. 25.

37 RAJAGOPAL, Balakrishnan. *International law from below*: development, social movements and third world resistance. Cambridge: Cambridge University Press, 2003.

novo método para lidar com os principais desafios enfrentados pelas populações periféricas urbanas do Terceiro Mundo no contexto da globalização, *Local Space, Global Life* renova a crítica de terceiro mundo do direito internacional, readaptando-a ao contexto contemporâneo das cidades e de seus habitantes, isto é, ao contexto da vida real, subjetiva e material das pessoas. Por essa razão, é possível afirmar que o livro possui inegável relevância para o estudo crítico do direito internacional. Sua leitura é, portanto, recomendada a todos aqueles juristas comprometidos com a construção de uma ordem internacional mais justa e de um direito internacional mais favorável a populações destituídas e periféricas do mundo.

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Gabriel Antonio Silveira Mantelli**

Em 2014, no Festival de Cinema de Berlim, um único filme trouxe para o solo europeu questões atinentes à realidade da África. Concerning Violence, ironicamente um documentário coproduzido por países do Primeiro Mundo, resgata o passado colonial ao apresentar os movimentos africanos de independência das décadas de 1960 e 1970 e acaba questionando, inclusive, as relações contemporâneas de poder entre os países do Norte e do Sul. O documentário, de extrema relevância, é construído em torno de trechos da obra de Frantz Fanon, importante intelectual que influenciou toda uma geração de pensadores/as pós-coloniais. Em sua obra seminal, os condenados da terra, ele afirma que a descolonização é um processo de violência e que "[n]a descolonização há, pois, a exigência de uma entrega completa da situação colonial".[1]

No campo do direito internacional, há quem realize esse movimento de retorno ao colonial para desvendar certas estruturas que, ainda, vingam em nosso contexto global. Em sintonia com Fanon, temos Sundhya Pahuja que afirma que o movimento de descolonização pode ser encarado não somente do ponto de vista otimista do nacionalismo, como bradado nos movimentos de libertação política, mas, também com certo ceticismo. Nesse caso, a descolonização poderia ser encarada como uma nova forma de aprisionamento, agora jurídico, afinal, para se tornarem independentes e comporem a nova ordem mundial, as antigas colônias tiveram que adotar os modelos jurídicos estipulados pelas potências da época, normalmente suas antigas metrópoles. Assim, paradoxalmente, para resistirem à colonização, esses novos países acabaram por se *entregar* à epistemologia de seus antigos opressores.

No direito internacional, de fato, parecia que a temática da colonização havia sido deixada para trás em função de certa narrativa focada na vitória da globalização e dos direitos humanos. Todavia, uma agenda crítica tem trazido à tona o "outro lado da moeda"[2] do direito internacional. Nessa

* PAHUJA, Sundhya. Decolonising international law: development, economic growth and the politics of universality. Cambridge: Cambridge University Press, 2011

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1 FANON, Frantz. *Os condenados da terra*. Lisboa: Ulisseia, 1961. p. 31.

2 Usa-se a expressão comumente utilizada pelos teóricos/as latino-americanos/as decoloniais, em que o lado escuro da modernidade seria a colonização. Neste sentido, ver: MI-

agenda, o regime colonial e o imperialismo têm sido campos de estudo bastante fecundos para esses trabalhos, sobretudo por teóricos/as alinhados/as às Abordagens do Terceiro Mundo no Direito Internacional (Third World Approaches to International Law – TWAIL).[3] Incluída nesse grupo (e particular a ele também),[4] Pahuja explora a temática do desenvolvimento no livro Decolonising internacional law: development, economic growth and the politics of universality.[5]

Publicado em 2011, pela Cambridge University Press, fruto do seu doutorado no Reino Unido e atuação como professora na Austrália, o livro é capaz, ainda hoje, de lançar importantes reflexões sobre o direito internacional no contexto dos países do Terceiro Mundo bem como tem papel relevante no contexto brasileiro de pesquisa em direito, colaborando para a construção de uma agenda crítica no direito internacional. O título do livro dá a tônica de um debate pós-colonial e a ênfase terceiro-mundista é perceptível no questionamento que abre o trabalho: "por que o direito internacional, da perspectiva do Terceiro Mundo, tem sido tão decepcionante?". De um lado, a noção de desapontamento que a autora procura explicitamente vincular ao direito internacional ilustra uma das marcas do livro: olhar o direito internacional para além do seu funcionamento normativo. Com isso, ela agrega ao estudo uma esfera contextual e interdisciplinar bastante reveladora de tensões e dinâmicas que o direito, isolado, talvez não fosse capaz de explicar. De outro lado, a escolha pelo termo Terceiro Mundo para designar o que hoje se define, na academia e fora dela, como países em desenvolvimento ou Sul Global. A própria autora dedica um anexo do livro para explicar essa escolha, justificando que a intenção é remontar ao movimento anticolonial e demarcar uma dimensão política que outras nomenclaturas, segundo ela, não são capazes de atrelar. Ao fazê-lo, Pahuja deixa, ainda mais evidente, o lugar de onde o trabalho foi elaborado.

