



HUMAN RIGHTS  
AND BUSINESS  
CENTRE

# New elements for the UN Business and Human Rights Treaty



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## 1 DIRECT OBLIGATIONS

HOMA, Human Rights and Business Centre, bearing in mind its research on the subject of Human Rights and Business and monitoring the process of drafting a binding instrument that holds corporations accountable for the violation of Human Rights, highlights in this document, devices it considers important for inclusion in the scope of the future binding international instrument on the subject.

Firstly, it is important to demarcate, as a starting point, the relationship between a possible binding instrument on business and human rights, and any other existing international norms on the subject, especially John Ruggie's Guiding Principles (2011). These principles, because of their voluntarist nature, are insufficient to generate effective accountability of transnational corporations for human rights violations. It is understood, then, that the Guiding Principles played an important role as the precursor of the discussions on the subject and led to the elaboration of a binding treaty that will have exactly the function of complementing the existing gaps in the legislation.

We largely share the position advocated by other scholars, such as Bonita Meyersfeld, in the first edition of the journal "Homa Publica: International Journal on Human Rights and Business", which set out the States' duty to to adjust their policies and internal legal systems to international human rights instruments (MEYERSFELD, 2016, page 38). In this way, the Guiding Principles are added up to the national action plans for the complementation of human rights enforcement means in the face of corporate violations in the internal regulation's sphere, which assumes a binding commitment at the international level.

It is noticeable that there is a pattern of violations of human rights by transnational corporations in the conduction of their ventures and that they take advantage of the existing legal structure to remain unpunished for the committed violations. Transnational corporations are responsible for both direct and indirect violations of human rights. The first are committed when the group of entities that can be considered as part of the transnational causes damage to the environment, violates labour rights, commits financial crimes, etc.. Moreover, indirect violations correspond to the consequences of transnational activity, such as influence peddling or tax frauds, which prevent people from obtaining the fulfillment of the State's commitments, placing transnational corporations above democracy and above public policies that may truly benefit the population (CETIM, 2016, pp. 23-29).

Thus, the violating potential of a transnational corporation is undisputable and it is worrying that there is an "architecture of impunity" (BERRÓN, 2014, p.61; ZUBIZARRETA; RAMIRO, 2016, p.8) that allows a modus operandi for violating rights without any sanctioning measures. The Guiding Principles state only that States must impose upon companies the realization of human rights due diligence, in which they have an obligation to oversee that the entire production chain operates in compliance with Human Rights. The major problem is the lack of a State supervisory agent to verify companies' compliance with these obligations, so that a binding accountability instrument can bridge the gaps left by current legislation that makes impunity possible.

Another essential point advocated by HOMA, with respect to the scope of the proposed Treaty, refers to the limitation of international accountability only to transnational corporations. Extending the scope of the instrument to all types of business enterprises would be a deviation from the main purpose of the Treaty, namely the fulfillment of the regulatory gap regarding the operation of transnational corporations. After all, other companies already have the regulation of the national laws in the territories they are established.

Unlike domestic companies, the architecture of impunity makes it possible that transnational corporations avoid being held accountable for human rights violations, since they have complex contractual and business structures (CORREA, 2016).

It is therefore a propitious moment to establish direct obligations to transnational corporations through the binding instrument, ultimately seeking to: (1) improve the protection of individuals and communities affected by violations related to the operation of transnational corporations and other commercial enterprises and (2) give them access to effective remedies, in particular through judicial mechanisms.

Through the proposed normative document, judicial authorities should have the prerogative to apply doctrines through which it is possible to determine the true links between formally separate entities, such as the doctrine of "piercing the corporate veil" or the doctrine of "single economic unit". In general terms, the "piercing the corporate veil doctrine", also called "lifting the corporate veil", refers to a legal decision that seeks to treat the rights or duties of a corporation as the rights or obligations of its shareholders, even though the company is a legal entity separate from the legal and / or natural persons of the shareholders that constitute it.

In turn, the doctrine of "Single Economic Entity" suggests that the companies associated with each other by common control operate as a single economic unit and, therefore, the con-

solidated financial statements of a group of companies should reflect the essence of this agreement. Similarly, when judged for human rights violations, companies will not be able to evade accountability by placing blame on a subsidiary or any other legal entity that is in the same group of companies and on which a single control rests demonstrated. In this way, such authorities should be able to apply the presumption that parent companies are able to exert influence over the policies and activities of affiliated or subsidiary companies, which ultimately allows for a more effective accountability of human rights violations.

