

BUSINESSES AND HUMAN RIGHTS: REGIONAL APPROACHES

Empresas y Derechos Humanos: enfoques regionales

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Abstract

Transnational corporations (TNCs) have great political, economic, and legal power around the world, supported by a structure that protects their interests, situation that is clearer when TNCs' activities have adverse impacts on human rights. This has been proven in cases such as Chevron and its effects in the Ecuadorian Amazon region, or the collapse of the Rana Plaza building in Bangladesh in 2013.

Against this background, the international community recognized the need to fill the legal vacuum in regard to TNCs' activities, and two main frameworks were created. First, the Norms on the Responsibility of TNCs and other Business Enterprises with regard to Human Rights (2003), which were never formally adopted; and the Guiding Principles on Business and Human Rights (UNGPs) (2011), which are strictly voluntary. Afterwards, in 2014, the UN Human Rights Council acknowledged the indispensability of a legally binding instrument regarding human rights and TNCs, therefore, creating a specialized working group for this purpose.

The aforementioned efforts are part of the International System, which raises the following questions: Are regional bodies addressing this issue? Do any of the regional human rights instruments have dealt with it in any way? The focus of this paper will be to compare and contrast existent human rights regulations related to transnational corporations' impact on human rights, focused on the European and the Inter-American regional systems.

Keywords

Human Rights, Transnational Corporations, Inter-American System, European System, Standards.

Resumen

Las empresas transnacionales (ETN) tienen un gran poder político, económico y legal en todo el mundo, respaldado por una estructura que protege sus intereses, situación que se hace más clara cuando las actividades de las ETN tienen impactos adversos sobre los derechos humanos. Esto ha sido probado en casos como el de Chevron y sus efectos en la región amazónica ecuatoriana, o el colapso del edificio Rana Plaza en Bangladesh en 2013.

En este contexto, la comunidad internacional reconoció la necesidad de llenar el vacío legal con respecto a las actividades de las ETN, y se crearon dos marcos principales. Primero, las Normas sobre la Responsabilidad de las ETN y otras Empresas Comerciales en materia de Derechos Humanos (2003), que nunca fueron adoptadas; y, los Principios

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Rectores sobre Empresas y Derechos Humanos (PRNU) (2011), que son estrictamente voluntarios. Posteriormente, en 2014, el Consejo de Derechos Humanos de la ONU reconoció la necesidad de un instrumento jurídicamente vinculante en materia de derechos humanos y las ETN, por lo que se creó un grupo de trabajo especializado para tal fin.

Los esfuerzos antes mencionados son parte del Sistema Universal, lo que plantea las siguientes preguntas: ¿Los organismos regionales están abordando el tema? ¿Alguno de los instrumentos regionales de derechos humanos lo aborda de alguna manera? El enfoque de este artículo será comparar y contrastar la normativa existente en materia de derechos humanos dirigidas a la regulación del impacto de las empresas transnacionales en los derechos humanos, tanto dentro del sistema regional europeo como el interamericano.

Palabras clave

Derechos humanos, Empresas transnacionales, Sistema Interamericano, Sistema Europeo, Estándares.

1. Introduction

Transnational corporations (TNCs) have profound effects on human rights. Through foreign investment, they bring employment and economic growth for local communities, improving the living standards of their people and furthest aiding with the realization of human rights, economic, social and cultural rights (ESCR) in particular, with the consideration that when discussing ESCR, within the Inter-American system, environmental rights are considered part of this grouping. Nevertheless, for their political, economic, and legal power, there is a potential harm and adverse impacts on human rights, like infringements to the rights to life and health or widespread environmental damages (McBeth, 2010, p. 245). This has been proven in cases such as Chevron and its effects in the Ecuadorian Amazon region, or the collapse of the Rana Plaza building in Bangladesh in 2013. There is a variety of human rights that could be potentially infringed by TNCs' activities, including the rights to life, personal integrity, dignity, freedom of expression, access to information, to live free from discrimination and violence, and to judicial protection and remedies.