É interessante atentar para o debate do pós-colonialismo refletido na obra. A perspectiva pós-colonial foi "[i]niciada por aqueles autores qualificados como intelectuais da diáspora negra ou migratória" e, após esse primeiro momento, "expande-se geograficamente [...], fazendo dos trabalhos de autores como Homi Bhabha, Edward Said, Gayatri Chakravorty Spivak ou Stuart Hall e Paul Gilroy referências recorrentes".[6] De um lado, o pós-colonialismo emerge "tanto [como] um ponto de encontro quanto um campo de batalha entre uma variedade de disciplinas e teorias";[7] de outro, "contém uma crítica, implícita ou explícita, aos silêncios das análises pós-coloniais na primeira acepção".[8] No trabalho de Pahuja, cujo esforço interdisciplinar é louvável, esse viés é bastante demarcado, tanto pela temática da descolonização quanto pelo tom crítico da autores, pensadores/as pós-coloniais como Dipesh Chakrabarty, Partha Chatterjee e Gayatri Spivak são utilizados/as como referenciais teóricos.

Se, de um lado, podemos observar o contexto do trabalho, que aponta para uma obra crítica de direito internacional, influenciada pelo pós-colonialismo; de outro, podemos demarcar a estrutura de *Decolonising international law*. Ele é dividido em seis capítulos, com dois apêndices, um que já apresentei, e outro com o discurso de Harry Truman que abre o debate global sobre desenvolvimento. Os dois primeiros capítulos introduzem a matéria a ser trabalhada no livro, basicamente a concepção do desenvolvimento enquanto um discurso que legitima uma nova racionalidade no direito internacional. Para essa tarefa, os três capítulos seguintes apresentam três casos relevadores dessa nova dinâmica, o que abordo, oportunamente, e apresenta um capítulo

GNOLO, Walter. *The darker side of western modernity:* global futures, decolonial options. Durham: Duke University Press, 2011.

3 Ver genericamente: MUTUA, Makau. What is TWAIL? *American Society of International Law*, Proceeding of the 94th Annual Meeting, p. 31-39, 2000; CHIMNI, Bhupinder S. Third world approaches to international law: a manifesto. *International Community Law Review*, Leiden, v. 8, p. 3-27, 2006; GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, v. 1, n. 119-124, p. 46-68, 2013; ANGHIE, Antony. Imperialism and international legal theory. In: ORFORD, Anne; HOFFMAN, Florian (Org.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015. p. 156-173.

4 Ela se posiciona de forma singular tanto ao pensamento *mainstream* quanto ao próprio terceiro-mundista. Acadêmicos/as das principais correntes celebram o fim da 2ª Guerra Mundial como o fim do imperialismo, ao passo que os terceiro-mundistas criticam suas continuidades. Para Pahuja, o direito internacional do pós-2ª Guerra Mundial é tanto imperialista quanto emancipador.

5 PAHUJA, Sundhya. *Decolonising international law:* development, economic growth and the politics of universality. Cambridge: Cambridge University Press, 2011.

6 COSTA, Sérgio. Desprovincializando a sociologia: a contribuição pós-colonial. *Revista Brasileira de Ciências Sociais*, São Paulo, v. 21, n. 60, p. 117, fev. 2006.

7 GANDHI, Leela. *Postcolonial theory:* a critical introduction. Nova York: Columbia University Press, 1988. p. 3.

8 SANTOS, Boaventura de Sousa. Entre Próspero e Caliban: colonialismo, pós-colonialismo e interidentidade. *Novos Estudos CEBRAP*, São Paulo, n. 66, p. 26, jul. 2003.

para a conclusão. No livro, temos como marco o fim da Segunda Guerra Mundial e o estabelecimento de uma nova ordem global, em que o direito internacional passou a ser bastante influenciado pela hegemonia dos Estados Unidos da América e pelo discurso universal de desenvolvimento. Segundo ela, a partir desse momento, o direito internacional teria passado a constituir um complexo ideológico-institucional que, ao mesmo tempo, seria capaz de abarcar tanto o imperialismo quanto a resistência a ele. E que, desde então, o direito internacional haveria sofrido tanto uma ruptura quanto um continuísmo das dinâmicas do colonialismo: teria existido o nascimento de novas estruturas institucionais que deram continuidade a velhas práticas imperialistas. A principal tese da obra, por sua vez, gira em torno da ideia de que a descolonização, o desenvolvimento moderno e a universalização do direito internacional teriam produzido uma nova forma de poder ou, nas palavras de Pahuja, uma nova racionalidade (*ruling rationality*, no original). Essa nova racionalidade teria capturado as reivindicações do Terceiro Mundo e, nesse processo, teria minado o potencial radical deles. O principal efeito desse cenário seria, então, a emergência de um quadro regulatório, universalmente aplicado, que tem subsumido a promessa criativa do direito internacional.

Para desenvolver essa tese, Pahuja se utiliza de três casos relevadores: primeiro, o movimento de descolonização que levou à formação do Estado-nação desenvolvimentista; segundo, a transformação da soberania permanente sobre recursos naturais em regras de proteção a investidores estrangeiros, elevando-os à categoria de sujeito do direito internacional; e, terceiro, a transformação do império do direito internacional em internacionalização do império do direito (*rule of law*) enquanto uma estratégia do desenvolvimento. Por meio dessas três esferas críticas — a nação, os recursos naturais e a economia política —, o que se argumenta é que a antiga missão civilizadora do colonialismo, então sob o duplo mandato de explorar recursos para o benefício mútuo da colônia e da metrópole, acabou, também, persistindo sob o pretexto da construção de uma nação desenvolvida e da integração internacional. "Descolonizar" o direito internacional, nesse contexto, teria como propósito demarcar a dualidade desse direito — suas tendências imperialistas e emancipatórias.