In addition, the Treaty will prevent States from applying the doctrine of the *forum non conveniens*, often invoked in common law countries to decline jurisdiction over a particular matter. The said doctrine consists of the refusal by certain courts to take jurisdiction over matters when it is considered that there is a more appropriate forum available to the parties. As a conflict-of-law doctrine, *forum non conveniens* is applied between courts in different countries and between courts in different jurisdictions in the same country. In the case of violations of human rights by companies, such a doctrine ends up delaying the proper judgement of violations, which ultimately leads to impunity for transnational corporations and to a lack of adequate reparation for the victims (CORREA, 2016).

The contracts signed between transnational corporations and States are also a problem for the protection of human rights, since capital investments are received (from WTO, IMF, World Bank) for the projects of transnational corporations that have as their sole interest the stability of their business and an increase in profits, while the state should protect its sovereignty and the genuine public interest (ZUBIZARRETA; RAMIRO, 2016, p.20). Thus, contracts concluded between transnational companies and the State must comply with internal rules that already protect human rights, so that when there are disputes national legislation and domestic courts can resolve them, and may even make alterations on the contracts with transnational corporations when they leave space for violations. The goal is to ensure that human rights prevail over any private interest.

Financial crimes are also a point that must be considered in the scope of the Instrument, since companies when sanctioned merely indemnify companies and banks, which leaves the victims at the mercy of the State (CETIM, 2016, p. 24). This is a problem insofar as States end up having an obligation to control the damage that violators generate, such as the loss of workers' jobs, changes in the local economy, and the traditional ways of income attainment that often become unfeasible (such as fishing and local agriculture). It remains for the States to indemnify with public money and solve these violations' impacts, which ultimately means that the population itself is paying for the reparation of the damages that the companies cause. That is to say,

in addition to violating Human Rights, withdrawing tax benefits from the States and not returning these benefits to the population, they are also financed by the victims themselves.

The access to Justice for the victims must be considered an important aspect of a juridical order in which the protection and promotion of Human Rights is intended above all. Companies have, as already pointed out, a pattern of violations that is revealed by their *modus operandi*, so that several cases concerning violations become disputes whose companies are professional litigants. This great inequality of arms between victims and companies is revealed by the qualified law firms in the service of corporations, as guardians of a kind of new feudal order of transnational corporations that have diverse power and decision making channels, leaving the Ethics of Law aside in favor of economic interest through a political lobby (ZUBIZARRETA; RAMIRO, 2016, p.18).

The Binding Instrument must have means to ensure that Human Rights are respected and assigned as the ultimate goal of States, above all economic interests that in turn benefit private capital only to the detriment of the population. It should be emphasized that direct obligations to protect human rights must apply not only for States but also for companies and subsidiaries at any level of the production chain as a way of not leaving violations unpunished.

In addition, the Instrument should have in its scope devices that would allow, if necessary, to change economic contracts and constitutive acts between corporations and the State. Moreover, the obligations laid down in the Treaty should be incorporated into the Bilateral and Multilateral Investment Agreements, therefore the violations would become an offense to international law and a breach of contract (ZUBIZARRETA; RAMIRO, 2016, p.89-90). Through such devices, the Instrument would enable these contracts to be a mean of safeguarding Human Rights while also helping the State to be able to act in the face of the occurrence of violations, and no longer protecting companies.

We consider that the mentioned issues regarding direct obligations should be covered by the scope of the Business and Human Rights Treaty. Therefore, we suggest the following devices:

*1. Free trade will not be realized as an end in itself, but with the objective of promoting the Human Rights already consolidated in international and domestic laws.*

2. Signatory States of the Binding Treaty on Human Rights and Enterprises agree to cooperate with each other in the promotion of Human Rights and in providing access to effective remedies, in particular through judicial mechanisms, whenever they can be carried out in their jurisdiction.

3. The signatory States of this Treaty undertake to incorporate all of its obligations into Bilateral and Multilateral Investment Agreements in order to link financial and arbitration institutions to human rights norms.