A corporation can be involved in human rights violations in different ways. As listed by Jason Karp (2014), in first place, the corporation might be "complicit with a state's human rights violations". Secondly, it may have involvement in a situation "which [it is] bound up in daily aspects of governance together with states and where human rights violations are said to occur". Finally, there is the option "in which companies have greater freedom of action from state interference/regulation [...], leading to accusations of human rights violations" (p. 16). Much has been discussed, both academically and legally, regarding the best approach and method to regulate TNC's activities, whereas if they should be separated from domestic-level discussions and if human rights standards used for other non-state actors can be similarly applied, and if it possible, how to apply them (Karp, 2014, p. 16). The general opinion of the international community is that there is a need to fill the legal vacuum with regards to TNCs' activities.

Legal development has occurred in the International Human Rights System in these matters, which raises the question: Are regional bodies addressing the issue? If so, do regional human rights instruments deal with this issue? The focus of this paper will be to compare existing regulations related to TNCs' impact on human rights between the European and the American regional systems. To achieve this, it is important to start with a brief revision of

the existent initiatives in the Universal Human Rights system. Following, it will analyze both the European and American frameworks and initiatives, with a focus on the legal structures, policies, and its application through decisions from the regional courts. As a conclusion, this paper will provide a comparison between the current state of the regional approaches and a recommendation of plausible methods to increase accountability from TNCs.

2. Initiatives within the Universal Human Rights System

The international community, within what is considered the Universal Human Rights system, is at the heart of the United Nations mechanisms and has made considerable efforts towards the creation of a series of rules to regulate TNCs' and other businesses' influence in the scope of human rights.

Firstly, the Norms on the Responsibility of TNCs and other Business Enterprises concerning Human Rights, approved on August 13th, 2003, by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, constitute a relevant first step “[...] in holding businesses accountable for their human rights abuses [...] in] a succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights, humanitarian law, international labor law, environmental law, consumer law, anticorruption law, and so forth” (Weissbrodt and Kruger, 2003, p. 901). These norms set general obligations, the right to equal opportunity and non-discriminatory treatment, the right to security of people, rights of workers, as well as an obligation for TNCs and other business enterprises to respect national sovereignty and human rights, including environmental protection measures and general provisions of implementation. Nevertheless, despite the fact of its relevance, they are considered with “no legal standing”².

Secondly, Professor John G. Ruggie, Special Representative of the UN Secretary-General on business and human rights, presented the UN Human Rights Council (UNHRC) a report with concrete recommendations resulting in the UN Guiding Principles on Business and Human Rights, which were adopted by the UNHRC by Resolution 17/4 on 16 June 2011. The Principles have three main pillars: States' duty to protect human rights; the corporate responsibility to protect, referring to acting with due diligence; and the access to remedy if the rights are not respected (Office of the High Commissioner of Human Rights of the United Nations, 2010, p. 6). These are a “[...] set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations” (UN Human Rights Council, 2014, p. 2). In the same resolution, the UNHRC established a topic-specific working group.

Finally, the UNHRC (2014), acknowledging the necessity of a legally binding instrument, established “an open-ended intergovernmental working group [...] to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (p. 2). The Open-ended Intergovernmental Working Group (OEIGWG) has already held seven sessions and they are working on a revised draft of a legally binding instrument on business activities and human rights (UN Human Rights Council, 2021, p. 2). During the last session, that focused on State-led negotiations, discussions proceeded article by article, with specific revision of the changes introduced in the third revised draft. The OEIGWG will hold an eighth session in 2022, since the updated draft will be presented by the Chair-Rapporteur no later than by the end of July 2022. The Chair-Rapporteur is expected to update the draft legally binding

² See more in: Choudhury, B. (2018).

instrument taking into consideration the compilation of the concrete textual proposals submitted by States during the seventh session and the outcomes of the consultations as reports by the friends of the Chair³.

3. Regional frameworks and initiatives

3.1. European system

3.1.1. General legal regional framework

In formal terms, the European Convention on Human Rights (ECHR) applies to violations of human rights by States. Article 1 reads “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (European Convention on Human Rights, 1950). This provision is understood as within the scope of the States’ obligation to bring protection against human rights-related abuses. The same convention defines the European Court of Human Rights’ jurisdiction as limited to applications received by persons, non-governmental organizations (NGOs) or groups of individuals “claiming to be the victim of a violation by one of the High Contracting Parties of the rights outlined in the Convention or the Protocols thereto” (Art. 34). Despite this jurisdictional restriction, “international human rights bodies have gradually defined [...] the duties of States to control the conduct of non-state actors to avoid interference with human rights, giving rise to the notion of ‘indirect’ obligations” (O’Brien, 2018, p.17).

