



HUMAN RIGHTS
AND BUSINESS
CENTRE

TREATY ON BUSINESS AND HUMAN RIGHTS: TWO MAJOR ISSUES

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INTRODUCTION

The potential drafting of a binding Treaty on Business and Human Rights raises some unclear issues both to the academy and to civil society. Aiming to contribute to the discussion on the theme in a national level, **Homa** is presenting a series of papers with brief comments about some of the most relevant points.

In this article, two issues will be discussed: (i) the recognition of transnational enterprises as subjects of international law, directly responsible for human rights violations; (ii) the accountability scope of these companies, examining the inclusion, in this aspect, of all human rights or just gross violations.

The analyzed topics have as their starting point the adoption of Resolution 26/9 by the UN Human Rights Council in June 2014, which established the Working Group for the drafting of a binding instrument on Business and Human Rights. The first point concerns the possibility of recognizing transnational companies as subjects of rights and duties under International Law. Therefore, holding them accountable in cases of human rights violations. In this sense, harmed individuals could directly request the companies for reparation, regardless of the behavior of the Member States, who act as intermediaries in this process. In other words, complying to international human rights standards, con-

trolling and being held accountable for the activities of companies, would be no longer the State's sole responsibility. Transnationals themselves would also take on this role, becoming accountable for violations related to their entire production chain, in any territory they are established.

The second topic of discussion will be the definition of the scope of the Treaty on Business and Human Rights shall encompass: Should it be restricted to gross violations or include all human rights? Which of the two options would bring greater effectiveness to this new instrument? Which of the two would really extend the level of protection of individuals beyond the current one?

Both the discussion about the possibility of admitting transnationals as subjects of rights and duties as the uncertainty about the scope of the treaty has divided a good part of the academic works related to this matter, as we will see throughout this article.

TRANSNATIONAL ENTERPRISES AS SUBJECTS *OF DUTIES*?

There is a resistance in the academy to the idea of direct accountability of companies based in the statement that only the States, while subjects of formal international law, could be directly held accountable for the violation of human rights provided in international Treaties. Another

argument in this respect is linked to the sovereignty of States, since the accountability of companies could come into conflict with the state jurisdiction under a given territory.

Traditionally, International Law was made by States and for States¹. Its main objective was to bring some order to inter-state relations, seeking to regulate its interests such as borders and maritime boundaries, diplomatic privileges and immunities, legal disputes and treaties between them, and recognition of States. Until World War II, internationalists believed that international law could be applied only to States, and that only States could be subjects of international law².

However, after the Second World War, non-state actors, including corporations and individuals, came to be accepted as part of the international legal system as subjects of rights and duties. The Trials of Nuremberg were a paradigm-shifting moment when, for the first time, individuals were liable in an international court, expanding the traditional conception of the subjects of international law.

¹ LOPEZ, Carlos. **International talks on a treaty on business & human rights: A good start to a bumpy road**. Business & Human Rights Resource Centre. Available at: <http://business-humanrights.org/en/international-talks-on-a-treaty-on-business-human-rights-a-good-start-to-a-bumpy-road>

² INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. **Beyond Voluntarism: human rights and the developing international legal obligations of companies**. Versoix, Switzerland. 2002. Available at: http://reliefweb.int/sites/reliefweb.int/files/resources/F7FA1F4A174F76AF8525741F006839D4-ICHRP_Beyond%20Voluntarism.pdf

Nevertheless, even before this event, we can find examples of accountability of non-State agents. Jennifer Martinez, researcher of the Stanford Law School, published a detailed article³, which later would become a book, reporting that between 1817 and 1871, bilateral treaties between Britain and several other countries, including the USA, led to the establishment of international courts for the abolition of the slave trade. These were the first International Human Rights Courts. They were comprised of judges from different countries and had the explicit purpose of promoting humanitarian objectives. Although almost completely ignored by historians and internationalists, this event indicated a change of perspective in the international system, wherein the individual is seen as a subject to be safeguarded by international law.

Still in the wake of accountability of non-state entities, an important example is the International Criminal Court (ICC). According to Nadia Bernaz⁴, during the preparation of the Rome Statute, there were arguments towards holding companies accountable for international crimes. Although not fully rejected, this proposal was not included in the final statute. This pro-

³ MARTINEZ, Jennifer (Jenny) S., **Anti-Slavery Courts and the Dawn of International Human Rights Law**. Yale Law Journal, Vol. 117, p. 550, Fall 2007. Available at: <http://ssrn.com/abstract=984077>

⁴ BERNAZ, Nadia. **Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient**. Available at: <http://business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient>

cess of non-recognition of the liability of corporations has put in check the idea that corporations could, in fact, have direct international law obligations.

In other words, it seems that the previous opening on the extent of subjects of international law, verified at the moment in which individuals started to be featured, was interrupted during the drafting of the Rome Statute. The opportunity of broadening this concept in order to include the corporations was then lost.