4. The signatory States of this Treaty shall concurrently establish civil and criminal liability for corporations and their directors. Such accountability should occur regardless of whether they operated as perpetrators or accomplices of violations, and should extend to all links in the productive chain of the corporation in question.

5. The signatory States of this Agreement recognize that transnational corporations are subject to direct obligations to protect human rights and that these will be incorporated by national laws.

6. The recognition of direct obligations of transnational corporations by States has a complementary relationship between the two types of obligation and does not exempt States from their obligations in the field of Human Rights.

7. The signatory States of this Treaty undertake to incorporate direct obligations into their national legislation in such a way that transnational corporations assume the obligation to supervise their productive chain in order to ensure that all links in that chain operate by the same standards of protection of Human Rights to which they are subjected.

8. The signatory States of this treaty undertake to promote the full access to Justice for the victims of human rights violations by companies, offering free representation service in court and free technical legal assistance, advisory and orientation, granting the exemption from procedural and extra-procedural expenses as long as they are necessary for the progress of the process.

9. The promotion of fundamental human rights as a way of improving the standard of living and the development of sustainable life shall be the major objective considered by States and Companies. For this reason the companies are subject to these human rights obligations and the economic activity shall not be an end in itself.

10. The obligation to protect human rights is the duty of States, and transnational corporations do not fall short of this obligation, since they are also possible violators of human rights.

11. States are responsible for the inspection of the entire production chain of transnational corporations in order to protect human rights, such as forbidding work analogous to slavery.

12. The subsidiaries and any other companies linked by commercial relations with the parent company are responsible for the monitoring and shall respond jointly for the violations of Human Rights that remain proven.

13. Human rights obligations shall be incorporated into the constitutive acts and commercial contracts of companies, so that violating this commitment constitutes an offense against international law and contractual obligations, from the recognition that Human Rights must present a superior hierarchical position to trade and investment agreements.

*14. The signatory States of this Treaty shall not apply in a discretionary manner the doctrine of the forum non conveniens, committing themselves to adjudicate the claims concerning violations of Human Rights by Companies in an untimely manner and to the best of their ability.*

*15. The signatory States to this Treaty shall endeavor to make investment contracts consistent with their national law by allowing their courts to resolve any disputes that may arise.*

*16. The signatory States of this Treaty have the legitimacy to change laws and contracts with transnational corporations when they involve offences to national sovereignty and violations of human rights.*

*17. The financial crimes of companies will establish civil and criminal liability also extendable to all links in the productive chain of the corporation in question, where accountability primarily compensates the victims, in addition to banks and companies.*

## 2 RESPONSIBILITY OF TRANSNATIONAL MULTISOCIETARY ENTERPRISES

The urgent outcry of victims of human rights violations, stemming from the structure of corporate and private law, highlights the need for a change in the relationship between the Company and the State, which overwhelmingly tolerates the abuses of transnational corporations (TNCs). Establishing a new normative framework that makes transnational groups responsible for the performance of their entire productive chain, in the various impacted territories, is necessary to respond to civil society.

Existing national and international legislation on the subject, as well as the guidelines reflected in the Guiding Principles, do not address the core of the problem, which is corporate separation, established by the principle of limited liability. From this separation, two tools are

used by TNCs to avoid the fulfillment of their obligations: the corporate veil and the jurisdictional veil.

When referring to a transnational company, it is in fact a large number of limited liability companies established in a plurality of jurisdictions. These complex structures adopted by TNCs constitute one of the central factors of the architecture of impunity. This is because TNCs use this fragmentation and the supposed autonomy of each entity to exonerate itself from the responsibility for human rights violations, on the grounds that each society component of the group is independent. Thus, for example, the controlling society excuses itself from responding for the damage caused by one of its subsidiaries.

The issue of the responsibility of multisocietary companies touches on one of the main dogmatic obstacles of Corporate Law. Jurists from different countries have conflicted with this logic, seeking for legal regulation for this form of business organization. In what concerns international law, it is evident that the corporate context does not only affect the private scenario, but also affects the public sphere, especially regarding human rights.

The juridical and patrimonial separation between the partners and the business society causes that only the latter can be legally charged of sanctions on the activities practiced in its name. Therefore, the business society assumes an autonomous and independent economic and legal character, with its own rights and obligations and, essentially, has individualized patrimony. In addition, the multisocietary or group company has a diversity of legally independent corporate entities, named “daughter companies” or “subsidiaries”, which are subject to a common economic management of the parent company. If on the one hand, the companies have legal independence, which establish themselves as organizations conferred of their own individual patrimony, on the other hand, there is economic unity of the whole.