Furthermore, the European Social Charter (ESC) determines that Member States “accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the [rights and principles contained in the ESC] may be effectively realized” (1996, Part 1). These obligations are “the basis of the state’s duty to take effective domestic measures to prevent human rights abuses by non-state actors” (O’Brien, 2018, p. 18). The Additional Protocol Providing for a System of Collective Complaints established a mechanism that allows social partners and NGOs to file collective complaints, through the European Committee of Social Rights, against States for their alleged breach to the ESC. Nevertheless, the ESC recognizes rights that may have implications for businesses, mainly worker-related, and recognizes negative and positive duties for States.

3.1.2. About the Council of Europe Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States on human rights and business, adopted on March 2nd, 2016

Its preamble recognizes that “business enterprises have a responsibility to respect human rights” and recalls “member States’ obligation to secure to everyone within their jurisdiction the rights and freedoms defined” in the ECHR. The Committee of Ministers recommended member States to:

1. Review national legislation and practice;
2. Ensure wide dissemination of the recommendation among competent authorities and stakeholders to raise awareness of corporate responsibility to respect human rights;
3. Share examples of good practices related to the implementation;
4. Share plans on national implementation of the UN Guiding Principles;
5. Examine the implementation of the recommendations no later than 5 years after the adoption (2021).

³ Group of ambassadors in Geneva to act as friends of the Chair, which shall reflect a balanced regional representation, to start consultations with a view to facilitating and advancing work on the draft legally binding instrument during the inter-sessional period, aiming at ensuring the broadest possible cross-regional support.

The Recommendation includes detailed suggestions for the implementation of the UN Guiding Principles, including the need to take into consideration three fundamental pillars, which are: non-discrimination, gender perspectives, and a “full spectrum of international human rights standards”.

Furthermore, it calls on member States to enable corporate respect for human rights, referring to the application of measures to encourage or require that “business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations”, and that “business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence [...]”. The Recommendation includes a description of what a company’s due diligence process should include: “project-specific human rights impact assessments, appropriate to the size of the business enterprise and the nature and context of the operation”, suggesting measures that States could take. Additionally, member States are encouraged to require greater transparency and reporting on human rights measures adopted by businesses, including corporate responsibility and due diligence (Council of Europe, 2016, ¶ 20 -21).

Furthermore, the Recommendation addresses “measures to facilitate access to justice for victims of business-related abuses via judicial and non-judicial remedy mechanisms [...]and] highlights additional steps required to protect the rights of specific groups including workers, human rights defenders, and children” (Council of Europe, 2016, ¶ 21).

After the adoption of the Recommendations, an online platform for Human Rights and Business was adopted to enable the sharing of National Action Plans (NAPs) and implementing actions⁴. The platform allows users to search and view the NAPs and implementing actions of member States, as well as standards and guidelines applicable to Human Rights and Business.

3.1.3. Decisions of the European Court of Human Rights (ECtHR)

As part of the positive obligations doctrine developed by the ECtHR, States are required to abstain from interfering with human rights and “obliged to adopt protective or preventive measures to avert human rights abuses by third parties”, including TNCs. Therefore, “intervention may be required by States to secure human rights under the ECHR ‘even in the sphere of the relations of individuals between themselves’” (O’Brien, 2018, p. 19).

It is worth noting that there is a wide theoretical discussion on the issue of *horizontal application of human rights* (also called *drittwirkung*). According to this legal concept, originally developed in the German legal system and that literally translates as “third effect” or effects from third parties, a government can be held responsible for failing to prevent the violation of an individual’s human rights by another person or private non-state actor through either judicial or law enforcement mechanisms, that is, the application of human rights provisions in the private sphere. This principle was adopted by the European Court of Human Rights in the case of *X and Y v. The Netherlands*, where the ECtHR said that:

[...] although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: [...] there may be positive obligations inherent in an effective respect for private or family life [...]. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves” (1985, ¶23).

⁴ Online Platform for Human Rights and Business (2016).