Tal dualidade produz, no âmago do direito internacional, o que a autora chama de instabilidade crítica. De um lado, o direito internacional seria, em si, pós-colonial. Quer dizer, assim, que o direito internacional não precederia as categorias em que ele se funda (como as noções de Estado e universalidade, por exemplo). Ao contrário, o direito internacional produziria e modelaria essas categorias; seria um gerador e mantenedor de um conteúdo particular para o universal. Então, na medida em que o direito internacional não poderia ser considerado universal, mas sim como detentor de valores, categorias e formas sociais particulares ou ocidentais, teríamos uma instabilidade crítica. Com esse raciocínio, o que Pahuja procura desvendar é a maneira como certos atores e determinadas narrativas acabam silenciados. Isto porque, segundo ela, essa instabilidade cria categorias que tornam invisíveis aqueles que não se conformam com as particularidades do direito internacional. De outro lado, essa instabilidade, e aqui retomamos o questionamento inicial da autora, advém da lacuna existente entre a promessa de justiça do direito internacional e a personificação do direito internacional em uma agenda regulatória fechada. Lacuna esta que ela denomina de política do direito internacional.

As ideias apresentadas por Pahuja são bastante provocadoras, tanto para pensadores/as tradicionais do direito internacional quanto, inclusive, para ativistas de direitos humanos que se utilizam da narrativa do direito ao desenvolvimento. O título que desta resenha, também com esse viés provocativo, se inspira na peça teatral *Who's afraid of Virginia Woolf?*, obra de Edward Albee que tem despertado reflexões sobre o caráter dúbio das dinâmicas humanas e o falso otimismo que criamos em torno da sociedade moderna. O desenvolvimento, que, por seu caráter transcendental, pode ser encarado tanto uma nova "religião", como Pahuja aponta ao retomar a obra de Gilbert Rist, quanto um discurso, se referindo à obra de Arturo Escobar, tem, de fato, subsumido a promessa do direito internacional pela inclusão e justiça genuínas — basta um olhar aguçado para o contexto que nos rodeia.

O pós-colonialismo, por sua vez, traz consigo um potencial de resistência que tenciona o próprio direito internacional. Com o trabalho de Pahuja, ao tomarmos consciência dessa instabilidade crítica do direito internacional, temos um interessante ferramental que pode auxiliar a elaboração de categorias jurídicas anti-imperialistas e emancipatórias. No caso de produções situadas desde a América Latina, o potencial de ganho analítico é maior e ainda pouco explorado no direito internacional pensado a partir do Brasil. No caso do

pensamento decolonial,[9] essa nova literatura, elaborada no seio das ciências sociais, também tem questionado o passado colonial, dessa vez de forma mais aprofundada e sintonizada com ideários emancipatórios de resistência. Encarar esses dilemas históricos, no caso de trabalhos interessados em compreender o direito internacional na América Latina, é tarefa da ordem do dia.

De todo modo, temos em mãos uma importante contribuição para nosso campo de estudo. Bastante oportuno e metodologicamente interessante, *Decolonising international law* deveria, por fim, constar nas sugestões de leitura dos cursos de graduação e pós-graduação de direito, especialmente para aqueles programas que se interessem em debater narrativas alternativas no direito internacional.

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9 Ver genericamente: CASTRO-GÓMEZ, Santiago; GROSFOGUEL, Ramón (Ed.). *El giro decolonial*: reflexiones para una diversidad epistémica más allá del capitalismo global. Bogotá: Siglo del Hombre Editores, 2007.

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Direitos humanos como um novo projeto para o Direito Internacional? Notas sobre The Last Utopia, de Samuel Moyn*

João Roriz**

I. Vários textos historiográficos recentes têm se dedicado ao exame das origens dos direitos humanos. Eles têm questionado histórias canônicas e celebratórias que traçam suas origens em tempos longínquos como o Código de Hamurabi, apresentando-as como grandes narrativas que criam lugares fictícios de autoridade e pouco revelam sobre processos históricos. Um dos historiadores centrais nessa nova onda revisionista é Samuel Moyn, professor na Universidade de Yale cujas teses polêmicas têm entusiasmados admiradores e críticos, mas cuja obra na área dificilmente se contorna quando se quer pesquisar o assunto da história dos direitos humanos.

A tese de seu principal livro sobre o tema, *The Last Utopia: Human Rights in History* (2010), afirma que os direitos humanos, tal como o entendemos na atualidade, têm origem recente, mais precisamente na década de 1970. A simplicidade do seu argumento esconde seu potencial iconoclasta: com ele, Moyn assevera que outras histórias que se contam sobre direitos humanos não condizem com a atual concepção da expressão. Não há, para ele, linearidade histórica entre o atual entendimento de direitos humanos com as declarações das revoluções liberais do século XVIII ou com a Declaração Universal de 1948. Antes dos 70, direitos humanos eram sempre empregados com base nas noções de cidadania e soberania. Sua autoridade estaria no Estado, não acima ou separada dele. O "significado central de 'direitos humanos' nos [anos] 1940 permaneceu compatível com o Estado moderno", nas palavras de Moyn, "assim como a antiga tradição dos direitos do homem domésticos haviam sido"[1]. A Declaração Universal de 1948 "retém, ao invés de superar, a santidade da estatalidade". Ademais, e mais importante para o historiador, nenhum movimento social transnacional se construiu ao redor da ideia, que permaneceu restrita às longínquas e assépticas conferências diplomáticas em Nova York e Genebra.

