



2013 United Nations Forum on
Business and Human Rights
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REPORT II ANNUAL UNITED NATIONS FORUM ON BUSINESS AND HUMAN RIGHTS



CENTRO DE
DIREITOS HUMANOS
E EMPRESAS

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INTRODUCTION

The known and interrelated phenomena of globalization, which were intensified during the mid 1970's, and those derived of the debt crisis of underdeveloped countries the following decade, leveraged the persona of the transnational corporation, which would later and strategically install itself on these territories, taking advantage of the new context.

Adding to this broader scenario, the advantages offered by underdeveloped countries, the pressure of International Investment Treaties, the barely inexistent legislation and the weak government, collaborate to the production growth of transnational corporations, as well as lowering their costs, achieving greater influence and dictating favorable policies to their home country's political agenda.

After overcoming the recessive frame of the 1980's debt crisis, 1990's globalization and the adoption of the neoliberal ideal, companies became even more present in developing countries and emerging States, opening branches and subsidiaries in partnership with the States themselves.

Therefore, the creation of regulatory and protective human rights mechanisms regarding the performance of business activity in the international context is due, mainly, to the growing prominence of large transnational corporations regarding the paradigm of the new economic order.

Thus, the UN's debate regarding the monitoring of Human Right's violations perpetuated by businesses was raised. In 1977 the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy from ILO (International Labour Organization), was approved, which (and now) in the current frame of the 21st century, dialogues with the OECD Guidelines for Multinational Enterprises. These Guidelines were created in 1976 but due to the syndicate crisis and the labour standards, only started to resound in the late 1990's.

Following the general tendency of greater concern of corporate activity regarding human rights, ISO released the ISO 26000 Normative - Box 6, in 2010, the ISO 26000, by establishing the leading principles of Social Responsibility, corresponding to the logic of the main Human Rights Treaties. Various spectrums of protection are encompassed, such as Work practices; Environmental; Corruption Prohibition, amongst others.

In 1997, the UN Sub commission for the promotion and protection of Human Rights, main subsidiary organ of the UN's Human Rights Commission composed by specialists, prepared a study about the connection between Transnational corporations and human rights. This study led to the establishment of a Working Group about Work Methods and TNC Activity, which in 1999 commenced the development process of

the code of conduct (conduct code) for corporations.

This process was carried out under exhaustive research of legislation and corporate codes, as well as a broad consulting process regarding corporation unions and non-governmental organizations. The results in 2003, were the Norms about Transnational Corporations Responsibilities and Other Private Enterprises Concerning Human Rights.

However, the so called "Norms" were not well received by corporations and some States, undergoing harsh criticism by the Human Rights Commission due to the fact that they, in a simplistic manner, extended to the corporations the States' obligations regarding human rights, in "within their respective spheres of activity and influence", determining limited corporate responsibility subsidization concerning States, in addition to positive and negative obligations directed at both.

Alongside the rejection of the proposal presented by the Sub commission of Human Rights, the Commission adopts a contrasting measure: disallows the Sub commission and disqualifies the ongoing debates within civil society.

Following the work of the Sub Commission for the Protection and Promotion of Human Rights, the UN edits, in 1999, the UN's Global Compact, a voluntary initiative to promote sustainable development and good corporate citizenship, consisting of

ten principles to be incorporated by business members in their corporate routine.

Furthermore, civil society's pressure is maintained and evidences the historical demand identified in favor of corporate responsibility in Human Rights, which cannot be ignored. Therefore, the Commission requests the former Secretary General of the United Nations, Kofi Annan, to appoint a Special Representative on Business and Human Rights.

Once more, the articulations that precede the designation are struck by civil society's stance against merely voluntary obligations, as stated in the Global Compact, and thus demanding that the UN impose binding norms on corporations, which would limit their conduct and charge them when violating human rights. However, the excessive North American influence, guiding the selection of the Representative and favorable to mild arbitration clauses, instigates distrust amongst civil society regarding the legitimacy and effectiveness of the work results.

This scenario is portrayed by Professor John Ruggie himself acknowledging that his designation, on 28th of July 2005, as Special Representative for Business and Human Rights corresponds to the profile yearned by the United States. Professor Ruggie had been Chief Counselor for Kofi Annan on the formulation of the Global Compact.