With this interpretation, the ECtHR acknowledges that the States' obligations can go into the private sphere. This perspective has been replied in several other decisions, like *Moldovan and Others v. Romania and Ouranio Toxo and Others v. Greece*.

In *Osman v. United Kingdom*, the ECtHR held the UK responsible for abuses perpetrated by non-state actors by determining that

[...] where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their [...] duty to prevent and suppress offences against the person [...], it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures [...] (1998-VIII ¶116).

Furthermore, the ECtHR has found that “[a] state’s acquiescence or complicity with the acts of private individuals breaching human rights can [...] engage its responsibility under the ECHR” (O’Brien, 2018, p. 20), in cases like *Ireland v. the United Kingdom*.

Moreover, the ECtHR has identified a positive duty of States to regulate private industry, in the context of “States’ failures to prevent harms to human rights by corporations” (O’Brien, 2018, p. 20). In *Taşkın and Others v. Turkey*, in the context of pollution caused by a gold mining company, the ECtHR decided that

[...] where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life [...]. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 8 would be set at naught (2004-X, ¶113).

Similarly, in *Fadeyeva v. Russia*, “the applicant complained that the operation of a steel plant endangered her health and well-being” and the ECtHR found that “[...] the State’s responsibility in environmental cases may arise from a failure to regulate private industry” (O’Brien, 2018, p. 20), giving rise to States’ positive duty to take reasonable and appropriate measures to secure human rights.

The ECtHR has decided on cases relating to violations arising from business activities on interference with freedom of expression and privacy by media companies (*Axel Springer AG v. Germany*, 2012); abuses occurring in private hospitals (*Storck v. Germany*, 2005) and schools (*Costello-Roberts v. the United Kingdom*, 1993); interference by employers with the right to form and join trade unions (*Wilson, the National Union of Journalists and Others v. the United Kingdom*, 2002); and legislation and other regulatory measures required of States to tackle human trafficking (*Rantsev v. Cyprus and Russia*, 2010) (O’Brien, 2018, p. 21).

Finally, although not a human rights court, the Court of Justice of the European Union (CJEU) has discussed how intimately connected with businesses are other less common types of rights, like the right to be forgotten. In *GC and Others v. CNIL*, as it is practically impossible for Google to get consent for everything their search results present, users must first inform Google about the personal data they do not consent to being listed. The CJEU also determined that private companies should have bigger responsibilities, like controlling

user-generated content online. In *Glawischnig-Piesczek v. Facebook*⁵, it concluded that to remove identically worded content previously determined as defamatory, national courts may order Facebook to monitor all posts shared by the users.

3.1.4. Recent legal developments

On 10 March 2021, the European Parliament adopted a legislative initiative report calling for “the urgent adoption of a binding EU law that ensures companies are held accountable and liable when they harm - or contribute to harming - human rights, the environment and good governance” (p. 9). This report sets out recommendations to the European Commission (EC) on corporate due diligence and accountability, including a draft directive, proposing the introduction of “a mandatory corporate due diligence obligation to identify, prevent, mitigate and account for human rights violations and negative environmental impacts in business’ supply chains” (Richmond *et al.*, 2021, ¶1).

The draft directive (European Parliament, 2021, pp. 1-40) recommends a very wide scope, in the sense that large undertakings governed by the law of a member state, private or state-owned, publicly listed small and medium-sized undertakings and high-risk and medium-sized undertakings would be covered by the proposed legislation. The directive also includes companies governed by third country law if they provide goods or services in the EU market. This is an interesting addition, considering its application means broadening the application of the legislation to organizations based outside the EU.

The directive also recommends determination of specific duties and obligations for enterprises, making them “take all efforts to identify and assess potential or actual impacts on human rights, the environment or good governance caused by, contributing to or linked to their operations or business relationships, using a risk-based monitoring methodology that takes into account the impact, nature and context of the undertaking’s operations” (European Parliament, 2021, p. 35). About investigations, sanctions and penalties, the directive grants Member States discretion to set proportionate, turnover-based sanctions in accordance with their national laws, which may include temporary or indefinite exclusion from public procurement processes, state aid, public support schemes and even seizure of commodities. A key aspect included is that stakeholders should be allowed to voice concerns on potential or actual adverse impacts and enterprises must provide a mechanism to enable it, as early-warning and mediation system.