Uma ruptura ocorreu três décadas mais tarde, de acordo com Moyn. Direitos humanos "aparentemente do nada" emergem na segunda metade da década de 1970 como um vocabulário de transformação social e agência política. Seu significado, entretanto, diferiria daquele das conferências dos 40 e seriam marcados pela novidade. Moyn distingue, então, o que ele chama de 'direitos humanos' de 'direitos do homem': enquanto o primeiro seria um vocabulário emancipatório dos anos 70 que não dependeria do Estado, o segundo pressuporia precisamente sua existência do ente estatal. Para ele, "os direitos humanos na maioria das vezes significam proteção individual contra o Estado"[2]. Ao considerar por que esse léxico teria ganhado espaço justa-

* MOYN, Samuel. The last utopia: human rights in history. Cambridge, MA: Belknap Press of Harvard University Press, 2010.

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1 MOYN, Samuel. *The last utopia:* human rights in history. Cambridge, MA: Belknap Press of Harvard University Press, 2010. p. 81.

2 MOYN, Samuel. *The last utopia:* human rights in history. Cambridge, MA: Belknap Press of Harvard University Press, 2010. p. 3-4.

mente nesse momento, Moyn aponta para o declínio de outros esquemas universalistas: o nacionalismo, o socialismo e o anticolonialismo. É nas ruínas de outras linguagens que teria surgido uma nova alternativa moral persuasiva ou, em suas palavras, a "última utopia".

Há várias resenhas sobre a obra de Moyn, tanto positivas quanto negativas, e não pretendo retomar, neste artigo, os argumentos que outros já lançaram.[3] *The Last Utopia* gerou um significativo debate e algumas questões levantadas pelo livro parecem sedimentadas ou mesmo superadas.[4] Nessa resenha, enfatizo uma perspectiva que me parece pouco trabalhada, o encontro dos direitos humanos com o direito internacional.

Parte da obra de Moyn conflita com o principal trabalho historiográfico de direito internacional dos últimos anos, o prestigiado *The Gentle Civilizer of Nations: The Rise and Fall of International Law*, de Martti Koskenniemi. Nesse livro, o jurista finlandês traça a trajetória do direito internacional: da sua ascensão ao final no século XIX como parte das sensibilidades liberais e cosmopolitas capazes de fazer avançar o projeto civilizacional com base na soberania, até sua queda decorrente de um pragmatismo legal despolitizado que dá espaço a outras disciplinas por volta da década de 1960 no século XX. Koskenniemi ancora suas alegações em uma história das ideias dos principais juristas europeus envolvidos nessa empreitada e apresenta uma rica sociologia da disciplina. Seu trabalho inaugura um "giro historiográfico"[5] no direito internacional que ainda move agendas e direciona carreiras profissionais.

Entendo que ao posicionar os direitos humanos como a nova racionalidade do direito internacional, Moyn inverte a leitura de Koskenniemi sobre a matéria: desde a década de 1970, o direito internacional está em *ascensão*, não em queda. Enquanto Koskenniemi teria enxergado as ausências de articulação intelectual e entusiasmo político que abateram a disciplina, Moyn avistou, com base na aproximação com os direitos humanos, o resgate da relevância e ânimo do direito internacional. Graças aos direitos humanos, na avaliação de Moyn, os internacionalistas reverteriam o desencantamento que marginalizou a relevância da disciplina após duas guerras mundiais. O direito internacional seria o "beneficiário primário da recente crise e reformulação das aspirações utópicas",[6] em suas palavras. Se, para Koskenniemi, o direito internacional surge em 1870 em sua associação com uma 'missão civilizatória', para Moyn, os direitos humanos surgem em 1970 (ironicamente, talvez, no exato passar de um século) como uma 'utopia', também de um lugar melhor e mais justo.

II. A reunião dos direitos humanos com o direito internacional é descrita no quinto capítulo de *The Last Utopia*. No texto, Moyn primeiro oferece uma explicação para os rumos que os internacionalistas tomaram no pós-Segunda Guerra. Com a relevância da disciplina ameaçada, os projetos pendiam entre a construção de uma ordem pelo direito (como a "paz pelo direito" de Hans Kelsen) ou uma guinada em direção ao indivíduo como destinatário de normas (como para Hersch Lauterpacht). A inclinação ao primeiro garantiu certa importância à matéria, mas ao preço de sua marginalidade em documentos como a Carta das Nações Unidas. Apesar das menções, os direitos humanos, também, pareciam muito mais adiados a outro documento do que efetivamente garantidos. A Declaração Universal de 1948 não ganhou força de tratado, o que Lauterpacht considerou perigoso porque inútil. Mesmo a regionalização dos direitos humanos entre (alguns) juristas europeus, após a Convenção Europeia de 1950, seria uma alternativa à sua universalização, não uma guinada em sua direção.