The regulation process by the UN of corporate activity reaches its main point. Thus obtaining a distinguished status when Professor John Ruggie is designated Special Representative of the Secretary-General of the United Nations for Business and Human Rights in 2005, remaining in this position until 2012, finishing his second mandate.

Assuming the position in 2005, John Ruggie engages in an exhaustive research with the international civil society, business and governments about what had been done and their suggestions and expectations. In 2008, Ruggie presented to the United Nations Human Rights Council the "Protect, Respect and Remedy" Framework, outcome of his research. The Framework delineates three basic pillars directed at States and companies regarding Human Rights.

The first pillar determines the State duty to protect human rights; the second determines the State duty to respect human rights in their actions and those of their organisms, and the corporate responsibility to respect human rights; the third pillar involves the State duty to provide remedy for the victims of human rights violations.

It is important to highlight the "grammatical" difference used by Ruggie concerned about corporate "obligations", establishing duties for the States and only responsibilities for corporations.

This vocabulary difference brought by the 2008 Framework evidences the tendency that would be later reified in 2011 along-

side the Guiding Principles. The tendency of the States would hold *stricto sensu* obligations regarding the protection and respect of human rights and remedy to the victims of violations. This would have an obligatory nature. On the other hand the corporate "obligations" would stand in a moral and ethical level, of what would be right to be done and be valued as corporate routine.

With the presentation of the Framework, the Human Rights Council undergoing great pressure from segments of civil society, concludes for the need of clearer principles in the orientation of State and corporate activity regarding human rights. Therefore, Ruggie's mandate was extended for three more years and in 2011 he presented to the Council the Guiding Principles on Business and Human Rights.

The Guiding Principles are a set of 31 principles that lay out guidelines based on the three pillars constant of the 2008 Framework. It is secured in this document the "principled pragmatism" adopted by Ruggie, focusing on practical results, not intending to defy the real corporate situations but aiming on obtaining the maximum support possible of the corporate sector.

On the 6th of July 2011, through the 17/4 Resolution, the UN Human Rights Council unanimously adopts John Ruggie's Guiding Principles. Moreover, the Council also establishes a Working Group that should coordinate the activities of a Forum specifically for Business and Human Rights, which, in

turn, should report annually to the Human Rights Council and the United Nation General Assembly.

The Working Group, by dialoguing with society through the Forum has the mission to propose mechanisms for greater effectiveness of the Principles, during a 5 years term.

THE II UNITED NATION'S FORUM ON BUSINESS AND HUMAN RIGHTS

GENERAL PERCEPTIONS WITH AN EMPHASIS ON CIVIL SOCIETY

The second edition of the UN Forum on Business and Human Rights occurred under the wary eyes of the international civil society, (they perceived a dominance of the debate by the corporate sector and its interlocutors during the first forum edition, in 2012). This was observed because the denouncements made by civil sector's organizations did not obtain answers from States nor corporations.

It is necessary to acknowledge the effort of the Working Group on guaranteeing the materialization of the event and in broadening the collective spaces for debates and discussion. However, the setting is scientifically controlled with determined speech time, rigorous parity between the actors and predefined topics.

A questionable point concerns the speech parity on the official panels and the

demonstrations of the audience regarding the three axes of actors, states, corporations and civil society. All official events had as components of the table one State representative, one representative of the corporate sector and one representative from civil society. Nonetheless, this is exclusively a formality.

For each State that was present, (and not all of the UN States were present) there was one or very few representatives. Employees of large companies, consultants and corporate lawyers represented the corporate sector. Meanwhile, the civil sector was represented by non-governmental organization members, human rights violations victims, members of academic centers and lawyers from the general population, adding multiple outlooks, all focused on only one axis of actors.

Hence, the real parity conditions did not meet the provision of equality. The multiple perspectives and opinions embraced by the civil sector, on various circumstances could not be expressed by lack of time or opportunity.

A secondary aspect that also tangencies the joint treatment is the attempt to carry out and also joint dynamic. This was evident during the discussions regarding the conduction of the responsibility attribution process for the protection of human rights in corporate activity. Based on the stance of several representatives of the civil sector, the actors are included in the process,

equally, as stakeholders, since the movements and affected population want to leave a clear and thorough position as victims of violations and to lay out the joint responsibility between States and corporations.

During the Forum, civil society pursued to articulate and debate several matters on parallel events that were occurring on December 2nd at the Pre Forum, or during the evening after the end of Forum activities, due to a broader freedom of speech and as a strategic attitude.