Finally, on 23 February 2022, the European Commission published the proposal for a Corporate Sustainability Due Diligence draft directive, with the objective of fostering “sustainable and responsible corporate behavior and to anchor human rights and environmental considerations in companies’ operations and corporate governance” (p. 1). The way the European system has shaped its guidelines, decisions, and legislation on business and human rights (BHR) differs in certain ways from what the Inter-American system’s approach has been. The following section will provide a glimpse of how the issue has been tackled in the Americas.

⁵ *Glawischnig-Piesczek v. Facebook* (2019).

3.2. Inter-American system

3.2.1. Inter-American Commission on Human Rights report: “Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities”

The Inter-American Commission on Human Rights (IACHR) oversees the States’ obligations regarding the extraction, exploitation, and development activities concerning natural resources. In the report on ‘Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities’, published on December 31st, 2015, The Commission recognizes the importance of development projects, but highlights that States have “ineluctable obligations to respect and guarantee relevant rights in all settings, including [...] extraction and development activities” (2015, p. 9). The IACHR also mentions the range of human rights that can be impacted by the implementation of extractive and development projects, like the rights to life, to health, to personal integrity, to a healthy environment, to non-discrimination, to cultural identity and religious freedom, to personal liberty and social protest, information and participation, to protection from forced displacement, and the collective rights of the indigenous people and Afro-descendant communities over their territories and its natural resources, as seen in the rights of consultation and consent.

The IACHR’s legal analysis focuses on the duty to respect and ensure all human rights with due diligence, and to bring domestic legislation in line with the regional human rights instruments. By interpreting the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights evolutionarily and systematically, the Commission considers that the States’ obligations include six main components: (i) the duty to adopt an appropriate and effective regulatory framework, (ii) the obligation to prevent violations of human rights, (iii) the mandate to monitor and supervise extraction, exploitation, and development activities, (iv) the duty to guarantee mechanisms of effective participation and access to information, (v) the obligation to prevent illegal activities and forms of violence against the population in areas affected by extraction and development activities, and (vi) the duty to guarantee access to justice through investigation, punishment and access to adequate reparations for violations of human rights committed in these contexts (2015, p. 10).

The Commission addresses impacts on some rights, specifically,

violations of the right to collective ownership of indigenous and tribal peoples, and Afro-descendent communities over their lands, territories and natural resources; the right to cultural identity and religious freedom; the right to life, health, personal integrity, and a healthy environment; economic and social rights such as food, access to water and labor rights; the right to personal liberty and social protest; and protection from forced displacement (IACHR, 2015, p. 11).

Finally, the report provides recommendations to the States on the obligations and lines of action they should follow under international human rights law, including a) design, implementation and effective enforcement of “a normative framework for the protection of human rights applicable to extractive, exploitation, and development activities”; b) prevention, mitigation and suspension of the negative impacts of extractive and development activities; c) “take reasonable steps to prevent violations of human rights where there is a real and immediate risk”; d) adoption of the necessary measures to put in place or strengthen systems of monitoring and control of extraction or development”; and, e) “take decisive actions to fight against impunity for human rights violations committed in the context of business activities

of extraction or development, through extensive and independent investigations, imposing sanctions [...] and providing [...] reparations to the victims” (IACHR, 2015, pp. 178-179).

3.2.2. Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights report: Business and Human Rights: Inter-American Standards

On January 27th, 2020, the Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights (REDESCA, by its initials in Spanish) of the IACHR published its report called: Business and Human Rights: Inter-American Standards, the first time that the IACHR comprehensively addresses the issue. The report begins with an identification of the fundamental Interamerican standards, like the centrality and focus on the person and human dignity; the universality, indivisibility, interdependence, and interrelation of human rights; the prevailing importance of equality and non-discrimination; the rights to development, healthy environment and defend human rights; the transparency and access to information; the need of free, previous and informed consultation; the mechanisms of prevention and due diligence; extraterritoriality; and the fight against corruption (IACHR, 2019, pp. 33-42).