However, it should be clarified that, even if the accountability of companies had been provided in the Rome Statute, such provision would not include the protection of all human rights - which we believe to be necessary for an effective protection of individuals from companies. According to the perspective adopted in the drafting of the Statute, only gross violations (as, for example, war crimes and humanitarian law offenses) would be included as practices capable of triggering accountability. Such a provision, yet incomplete, would have marked the first step towards considering companies as subjects of duties in the international context.

Currently, the elaboration of the Treaty corresponds precisely to a reopening of an opportunity window for the insertion of the liability of corporations for human rights violations. Many corporations have an economic power so high to the point of rivaling States. In addition, as well pointed

by Chip Pitts⁵, corporations enjoy countless privileges within the international legal system. We can quote as examples the right to intellectual property (the TRIPs agreement) and the right - as investors - to directly sue States in arbitral courts established by Bilateral Investment Treaties (BITs).

This privileged position is reinforced in emerging countries, where institutions are fragile and the State is often colluded with the abuses of the companies. As Surya Deva⁶ highlights, the loosening of supervision from these States stems from the fear that requiring strict compliance from transnationals to the law would move away future investments, necessary for local development. Deva mentions other factors, such as the absence of a fully developed legal system, the economic difficulties of the States, corruption and overreliance in courts.

Another point raised by the author, which explains the dominant presence of transnational enterprises in these States, refers to the low standards of environmental and labor protection in most emerging countries. These circumstances attract the transnationals that, as explains Pinheiro⁷, seek comparative advantages for large-

⁵ PITTS, Chip. **For a Treaty on Business & Human Rights**. Available at: http://international.nd.edu/assets/133586/remarks_pro_treaty_by_chip_pitts.pdf

⁶ DEVA, Surya. **Corporate Human Rights Violations: A Case for Extraterritorial Regulation**. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195887

⁷ PINHEIRO, Sílvia. **A Empresa Multinacional e seu novo papel na promoção do desenvolvimento sustentável**. Revista Ética e Filosofia Política.No 13.Volume 2. Junho de 2011.

scale production, which involves productive chains scattered in several territories incapable of preventing human rights violations.

In the international legal system, there is no formal hindrance in considering transnational enterprises subjects of duties. In fact, the resistance to this paradigm shift is related to the traditional practice of international law, as well as to political and economic issues. Also, despite the formal difficulties in categorizing transnationals as subjects of rights or duties in the international context, the fact is that there are mechanisms within the international law that directly reach them⁸ as, for example, the International Convention on Civil Liability for Damage Caused by Oil Pollution, which stipulates that the owner of a ship - which may be a company - "shall be responsible for any damage caused by oil pollution that has escaped or been discharged from the ship as a result of the incident"⁹. Furthermore, another international instrument that provides the accountability of corporations is the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which stipulates that the operator of a hazardous activity - which could also be a company - "shall be held liable for damage caused by its activity

as a result of incidents in the time or during the period in which it was exerting control of that activity¹⁰.

As stated before, transnationals already act as subjects of rights. For this reason, Chen¹¹ highlights that internationalists as Surya Deva and Chip Pitts consider both the relation between the rights and obligations of corporations in International Law as the relation between the victims of human rights violations and the violator companies asymmetric. Therefore, the Treaty could help balancing this position of extreme power of transnational enterprises in the international legal system.

Chen also clarifies that considering only the States as subjects of duties can make the Treaty more internationally admissible, for being more compatible with the tradition of the global system. However, the author himself explains that a binding instrument that is limited only to listing the obligations of States to regulate the entrepreneurial activity within their territories will add little to the protection of human rights, given that this requirement is already provided in several treaties on the subject.

Moreover, as stated by Selvanathan¹², it does not seem fair (nor effective) to de-

⁸ DEVA, Surya. **The Human Rights Obligations of Business: Reimagining the Treaty Business** (2014);

⁹ **International Convention on Civil Liability for Oil Pollution Damage**, U.N. Doc. 973 U.N.T.S. 4 (adopted on 29 November 1969, entered into force on 19 June 1975), art. III (1) read with art. I (2)/(3).

¹⁰ **Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment**, CSTS No. 150 (adopted 21 June 1993), art. 6(1) read with art. 2 (5)/(6).

¹¹ CHEN, Si. P.58. **Towards a Business and Human Rights Treaty**. Oslo: University of Oslo. 2015.

¹² SELVANATHAN, Puvan J. **The Business and Human Rights Treaty Debate: Is Now the Time?**. The Kenan Institute for Ethics, January, 2015.

mand the State to control transnationals in territories where its power cannot be applied with the same prominence as the capital of these companies. In the same direction, Debacker¹³ flags that the Treaty would precisely become a way to give voice to small and developing States. In other words, unlike some opponents of the Treaty say, this would be a way to ensure, and not to threaten, the fragile sovereignty of these countries.