Accordingly, Patricia Feeney, executive director of the British NGO Rights and Accountability in Development and director of the Study Center of Governance and Transparency from Kellogg College, at Oxford University, on an interview given to Conectas, says:

“The Forum is being used to promote a managerial response to corporate-related human rights violations, which are reduced to a communication issue: ‘knowing and showing’. This has little to do with a genuine human rights approach – the corporate world is definitely in the driving seat. The victims of corporate abuse have been airbrushed out of the picture and it is disappointing to see that the OHCHR apparently colluding in this.”¹

Gonçalo Berrón, from the Transnational Institute (TNI), on an interview to Marcel Gomes, from Reporter Brazil, on the same path as Finney says that the transnational corporations have already captured the UN’s discussion, and alternatives must be sought.

HIGHLIGHTED ASPECTS DURING PANELS AND PARALLEL REUNIONS

Without doubt, a highlighted point was the discussion between the efficacy and the Principles’ binding. Even on the official panel of the event’s closing ceremony the matter emerged, brought up by the Working Group itself. They questioned the duration time of this discussion, in light of the urgency of guaranteeing the Principles’ compliance by corporations. Considering the civil sector, a certain scission is observed, separating the groups between those that support the efforts for the establishment of an International Treaty regarding the matter – taking into account Ecuador’s initiative, with the mediation of the International Judges Commission – and those that consider Ecuador’s presence in this process suspicious. This reaction towards Ecuador is due to the country’s history of human rights violations and disrespect of the Interamerican System, as highlighted by Juana Kweitel from Conectas, being more favorable to a people’s control of the process.

¹ Available at <http://www.conectas.org/en/actions/business-and-human-rights/news/8495-ngos-should-expose-the-limitations-of-pragmatism>

Regarding the International Treaty on Business and Human Rights

At the second Forum, the discussion amongst civil society about direct accountability of States and corporations in case of human rights violations was stepped up. During the Forum's first edition this matter had already been discussed on parallel events.

Ecuador has been leading this ongoing initiative, followed by 85 more countries, as states Ecuador's declaration during the 24th session of the UN Human Rights Council. The statement was reaffirmed by Ecuador at the final plenary of the second Forum, on December 4th 2013.

This treaty is being articulated between the State of Ecuador, a coalition of countries and civil society entities. Mr. Carlos Lopez, from the International Jurists Commission is a prominent figure on the matter.

Regarding the People's Treaty

Parallel and complementary to the International Treaty movement, there exists a coalition of organizations from civil society for the establishment of a People's Treaty. This campaign was already launched during the People's Summit, in 2012 in Brazil, emphasizing the TNI (Transnational Institute) playing an important role in the global campaign against ALCA. For these organizations, the demands of subordinate populations should be contemplated, pro-

tecting them from the negative impact of corporate activities and promoting the respective accountability for corporate violations. Above all, a broader and more informed hearing must be guaranteed for the establishment of forms of commitment, reediting a global campaign. This would be the auspicious historical moment, since only the formal celebration of a treaty would not guarantee its compliance. Hence, an effective pressure from civil society is necessary, brought by a broader, more global consensus regarding the matter.

The Financial Institutions Role (Public and International Banks)

The Financial institutions role regarding the support of corporate activity was highlighted; defending the need of the Guiding Principles application, especially the number 4, to their guidelines and selection processes for financial support. Concerning Brazil, it was recognized the inefficiency and lack of preparation of BNDES on its financial policies, as well as involvement in projects full of irregularities regarding human rights violations, as observed in Belo Monte and TKCSA. A possible interpretation of the Principle 4 would be the immediate accountability of the State by omission or complicity in the human rights violations by the public banks.

On the "Public Finance: Applying the Guiding Principles to National Financial Institutions" panel, under the coordination of

Bonita Mayersfeld from Wits University, the transparency mechanisms of public banks were widely criticized. The instruments of complaint and consult of BNDES were questioned by the Brazilian non-governmental organization Conectas representative, Juana Kweitel, emphasizing their lack of efficiency, transparency and accessibility.