3 Foram publicadas resenhas diversas de *The last utopia*, com nuances e perspectivas diferentes. Para duas majoritariamente positivas, ver: BOB, Clifford. *American Historical Review*, v. 116, n. 3, p. 776–778, 2011; e, ETINSON, Adam. The last utopia: human rights in history (review). *Human Rights Quarterly*, v. 34, n. 1, p. 294-299, 2012. Para outras, mais críticas, ver: ALSTON, Philip. Does the past matter?: on the origins of human rights. *Harvard Law Review*, v. 126, p. 2043-2081, 2013; BENHABIB, Seyla. Moving beyond false binarisms: on samuel moyn's the last utopia. *Qui Parle*: critical humanities and social sciences, v. 22, n. 1, p. 81-93, 2013; e, BLACKBURN, Robin. Reclaiming human rights. *New Left Review*, n. 69, p. 126-138, 2011.

4 Samuel Moyn respondeu grande parte das críticas que lhe foram dirigidas em artigos subsequentes. Para um texto em que ele resume parte de sua réplica, ver: MOYN, Samuel. Substance, scale, and salience: the recent historiography of human rights. *Annual Review of Law and Social Science*, v. 8, p. 123-140, 2012. Moyn também participou de obras coletivas sobre o assunto, tais como: ECKEL Jan; MOYN, Samuel (Ed.). *The breakthrough*: human rights in the 1970s. Philadelphia: University of Pennsylvania Press, 2014; Slotte, Pamela; Halme-Tuomisaari, Miia (Ed.). *Revisiting the origins of human rights*. Cambridge: Cambridge University Press, 2015.

5 GALINDO, George Rodrigo Bandeira. Martti Koskenniemi and the historiographical turn in international law. *European Journal of International Law*, v. 16, n. 3, p. 539-559, 2005.

6 MOYN, Samuel. *The last utopia:* human rights in history. Cambridge, MA: Belknap Press of Harvard University Press, 2010. p. 176.

Na história que Moyn narra, a Guerra Fria e seu contexto inóspito ao estabelecimento de regras de comportamento e limites ao poder, também, não abriu espaço para que os internacionalistas se voltassem aos direitos humanos. Pelo contrário: juristas como Georg Schwarzenberger procuravam avançar uma "concepção realista" do direito internacional como uma forma de "esconder" os fatos gerados e explicados pelo verdadeiro motor da história, o poder dos Estados. Direitos humanos, para tais acadêmicos e operadores, teriam sido declarados em vão. A relação entre direito internacional e direitos humanos entre as décadas de 1940 a 1970 é, para Moyn, uma 'não-história', ou seja, como os juristas do primeiro não incorporaram o discurso do segundo.

O processo de captura dos direitos humanos pelos partidários da descolonização, na opinião de Moyn, tornaram-no, ainda, menos relevantes para os internacionalistas. Para ele, os juristas do direito internacional não identificavam a disciplina com o projeto anticolonial que os países africanos e asiáticos queriam avançar em fóruns como a Assembleia Geral da ONU. Moyn lista alguns internacionalistas que condenaram a caracterização da autodeterminação dos povos como direitos humanos, entre os quais se encontram alguns europeus como de Charles de Visscher, J. S. Fawcett e Samuel Hoare, e outros estadunidenses, como Clyde Eagleton e Quincy Wright. Com exceção de Egon Schwelb, para Moyn reinaram ressentimentos e ansiedades entre os juristas ocidentais com a iniciativa de posicionar a autodeterminação dos povos como o primeiro direito humano, tal como registraram os dois Pactos Internacionais de 1966.

Se, nos anos 1960, os direitos humanos não mereceram a atenção dos internacionalistas, a segunda metade dos anos 1970 alterou a dinâmica de seu encontro. Para contar tal história, Moyn elegeu como protagonista a trajetória de Louis Henkin, o acadêmico da Universidade de Columbia hoje tido como "avô" dos direitos humanos nos círculos jurídicos estadunidenses. Sua escolha é adequada porquanto seus escritos da década de 1960 e mesmo da primeira metade dos anos 1970 mostram que Henkin compartilhava o ceticismo dos seus colegas quando da associação entre direitos humanos e a luta anticolonial. Sua fala nas oitivas do Congresso estadunidense sobre política externa e direitos humanos ainda hesitava sobre o significado da expressão, e seus artigos tratavam do assunto desde uma perspectiva da cooperação internacional onusiana. Moyn resgata uma palestra de Henkin em 1974 na qual ele sugeriu que a proteção de direitos humanos se tornava uma decepção idealista, o que contrasta com o entusiasmo com que a contribuição de Henkin é lida atualmente. Moyn busca uma explicação para isso. Nos primeiros anos da segunda metade da década de 1970, Henkin "se jogou por completo na causa", escreve o historiador de Yale.[7] Fundou um centro sobre a matéria em Columbia em 1977, filiou-se a ONGs e iniciou uma prolífica empreitada com sua obra *The Rights of Man Today*, de 1978. No livro, Henkin aproxima a noção de direitos humanos dos valores dos EUA — e não hesita em ponderar a superioridade do modelo estadunidense. Na década de 1990, Henkin publica o apoteótico *The Age of Rights* e seu séquito acadêmico dá continuidade a ele como se o jurista sempre tivesse escudado direitos humanos da mesma forma.