The report develops the obligations that States must fulfill in the context of business and human rights from the perspective of the Inter-American system. First, referring to States’ general obligation to respect, found in Art. 1.1 of the Convention, determines that “the respect obligation implies that States should abstain from deploying behaviors related to business activities that contravene the exercise of human rights” (IACHR, 2020, p. 48). This situation could arise in investment or commerce agreements, if the State controls the company, or with State acquiescence. Concerning the general obligation to guarantee human rights, REDESCA identifies four duties, to i) regulate and adopt domestic legal provisions; ii) prevent the violation of human rights in the context of business activities; iii) oversee said activities; and iv) investigate, sanction, and ensure the access to integral reparations for the victims in these contexts (IACHR, 2020, pp. 54-55).

It also develops on the extraterritorial scope of the States’ obligations, evaluating if the acts or omissions attributed to the State might denote international responsibility for violation of human rights (IACHR, 2020, pp. 81-82). The discussion relating to the extraterritoriality of human rights obligations in general and in the context of business and human rights. Traditionally, the discussion of the extraterritorial application of human rights obligations has centered on the understanding of jurisdiction as “effective control”. Nevertheless, more recently, this understanding has been extended to cases in which the State has no *effective control* over the right-holder, but only over a potential cause of harm to that person, to apply it to cases of environmental harm, relating to States’ duties to prevent, protect or remedy, or in BHR cases where private persons are causing the harm (businesses or corporate entities)⁶.

The Report mentions the possible legal effects for companies from the general obligations of States to respect and guarantee human rights, concluding that “under the current Interamerican order, the legal content of human rights and the corresponding State obligations generate effects on businesses, although with different degrees and scope than those required of States [...]” (IACHR, 2020, p. 101). Hence, progressively, the situations and specific aspects that the authorities should oversee will have to be clarified by the System.

Furthermore, it talks about areas of special priority for the IACHR and REDESCA: the transitional justice and accountability of economic actors; the essential public services

⁶ For further discussion, see: Besson (2020).

and privatization contexts; climate change; aspects regarding business, fiscal policies, and influence on public decision-making; and the relation between businesses and information and communication technologies (IACHR, 2020, pp. 105-154). The Report underlines that “companies can be positive agents for the respect and guarantee of human rights, as well as can generate or motivate with their actions and behavior key changes [...] to transform those experiences of impunity and human rights abuses [...]” (IACHR, 2020, p. 51). Finally, the text concludes with recommendations for States, businesses, and to actors within the Organization of American States.

For example, for States, REDESCA recommended them to review and adapt the internal regulatory framework applicable to the context of business and human rights; for businesses, REDESCA mentioned that the recommendations for States have effects on businesses, reason, why companies must be oriented and guide their actions and processes by those international human rights standards applicable as the case, may be, refraining from infringing, contributing to, facilitating, encouraging or aggravating human rights violations and address negative human rights consequences in which they have any involvement; and to actors within the OAS to incorporate the applicable standards related to state obligations of respect, guarantee, cooperation and extraterritoriality in matters of human rights in the periodic evaluations that the Working Group of the Protocol of San Salvador carries out on the observance of economic, social, cultural and environmental rights.

3.2.3. Decisions of the Inter-American Court of Human Rights (IACtHR)

The IACtHR has approached State responsibility in diverse ways. First, in *González Medina and Family v. Dominican Republic*, the IACtHR said that a State’s international responsibility can be based on acts or omissions: “[...] it is sufficient to demonstrate that acts or omissions have been verified that have allowed the perpetration of these violations or that a State obligation exists that the State has failed to meet” (2012, ¶133). Complementarily, in the case of the *Pueblo Bello Massacre v. Colombia*, the Court stated that “[...] it is not necessary to determine [...] the guilt of the authors or their intention; nor [...] to identify individually the agents to whom the acts that violate the human rights embodied in the Convention are attributed” (2006, ¶112).

Furthermore, the IACtHR’s jurisprudence has stated that violation of human rights can occur when the acts or omissions are committed by a particular non-state actor, like businesses or economic actors. In the case of *Velázquez-Rodríguez v. Honduras*, the Court determined that “[a]n illegal act which violates human rights, and which is initially not directly imputable to a State [...] can lead to international responsibility of the State [...] because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention” (1988, ¶172).