The logic of how these societies are structured hampers the direct responsibility of these groups. Each commercial company is autonomous, having its own active and passive legal sphere, and its members cannot be charged with their social liabilities (limited liability).

Considering the different ways of approaching this regulatory problem in each legal system (ANTUNES, 2005, pp. 39-46), it is essential that the binding instrument addresses this issue, in order to avoid that limited liability and property autonomy continue to constitute barriers between the people affected by the business activity and its controllers.

If the paradox established by the legal independence of companies and the economic unit of the group is one of the great challenges of Global Corporate Law (ANTUNES, 2005, p. 47),

extreme caution must be taken to ensure that this regulatory gap is not transposed to International Human Rights Law. In the absence of a single satisfactory model of corporate responsibility, a treaty should bring clauses on the presumption of economic unity between the parent company and its subsidiaries, being based, therefore, on the controlling power regardless of the jurisdiction in which they are established. It must stipulate a joint liability between the controlling company and subsidiaries in respect to human rights violations.

The treatment of the unitary liability of the group also makes it possible to overcome a strong critical view about restricting the scope of the treaty to TNCs: the claim of independence between the group companies, which would deprive it of its transnational character (MUCHLINSKI, 2007, P. 520). Once the unity of the transnational group is recognized, it could not escape the obligations of a treaty under such a claim.

## 2.1 THE REGULATORY MODELS OF CORPORATE SOCIAL RESPONSIBILITY

After tackling the problem of the impunity of these companies due to the difficulty in holding them accountable and given the architecture of Corporate Law, together with the different legal systems governing the parent company and its daughter companies, it is now possible to identify three types of regulatory strategies: Traditional "corporate autonomy", the German strategy, called the "dualist model" and, finally, the revolutionary strategies of "corporate control".

Being the most adopted by the legal systems around the world, the US regulatory strategy (corporate autonomy and separation of patrimony) takes into account the disregard for the legal entity. For this current of thought, it is not possible to attribute responsibility to the parent company regarding the acts of the daughter societies. This would only occur in exceptional cases, having jurisprudential character, to impose the disregard of the legal person. This model perpetuates even more the legal insecurity especially of the victims of human rights violations by these companies, since they depend on the judge's assessment, based on the analysis of each case, for the imputation of (exceptional) sanctions.

The German model divides and conceptualizes two categories, the so-called "groups of right" and the 'groups of fact'. The first establishes the power of the parent company over the administrative organization and the interests of the daughter companies, that is, there is an unlimited and joint responsibility between these entities, aiming at the protection of minority shareholders and social creditors. On the other hand, when it comes to the "groups of fact",

the parent company has a mere factual power, which is not legal, over the management of the daughter companies. This means that the parent company and its administrators will only respond to the abuses of daughter societies when there is a detrimental influence by the parent company. The criticisms of this model are not scarce, since it adopts a rigidity in the vision on the groups of fact and groups of right that does not match the reality.

Finally, it is worth commenting on the model adopted by the European Union. In this model, there is an excess of accountability of the parent company to the subsidiary companies, since an unlimited liability regime is stipulated. Thus, any contracted obligation of the subsidiary could be required of the parent company. In addition, the European strategy does not adequately regulate groups whose corporate control is more widespread.

Even after criticism of the institute of limited liability and corporate separation, in the context of claims made by victims, the issue is perpetuated by political choices made to induce a difficulty of accountability. It is possible to hold a legal entity accountable jointly with his subsidiary under the general principles of civil liability law. However, this involves a complex examination of the transnational organization to prove that the parent company was jointly liable for the harm causes to the claimant and there are always jurisdictional obstacles to overcome. Such problems could be mitigated by a statutory rule that assigns liability (preferably objective liability) to the parent company for negligent acts of the subsidiary based on a business commitment, together with the right to sue the company in its home country or in the country where the damage occurs, depending on the claimant's choice. On the other hand, the complete abolition of limited liability is fraught with too many pitfalls to be feasible.