O que explicaria a mudança do lugar dos direitos humanos para internacionalistas como Louis Henkin? Para tentar responder tal questão, Moyn primeiramente descarta a explicação de que se trata simplesmente de uma "evolução" na percepção dos juristas, como se a *opinio juris* refletisse o "espírito da época". Em vez de repetir a ideia de um esclarecimento interno à disciplina, Moyn investiga suas possíveis causas externas. Para ele, o desvanecimento da agenda anticolonial foi um dos fatores cruciais. O historiador considera a proeminência dos judeus dentro da disciplina (principalmente nos EUA), mas conclui que esse fator por si não explica o porquê de a guinada ter acontecido dos anos 1970. O argumento de Moyn é que nessa época houve uma mudança no contexto extradisciplinar, com transformações no que ele chama de utopias. Nas mãos de Moyn, os internacionalistas não mais se opunham aos direitos humanos, mas buscaram nesse discurso a redenção da sua disciplina; reinventaram-na no que o autor chama de 'triunfo moral' dos direitos humanos.

III. Mas Moyn, e a bibliografia historiográfica que o acompanha, detém a última palavra sobre o tema? Seu livro tem encontrado tanto guarida quanto resistência entre os estudiosos do tema. Dentre as críticas mais afiadas,[8] autores marxistas denunciaram a simultaneida-

7 MOYN, Samuel. *The last utopia:* human rights in history. Cambridge, MA: Belknap Press of Harvard University Press, 2010. p. 204.

8 Moyn tem sido muito prolífico ao combater outras histórias por meio de resenhas de livros. Ele é incisivo em sua revisão das obras *The slave trade and the origins of international human rights*, de Jenny Mar-

de da emergência dos direitos humanos com a guinada do liberalismo econômico. Onde estaria a economia política dos direitos humanos na obra de Moyn, perguntaram.[9] O autor responde tal crítica com outro livro, publicado recentemente,[10] mas cujas teses não cabem nesta resenha. Outras críticas se seguiram. Por exemplo, do ponto de vista teorético, a obra *The Last Utopia* foi repreendida por não ter se engajado com o debate sobre a normatividade específica dos direitos humanos,[11] ou por ter criado falsos binários como moralidade/ política e direitos humanos/ direitos de cidadãos.[12] Outros ataques vieram do front historiográfico, por exemplo, com teses que apontam para outras décadas que não os 70.[13]

Gostaria de ressaltar três pontos sobre *The Last Utopia* em relação ao encontro entre direitos humanos e direito internacional. Em primeiro lugar, a historiografia de Moyn ganha outros contornos quando posicionada à luz de outras que enfatizam projetos políticos diferentes, mas também sob a forma de direitos. Obras que procuram a gênese dos direitos humanos têm ressaltado momentos (e lugares) distintos: a filosofia estoica,[14] o pensamento escolástico,[15] a tradição judaico-cristã,[16] as revoluções liberais do século XVIII,[17] a luta antiescravista do século XIX,[18] a Declaração Universal de 1948,[19] ou ainda os movimentos anticoloniais do século XX.[20] Esses outros momentos (e seus autores) parecem não alcançar o alto sarrafo que Moyn edificou para qualificar como 'direitos humanos', um movimento transnacional de ação e reportório globais com alto impacto. Subterrâneas às teses de *The Last Utopia* parecem passar sugestões de que o poder de ideias não alcança estaturas válidas enquanto não consegue arregimentar atores poderosos capazes de estabelecer grandes agendas. Seu consequente desdém por outras experiências e lugares dá força àqueles que taxam seu trabalho de 'demasiado estadunidense', com razão.

Está ocorrendo atualmente uma "luta pela alma do movimento dos direitos humanos, e ela está sendo travada em grande parte pelo proxy da genealogia", na avaliação de um autor.[21] Tais historiografias de direitos humanos não precisam ser necessariamente excludentes; grupos diferentes historicamente enquadraram suas lutas com base em uma normatividade com ressonância em direitos. Pensar que, em tempos e espaços diversos, grupos específicos de direitos foram enfatizados, como liberdade, propriedade, direitos trabalhistas, direitos civis ou direitos culturais, dentre outros, significa reconhecer múltiplas origens a depender de quais direitos se quer enfatizar — assim como quais discursos, atores e agendas se quer valorizar. Moyn conta uma história dos direitos humanos com base em (certos) movimentos transnacionais que enfatizam (certos) direitos civis e

tinez, e *The Justice Cascade*, de Kathryn Sikkink. Enquanto a primeira deixaria lacunas inexplicadas em sua busca por direitos humanos na luta antiescravagista e não explicaria as condições de surgimento da justiça internacional penal, a segunda ignoraria tanto as razões pelas quais a moralidade pode guiar ações quanto o poder geopolítico pode ter significados múltiplos (MOYN, Samuel. Of deserts and promised lands: the dream of global justice, *The Nation*, 2012, Disponível em: <https://www.thenation.com/article/deserts-and-promised-lands-dream-global-justice/>. Acesso em: 24 jun. 2018. Moyn tampouco trata com parcimônia *Inventing Human Rights*, da historiadora Lynn Hunt. Para ele, sua colega de profissão contribui para a 'mitificação' da Revolução Francesa como o tempo de surgimento dos direitos humanos (MOYN, Samuel. On the genealogy of morals. *The Nation*, 2007. Disponível em: <https://www.thenation.com/article/genealogy-morals/>. Acesso em: 24 jun. 2018).

9 Por exemplo: BLACKBURN, Robin. Reclaiming human rights. *New Left Review*, n. 69, p. 126-138, 2011.

10 MOYN, Samuel. *Not enough:* human rights in an unequal world. Cambridge, MA: Belknap Press of Harvard University Press, 2018.