The IACtHR has found States internationally responsible for breach of their obligations in cases in which businesses were involved. In the case of the *Workers of the Hacienda Brasil Verde v. Brazil*, the Court analyzed the ‘knew or should have known’ principle and concluded that the State did not act with the required due diligence to adequately prevent the specific human rights violation discussed in the case, which was the existence of a contemporary form of slavery, and that it did not act in a reasonably expected way to end the violation (2016, ¶315-343).

The Court has also found violation of human rights for acquiescence, tolerance, or collaboration in the constitutive facts in the context of actions of non-state actors, specifically paramilitary groups. This notion was developed in a series of cases against Colombia,

known as Case Vereda, La Esperanza, Yarce and others. In the case of the *19 Merchants v. Colombia*, the Court declared the State responsible for its collaboration in the acts before the third party's illegal act, the State's acquiescence to the meeting of the third parties in which the act was planned and the active collaboration of the State in the execution of the illegal acts (2004, ¶135).

The Court has also referred to States' duty to implement effective supervision and oversight mechanisms to protect indigenous territories and natural reserve areas from the harm that might originate from the acts and omissions of private actors. In the Case of the *Kaliña and Lokono People v. Suriname*, the IACtHR established that "the State has the obligation to protect the areas of both the nature reserve and the traditional territories to prevent damage to the indigenous lands, even damage caused by third parties, with appropriate supervision and monitoring mechanisms [...]" (2015, ¶221). The Court added that "the State is also responsible for supervising and monitoring actions taken on the affected territory in order to achieve its prompt rehabilitation so as to ensure the full use and enjoyment of the rights of the peoples" (¶222).

In cases on collective rights of indigenous populations, the IACtHR considered the consequences derived of businesses' actions and their human rights impact. In the Case of the *Saramaka People v. Suriname*, the Court said that "[n]ot only have the members of the Saramaka people been left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems, but they received no benefit from the logging in their territory" (2007, ¶153). Similarly, in the Case of *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court evaluated the business' behavior, asserting that "the company's actions [...] failed to respect the established structures of authority and representation within and outside the communities" (¶191) or that "the company's actions did not form part of an informed consultation" (¶209). In the Case of the *Kaliña and Lokono Peoples v. Suriname*, the IACtHR attributed direct responsibility to the companies involved by recognizing that their "activities [...] resulted in the adverse impact on the environment and, consequently, on the rights of the indigenous peoples [...]" (2015, ¶223). The decision cited the UN Guiding Principles: "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. [Requiring] appropriate steps to prevent, investigate, punish, and redress such abuse through effective policies, legislation, regulations and adjudication." (¶224). The fact that this decision specifically mentions the UNGPs reflects the complementarity of the universal and regional systems, and the IACtHR's practice that it has the authority to use the content of other international instruments to inform the analysis of the content of the American Convention.

Furthermore, the Advisory Opinion 23/17 details that States have the obligation to prevent significant environmental damage within and outside of their territory, including cases in which businesses can be involved. Thus,

States must: regulate activities that could cause significant harm to the environment in order to reduce the risk to human rights; supervise and monitor activities under their jurisdiction that could produce significant environmental damage and [...] implement adequate and independent monitoring and accountability mechanisms; require an environmental impact assessment when there is a risk of significant environmental harm; institute a contingency plan in order to establish safety measures and procedures to minimize the possibility of major environmental accidents; and, mitigate significant environmental damage, even when it has occurred despite the State's preventive actions (2017, ¶174).

This Advisory Opinion is significant in the matter under analysis because it included the notion of extraterritorial obligations of the States, in a strategic move to strengthen the development of its jurisprudence in what it relates to States' duties, especially when referring to cross-border harm.

More recently, the IACtHR adopted two decisions worth mentioning. First, in the *Lemonth Morris and other v. Honduras* case (Miskitos Divers), the Court addresses the working and health conditions of Miskito divers who work for a fishing company that operates in their territory (of the Miskitos). The Court reviews the friendly agreement reached by the parties and makes a clear reference to the UNGPs. The Court states that “[...] the States have the duty to prevent human rights violations caused by private companies, for which they must adopt legislative and other measures to prevent such violations, and investigate, punish and repair such violations when happen” (2021, ¶48). With this background, the Court determines that it is the obligation of the States to carry out regulations, in laws and public policies, so that the companies that operate in their territories adopt actions aimed at the correct respect of all the human rights recognized in the different instruments of the system. However, despite the value of the inclusion of the UNGPs in the judgment, the Court did not make any specific application to the case sub judice, nor did it order that Honduras enact specific laws or policies to protect human rights from the activities of private companies; therefore, the effect of including the UNGPs lost its strength.