Therefore, the creation of a binding mechanism would effectively respond to the victims of these human rights violations by the corporate groups, balancing the existing power asymmetries. Thus, it is necessary to apply a model along the lines of the presented European model, taking into account the economic unit of the group, which prevents the affirmation of legal and patrimonial autonomy and enables international cooperation.

The regime contained in the instrument will not necessarily be transposed into areas such as International Trade Law or International Investment Law, as it will be designed to regulate cases of International Human Rights Law, where the parties find themselves in positions of great power asymmetry.

Such a measure is demonstrated by the procedural disparity between the violating companies and the affected people, which does not justify the enforceability of the principle of the burden of proof on the part of the victim. Contrary to this, it is necessary that the controlling

company demonstrate the lack of connection between itself and the abusive acts of the subsidiary. Thus, the parent company would not respond objectively to the damage caused when it is proved that there was no link.

That is, in order to combat the current architecture of impunity, the most effective model would be based on the presumption of economic unity of the economic group, disregarding the patrimonial and legal autonomy of subsidiaries and joint ventures. This is because, considering the disparity between the disputing parties, it should not be required that the affected parties demonstrate the connection between the subsidiary and the parent company, but that the economic agent demonstrates the absence of such a connection. In this way, the controlling companies would respond objectively to the damages caused by the other companies that make up their corporate arrangements, except when it is fully established that the company violating Human Rights has no link with the parent company. Thus, both a material rule of objective liability of the parent company by its subsidiaries would be established, except in extreme cases, as a procedural rule, setting the company's obligation to prove the absence of economic connection.

In this regard, we present the following suggestions on the scope of the Treaty on Human Rights and Business:

*1. The verification of the performance of the TNCs in the territories in which they operate shall be monitored by States that host their production chain, to the extent that these States have the material resources to carry out the due diligences.*

*I – If the host State proves the absence of material resources, it may request cooperation measures to carry out the inspection of the business activities within its territory to the State where the headquarters of the TNC is installed.*

*II – When setting up in foreign territory, TNCs undertake the due diligence mechanisms established by international instruments, as well as commit themselves to compliance with local laws.*

*2. The principle of limited liability may not be triggered by TNCs in cases of human rights violations committed by their subsidiaries.*

*3. In cases of violations of human rights in foreign territories, where it is not possible to sanction the company to compensate the victim, it will not be possible to apply the principle of patrimony and juridical separation between the partners and the company.*

*4. All companies included in the productive chain of TNCs shall commit themselves to offer the populations affected by their activities all the information they request, observing the principle of transparency.*

*1 – The provision of information about business activities can be demanded at any time, either during the company's installation, or during its activities or even after its closure, according to the needs of the affected populations.*

*5. In order to benefit the populations affected by the business activities, the economic unit between the parent company and its subsidiaries is presumed, which characterizes the joint responsibility between them regarding human rights violations.*

*6. Controlling companies are objectively liable for damages caused by other companies that make up their corporate arrangements, except when it is fully established that the company violating Human Rights has no ties with the parent company.*

*7. The Transnational Corporation shall hereinafter be understood as an economic group composed of all the corporations, entities, partnerships, subsidiaries, branches and affiliates in which the parent company holds the majority of shares.*

8. *The parent company shall have the presumption of control of all economic groups in which it is included.*

9. *The parent company shall be jointly and severally liable for all entities composing the economic group.*

10. *The presumption of control and the joint liability of the parent company for the group shall only be rebutted by clear evidence of the absence of economic and political influence over the tortfeasor company.*

11. *The burden of proof to rebut the presumption of control shall rest with the parent company or the other corporate entities represented in the litigation*

*I – The presumption of parental responsibility shall not be rebutted by the existence of other corporations possessing the shares of the latter's subsidiary when the amount of shares of the third party is not the majority.*

*II – The parental control shall be maintained whenever any other corporation of the economic group is the main shareholder of the tortfeasor corporation.*

*III – The joint and several parental liability shall remain even though the corporation is incorporated the limited liability company by the municipal law where it is established.*

12. *In the case of assets insufficiency of the parent company, all other entities of the economic group shall be jointly and severally liable for the acts of each other of the companies that compose the group.*

*13. The Transnational Corporation shall apply the Human Rights Obligations clauses herein expressed in their contracts or arrangements with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business In order to ensure respect for and implementation of the Treaty. [Clause based on the Draft Norms]*

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