11 MCCRUDDEN, Christopher. Human rights histories. *Oxford Journal of Legal Studies*, v. 35, n. 1, p. 179-212, 2015.

12 BENHABIB, Seyla. Moving beyond false binarisms: On Samuel Moyn's the last utopia. *Qui Parle*: Critical Humanities and Social Sciences, v. 22, n. 1, p. 81-93, 2013. Moyn combateu essa leitura de sua obra com um texto muito incisivo contra Benhabib: MOYN, Samuel. The continuing perplexities of human rights. *Qui Parle*: Critical Humanities and Social Sciences, v. 22, n. 1, p. 95-115, 2013.

13 Por exemplo, um trabalho que afirma que direitos humanos teriam nascido na década de 1990 e não de 1970: HOFFMANN, Stefan-Ludwig. Human rights and history. *Past and Present*, v. 232, n. 231, p. 279-310, 2016.

14 MITSIS, Philip. The stoic origin of natural rights. In: IERODIAKONOU, Katerina (Ed.). *Topics in Stoic Philosophy*. Nova York: OUP, 2001. p. 153-177.

15 BRETT, Annabel S. *Liberty, right, and nature*: individual rights in later scholastic thought. Cambridge: CUP, 1997.

16 JOAS, Hans. *The sacredness of the person*: a new genealogy of human rights. Tradução de Alex Skinner. Washington: Georgetown University Press, 2013.

17 HUNT, Lynn. *Inventing human rights*: a history. Nova York: W. W. Norton & Company, 2007.

18 MARTINEZ, Jenny S. *The slave trade and the origins of international human rights law*. Nova York: OUP, 2012; BLACKBURN, Robin. *The american crucible*: slavery, emancipation and human rights. Londres: Verso, 2013.

19 GLENDON, M. A. *World made new*: Eleanor Roosevelt and the Universal Declaration of Human Rights. Nova York: Random House, 2001.

20 BURKE, Roland. *Decolonization and the evolution of international human rights*. Philadelphia: University of Pennsylvania Press, 2010; JENSEN, Steven L. B. *The making of international human rights*: the 1960s, decolonization, and the reconstruction of global values. Nova York: CUP, 2016.

21 ALSTON, Philip. Does the past matter? on the origins of human rights. *Harvard Law Review*, v. 126, 2043-2081, 2013. p. 2077.

políticos contra (certos) Estados. Se esse continua sendo o enquadramento com base no qual continuamos falando direitos humanos hoje não significa que seja o único, nem que outras práticas, também, usaram a expressão antes.

Ao entender que Moyn não contou *a* história dos direitos humanos, mas *uma* das possíveis, podemos repensar seu envolvimento com o direito internacional. Se considerarmos que a tarefa autoimposta dos historiadores (principalmente da escola contextualista de Skinner) é pensar conceitos a partir dos seus tempos e que a dos juristas é considerá-los em sua circulação pelo tempo[22] (assim como pelo espaço), a história nas mãos de Moyn ganha contornos mais circunscritos. Para quem parte do direito internacional para compreender os direitos humanos, é custoso considerá-los 'natimortos' com tantos usos dos documentos nas décadas seguintes à Segunda Guerra; afinal, tais textos, minimamente, influenciaram a redação de outras normas nas décadas seguintes ou mesmo tiveram um papel nas suas condições de possibilidade. Ademais, a tese de Moyn de que os direitos humanos, nas décadas de 1950 e 1960, se resumem à luta anticolonial desconsidera que os dois Pactos de 1966 vão além do seu dispositivo primeiro. Apenas o art. 1º comum aos dois documentos se refere à autodeterminação dos povos; dentre os restantes figuram direitos como proteção à vida, à integridade pessoal, direito à educação, garantias judiciais, liberdade de religião e de opinião, direito ao trabalho digno, de formação de sindicatos, direitos políticos, proibição de tortura e da escravidão, liberdade de movimento, direito à seguridade social e outros. Os dois pactos, considerados grandes marcos jurídicos do direito internacional dos direitos humanos, têm menos espaço na trajetória defendida por Moyn do que, por exemplo, a Conferência de Helsinki de 1975, da qual não derivou um corpo jurídico de obrigações. Seu trabalho está mais preocupado com direitos humanos "como um poderoso ideal e movimento transnacional"[23] e menos com a construção da doutrina jurídica internacionalista.

Em segundo lugar, as fontes que informam Moyn são quase, unicamente, estadunidenses, não só dos jornais consultados para quantificar os usos da expressão,[24] como também dos juristas e de suas obras. Se se considera que Moyn ressaltou uma narrativa dentre outras possíveis, há ausências de intelectuais na história intelectual que se pretende: aqueles que pensaram, escreveram e professaram a disciplina em outros lugares são invisibilizados e não contribuem, seja como resistência ao enquadramento dos 70 ou mesmo como sua reprodução alhures. Sua história se restringiu a (homens brancos) juristas de círculos acadêmicos estadunidenses e, em menor medida, europeus. Esse ponto não decorre de chauvinismo que se satisfaria abrangendo a 'contribuição de juristas terceiro-mundistas', mas de, ao não fazê-lo, invisibilizar outros discursos, práticas e histórias que compõem a disciplina.