A similar situation occurred in the case of *Vera Rojas et al. v. Chile*, where the Court, by developing the right to health of girls and boys with disabilities and the role of the state in ensuring that private companies offer a quality and efficient service, in the sense of what is developed in its jurisprudence, with mention to the notion of progressiveness” (2021, ¶100); and to speak of the UNGP in the context of the state duty to regulate and supervise private companies that offer public services do not affect the rights to life and personal integrity of people ” (2021, ¶84-89). Despite the facts of the case, there is no reference to the issue of BHR that implies a true development of jurisprudence and standards applicable to future analogous cases. Similarly, the Court did not order specific measures from the State that could prevent future human rights violations, especially in the context of the business operations in relation to private health insurance companies and harmful practices that they can apply when pursuing their interests, without considering human rights.

After taking a look of this background, it can be concluded that although the Court has begun to apply the theory of BHR and non-binding international standards such as the UNGP, by only focusing on a considerate analysis and leaving aside an inclusion of the issue in the ordered reparations, the Court has missed great opportunities to determine standards and to create guidelines for the countries of the region.

4. Conclusions

Both the European and the Inter-American systems, are in line with what the universal system of human rights has indicated about corporate activity and human rights. This is shown on the adoption and incorporation of the UN Guiding Principles in their own regional guidelines, frameworks, reports, and jurisprudence, as well as the notions of corporate responsibility and due diligence. This demonstrates certain consistency and real complementarity between the regional systems and the universal system, not reflecting a hierarchical relationship between them, but more of a dialectical approach in which there is constant interaction and integration that aims to have human rights protection systems support each other.

The notion of indirect obligations for states has been developed and reflected in both systems' jurisprudence, with a heavy reliance on due diligence as the main standard for the indirect introduction of human rights obligations to TNCs. Thus, the similarities show a trend to expand states' duties, including their duty to take effective domestic measures to prevent human rights abuses by non-state actors.

Due to the specific circumstances, the Inter-American system has more widely developed jurisprudence relating to businesses' activities, their influence, and possible human rights violations, as, regionally, TNCs operations have had a particularly negative effect in the indigenous populations. This can be evidenced in paradigmatic cases like *Kaliña and Lokono Peoples v. Suriname*, where the IACtHR attributed direct responsibility to businesses for human rights violations; and the *Sarayaku v. Ecuador* case, in which the Court determined that collective rights of indigenous population were affected due to the consequences of businesses' actions. Nevertheless, considering the most recent developments (Corporate Sustainability Due Diligence draft directive) in the European sphere, there are more legislative prospects in Europe with a higher chance of actual national implementation due to the way the system is set up.

Regional systems must continue developing standards, not only focusing on developing them through jurisprudence, but also in preventing the human rights violations, by enabling dialogue that involves all stakeholders, including states, NGOs, civil society, experts, and business representatives, so that those standards are not only compatible with the regional and universal systems, but also feasible and achievable in practice. Considering that Europe has its integration mechanisms to develop standards for BHR and given the differences with the Inter-American system and its lack of common legislation on the matter, a regional and further comprehensive monitoring mechanisms should be adopted, aimed at obtaining specific information on states' actions with the objective of to making sure that businesses and TNCs abide their obligations to respect human rights, in the context of their activities.

The European Parliament's report and proposed draft directive is a clear move and sign of support for the implementation of mandatory human rights and environmental obligations not only for local businesses, but also for TNCs that have shown a tendency of taking advantage of the legal vacuums to exercise their activities freely. This proposal is truly valuable as, once implemented, it will have a real transformative impact on how human rights are protected in the regional European context.

Despite the recognition and importance of the regional human rights systems, it is still the States' main responsibility to regulate business and TNCs' activities in their jurisdictions. Hence, States must commit to adopting stricter legislation that sets clear paths of action for businesses that requires them to respect human rights in the context of their activities. That legislation should also enable domestic tribunals to provide effective judicial protection and guarantees in case of human rights violations.

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