THE SCOPE OF THE TREATY: ALL HUMAN RIGHTS OR ONLY GROSS VIOLATIONS?

The inclusion of *gross violations* only, is part of an approach that is considered more effective and consistent with the current reality of international corporate law. This pragmatic view, notably present in the elaboration of Ruggie's Guiding Principles, relies on the conciliation between business interests and a slow process of reshaping the international responsibility of enterprises.

However, the constant and unpunished violations of human rights seen at production chains results in victims who are crying out for urgent adjustments on how the States tolerate and are often colluded with abuses from transnationals.

¹³ BACKER, Larry Catá. **Considering a Treaty on corporations and human rights: mostly failures but with a glimmer of success.** CPE Working Paper 6/1, June, 2015.

Accepting that the Treaty should include only the liability for gross violations can be both a way to ensure greater compliance from States as a way of perpetuating the impunity of enterprises. As says Darcy¹⁴, even if considered victims of "less serious" offenses, individuals who have had their human rights violated deserve the recognition of that fact and its reparation as much as the victims of gross violations. In addition, focusing accountability only on crimes committed by companies, for example, would further emphasize political and civil rights, tossing aside years of effort towards the securing of social, cultural and economic rights.

On the other hand, one can question whether the drafting of a Treaty that provides accountability for all human rights violations would not mean the inclusion of excessively abstract rules, incapable of regulating concrete situations. Darcy¹⁵ presents a counter argument, stating that several human rights treaties lay down general shields and principles, which are subsequently developed by case law. For instance, the author cites the European Convention, whose content is being developed, for decades, by the European Court of Human Rights.

¹⁴ DARCY, Shane. **Key Issues in the debate on a binding business and human rights instrument.** Geneva for Human Rights. April, 2015.

¹⁵ DARCY, Shane. **Key Issues in the debate on a binding business and human rights instrument.** Geneva for Human Rights. April, 2015.

Another important point concerns the characterization of human rights. As emphasizes Deva¹⁶, such rights are indivisible, interdependent and correlated. Therefore, a hierarchy between them it is not possible: all are equally important, as well as are the victims of their violations. Thus, considering that business activities can violate any of these rights, it does not seem legitimate that only a few are pointed as sufficiently relevant to be included in the Treaty.

Still arguing in favor of a Treaty that includes all human rights, Deva highlights that these rights are not negotiable. In this sense, they cannot depend on the consent, good will or even the capacity companies claim to have of assuming the obligation to protect human rights. In the same sense, the author points that the interests of victims, while subjects of human rights, must be the central point of any regulatory system - it is the people and not the companies that must be prioritized, and finishes stating that respect and compliance with human rights should be mandatory for having the privilege of conducting business in our society

¹⁶ DEVA, Surya. *The Human Rights Obligations of Business: Reimagining the Treaty Business* (2014); DEVA, Surya. *Corporate Human Rights abuses and International Law: Brief comments* (2015).

CONCLUSIONS

Although there is no academic consensus about admitting companies as *subjects of formal rights and duties*, it is clear that despite the delay in the theoretical update of this term, enterprises are more than mere supporting players in the international scenario. The concreteness of economic power and therefore, the influence of these actors in all government bodies - including normative drafting - cannot be ignored under a purely formal analysis of the liability of companies for violations of human rights.

Adopted almost 70 years ago, the Universal Declaration of Human Rights - one of the central parts of the normative structure of the United Nations - has in its preamble the need for all the components of society to strive in achieving the ideal outlined in its articles. To claim that, according to traditional international law, transnationals may not be considered subjects of rights and duties seems not only a weak argument, but also a real mismatch to a reality that has been changed by the central role of these players in the overall dynamics of a globalized world. Dismissing the impact of enterprise activities and massive violations of human rights resulting from them is not compatible with present times.

A formal question, as is the case of this nomenclature, cannot remain an obstacle to the effective implementation of human rights. After all, this issue was not taken

into account when, in many bilateral agreements, enterprises had their rights guaranteed before the Member States without giving, on the other hand, this same guarantee from business activities to individuals. This points towards an incorrect evaluation of business at the expense of human dignity, from which the entire roster of rights derives.

Furthermore, it is precisely to preserve the foundation of this philosophical and universal human rights feature that the selection of only some of these rights as ensured by the Treaty is unacceptable. After all, in this case, we would not only be assuming the existence of a hierarchy between human rights, but also among the victims of its violations.

Finally, the suspicion that the negotiation of the Treaty is hampered much more by political and economic issues than by legal obstructions must be raised. The split between developed and developing countries' opinions incidentally flags in this sense. The countries with a more fragile legislative system and who depend more strongly on the capital of transnational corporations are, after all, those more prone to recognize the importance of a Treaty on Business and Human Rights, since they find themselves incapable of controlling violations in their national territory, and are also hostages of business interests in their whole scope of action.