Extraterritorial Responsibility

There is an urgent need of overcoming the barriers of access to justice by the victims, on national and international level. The importance of the means of corporate extraterritorial accountability in their home countries was also highlighted, especially regarding corporations that violate human rights in countries other than their own

The subject, however, was dealt with in a hasty and superficial manner, in spite of currently being the main corporate accountability mechanism. The Working Group lacks a more profound and regardful analysis about the corporate accountability issue, as well as the link between parent company and its subsidiaries. The Working Group should seek a consistency regarding the interpretations of this matter, such as: (i) A Forum convenient for the interposition of the action; (ii) the type of link that allows corporate accountability of the parent company in its home country; (iii) clarification regarding all States that possess extra-

territorial accountability mechanisms; (iv) third party service interface.

National Action Plans

The establishment of National Action Plans on Business and Human Rights (NAPs) by States, where they would explicit their stand concerning the progress of regulatory and supervision policies, would enable States do delineate guidelines for their organs and public companies.

States had already committed to developing such Plans of Action, recognizing the leadership of the United Kingdom given that it was the first State to publish its own National Action Plan.

Recently, on January 2014, Holland published its National Action Plan, possessing only a German version.

It is needed for the next Forum, a summary of the countries that published their Plans, as well as an analysis of the short-term results of corporate absorption of NAPs guidelines and of the generated effects on national policies.

Complaint and Investigation Mechanisms

The effectiveness of complaint and investigation mechanisms of violations, developed by corporations, financial entities institutions and international organizations, such as OCDE, was questioned. These mechanisms are frequently unclear, only

generating an impression of access by the victim to the corporation or to courts that would possibly solve the problem.

The complaint mechanisms matter was widely discussed during the Forum, with some panels bringing up the subject. However, the discussion did not progress enough to lay down minimum standards for the establishment of non-judicial mechanisms that would allow the settling of the conflict concerning the actors.

Human Rights Indicators

On December 2nd, a panel regarding the progress of human rights indicators occurred, briefly raising the point. This initiative is headed by the London School of Economics and is accompanied by several international organizations. The main goal is to enable an analysis of corporate performance quality, as well as their concern towards human rights. This seek to evaluate not only corporate social responsibility policies but also its real organizational and production transformation globally concerned with human rights.

The establishment of social indicators will allow the existence of a global ranking of corporations regarding human rights, enabling shareholders and supporters to consult these rankings previous any decision-making.

Greater Articulation of Civil Society

As part of the articulations surrounding the Forum and sum of those previously obtained by Brazilian civil society in other spaces, The Civil Society-BNDES Debate Platform was released, with the participation of NGO's such as Conectas and Justiça Global. Furthermore, the observatory of the Business and Human Rights was created, a partnership between Conectas, Justiça Global and DeJusticia, a Colombian organization.

Other Featured Points

The need of establishing a discussion platform concerning corporate espionage regarding civil society organizations – the Vale case was an example brought up during the Forum – was highlighted.

Also, the necessity for a deeper study regarding corporate structure was recognized, and how it could hamper the legal accountability of corporations in their country of origin as well as in the country the violations occurred.

The final panel, entitled "Priorities and Key Issues for 2014", highlighted a few points such as the attribution of a binding effect to the Principles and Equator's proposal; prompt actions; questions to Brazil concerning climate and environmental commitments; the increase of corporate representation at the Forum; protection of

human rights defenders; and the possibility of increasing the petitions from victims.

THE ROLE OF UNIVERSITIES AND THE IMPORTANCE OF ATTENDING THE FORUM

What we noticed and was also appointed by the “International Network of Human Rights” Organization, is the absence of the “Business and Human Rights” debate on academic programs at the Universities throughout the world. The number of academics registered was small, approximately 170 representatives in a total of 1700 participants, according to the official registration list released by the Working Group. From the participants included on the official list as representatives of academic institutions, several are not in fact linked to Universities but rather to study centers connected to civil society organizations. Regarding the participants linked to Universities, almost half are from the business and economics areas.

Therefore, the presence of the academy was quite restricted, especially if considered the presence of professionals from the humanities, such as Law, Social Sciences and International Relations.

Hence, it is crucial to strengthen the research in the area and to approach other academic centers, promoting the establishment of a coalition in the Business and Human Rights research. The Business and

Human Rights Project of Universidade Federal de Juiz de Fora, supported by The Ford Foundation, was the only Brazilian academic representative, accompanied by a few other Universities from other countries, such as the University of Essex, in the United Kingdom, The University of the City of Hong Kong, the University of Columbia, amongst others. Thus, it is essential that we participate in this space and disseminate its discussions amongst other research institutions.