Na escrita de Moyn, outros usos e experiências dos direitos humanos e do direito internacional são diminuídos. Por exemplo, juristas como os libaneses Jamil Baroody e Karim Azkoul e o afegão Abdul Rahman Pazhwak que colaboraram para enquadrar a autodeterminação dos povos como um direito humano,[25] ou não são mencionados ou o são de forma periférica. Também não têm espaço os latino-americanos que reproduziram o imaginário dos internacionalistas em práticas específicas de direitos humanos em processos de transição para regimes democráticos. Há excelentes trabalhos recentes que mostram que a história do direito internacional na América Latina tem nuances próprias.[26] Mas talvez o ponto mais sensível seja a falta de espaço em *The Last Utopia* para outros projetos 'utópicos' da disciplina, como a noção de "desenvolvimento". É provável que essa noção tivesse muito mais apelo entre juristas do

22 ORFORD, Anne. The past as law or history? the relevance of imperialism for modern international law. In: TOUFAYAN, Mark; TOURME-JOUANNET, Emmanuelle; RUIZ FABRI, Hélène (Ed.). *Droit international et nouvelles approches sur le tiers-monde*: entre répétition et renouveau. Paris: Société de législation comparée, 2013.

23 MOYN, Samuel. *The last utopia:* human rights in history. Cambridge, MA: Belknap Press of Harvard University Press, 2010. p. 7.

24 Moyn compilou a partir dos jornais *New York Times* e *London Times* o número de vezes que a expressão 'direitos humanos' aparece em seus editoriais, de 1785 a 1985. O resultado é um gráfico potente que referenda seu argumento de uma explosão no uso da expressão na década de 1970 quando comparada às décadas anteriores.

25 BURKE, Roland. *Decolonization and the evolution of international human rights*. Philadelphia: University of Pennsylvania Press, 2010.

26 Duas iniciativas nesse sentido são: SCARFI, Juan Pablo. *The hidden history of international law in the americas: empire and legal networks*. Nova York: Oxford University Press, 2017; e, LORCA, Arnulf Becker. *Mestizo international law: a global intellectual history 1842–1933*. Nova York: Cambridge University Press, 2014. Para resenhas, ver respectivamente: LUZ, Cicero Krupp da. O civilizador gentil das Américas: considerações em torno da obra The Hidden history of international law in the Americas: empire and legal networks, de Juan Pablo Scarfi. *Revista de Direito Internacional*, v. 14, n. 3, p. 278-281, 2017; e, VEÇOSO, Fabia Fernandes Carvalho. Book Review/compte rendus. *Journal of the History of International Law:* Revue d'histoire du droit international, v. 20, n. 1, p. 125-131, 2018.

terceiro mundo que direitos humanos nos anos 70.[27] Se a pretensão do artigo definido no título *The Last Utopia* e as afirmações de Moyn que desconsideram outras iniciativas como direitos humanos conferem força àqueles que se convencem pelo seu argumento, o efeito oposto, também, o enfraquece se considerarmos que há outras histórias possíveis.

Por fim, se o que marca a linguagem dos direitos humanos é sua característica antiestatal, Moyn dá poucas pistas sobre como entender seus usos justamente por aqueles que deveriam ser seus alvos, os Estados. Afinal, os direitos humanos afirmados por movimentos sociais não são oriundos de um retorno ao direito natural, mas derivam de costumes e tratados, fontes confeccionadas por Estados. Em *The Last Utopia*, o papel da política externa de Carter na construção dos direitos humanos é secundário quando comparado à agência transnacional de ativistas e movimentos sociais como a Anistia Internacional. Independentemente do debate se a administração Carter é realmente mais consequência do que uma das causas da ascensão dos direitos humanos, o livro oferece recursos limitados para quem quer aprofundar seu impacto na trajetória intelectual do direito internacional, assim como não se preocupa com quem ganha com esse formato. Uma vez que o jurista volta ao passado em busca de autoridade e dimensão prática,[28] é essencial para uma historiografia crítica tentar entender os processos de instrumentalizações de discursos.

No deslocamento dos direitos humanos para o cerne do direito internacional, aqueles foram ombreados com outras normas e instituições deste, cuja marca é a estatalidade: soberania, não intervenção, imunidades etc. Afinal, o que acontece aos argumentos da universalidade e agência transnacional dos direitos humanos quando estes passam a ser resguardados justamente pelo ente estatal que pretendiam superar? De que forma essa nova linguagem antiestatal convive com outra cuja marca sempre foi a da estatalidade, o direito internacional? Quais são os impactos para suas demandas normativas e aceitação como linguagem emancipatória quando os direitos humanos são instrumentalizados pelo Estado por meio do direito internacional? Tais questões certamente interessam à história intelectual do direito internacional.

Ressaltar os limites da obra não significa desmerecê-la. *The Last Utopia* provavelmente continuará sendo parada obrigatória àqueles que se dedicam à história dos direitos humanos, assim como pode auxiliar interessados em analisar o encontro dessa ideia com o direito internacional.

27 Na sua resenha da obra, Anthony Anghie aventou que a 'utopia do desenvolvimento' tenha gerado muito mais apelo e critica Moyn por menosprezar a *New International Economic Order*, uma iniciativa justamente dos anos 1970 (ANGHIE, Anthony. Whose utopia?: human rights, development, and the third world. *Qui Parle: Critical Humanities and Social Sciences*, v. 22, n. 1, p. 63-80, 2013).

28 GALINDO, George Rodrigo Bandeira. Force field: on history and theory of international law. *Rechtsgeschichte,* Frankfurt, v. 20, p. 86-103, 2012.

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