THE NECESSITY AND POSSIBILITY OF A BINDING APPROACH TO INTERNATIONAL CORPORATE HUMAN RIGHTS RESPONSIBILITIES

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Abstract

All victims of non-state violations, including corporate ones are entitled to a full protection. However, under State-centric and voluntary social responsibility paradigms, violations of businesses may remain in impunity and victims abandoned. This would be contrary to the foundation and main principles of international human rights law, namely human dignity, equality, and universality. In light of this, the article explores why international law permits to create direct corporate human rights obligations, and what strategies to protect and promote human rights from potential corporate abuses can be used.

Keywords: Non-state entities; international obligations; protection of human dignity; individual-centered analysis of international law; business and human rights.

INTRODUCTION

While they may have an impact on attitudes and be relevant, exclusively voluntary approaches to corporate respect of human rights, as corporate social responsibility principles, have shortcomings as the fact that they can be ignored without direct legal consequences and that exclusive reliance on them prevents the reparations of some victims whose human rights have been violated in events in which corporations participate. The fact that individuals are the protagonists of the human rights framework calls for examining how to better protect victims of all abuses, including corporate ones.

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Businesses are sometimes factual agents of human rights abuses, and often have influence, power and capacities that enable them to challenge, diminish the effectiveness of or or circumvent State controls. Furthermore, due to delegation or privatization they sometimes have functions and powers with a direct impact on the enjoyment of human rights, as happens for instance with the provision of water; and can operate transnationally or taking advantage of the separate personality of entities in a corporate group and take advantage of gaps in domestic legal systems, sometimes eluding control.

Those and other factors may lead to the lack of effective or full protection of some victims, given the shortcomings of strategies that only examine the responsibility of States, to be discussed later on, and violations may remain in impunity. Therefore, international legal processes (of regulation or supervision, among others) of a binding nature in relation to corporate conduct may be crucial to make up for the limits of voluntary and State-centered approaches.

Given the importance of holding entities that act contrary to important international legal interests and rights accountable, corporate offenders must be

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addressees of legal obligations and responsibilities: it must be examined if corporations capable of violating international human rights law (at the very least the fundamental ones) already have international duties, case in which breaches will automatically engage their legal responsibility, and if they do not further regulation will be required de lege ferenda. After all, the legitimacy of the system may be eroded if it is denied that corporate entities can violate human rights and must have obligations to refrain from doing so, as demanded by a victim- and individual-centered approach and current understandings that the content of human rights is central, rather than the identity of just some possible duty-holders (e.g. States). In turn, the importance of the presence of international strategies of protection, subject to complementarity and subsidiarity considerations, is due to the limits of domestic controls.

WHY THE FOUNDATIONS OF HUMAN RIGHTS CALL FOR INTERNATIONAL CORPORATE OBLIGATIONS

The legal foundation and core principles of international human rights law require that corporate duties exist for protection to have prospects of effectiveness and being full: some of those obligations exist already, and others must be created de lege ferenda.

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To begin with, the protection of human dignity, which is the foundation of international human rights law,\(^1\) is non-conditional or unconditional,\(^2\) which means that it cannot be made dependent on any factors different from the human identity of those who must be protected. This implies that the protection of human dignity and the rights (that must be) founded upon it\(^3\) cannot be made dependent on the presence of an offender with a State identity, which explains why some NGOs and actors concerned with human rights condemn non-state violations.\(^4\) Furthermore, all victims suffer, and thus the prevention of and appropriate response to all violations, for instance State or corporate, are important.\(^5\)

Furthermore, all outrages against the inherent worth and against legitimate free choices of individuals are contrary to the protection of human dignity,\(^6\) and corporations can engage in such misdeeds, reason why individuals must be protected from them. To do so, in the first place the existence of the capacity of corporations to violate human rights must be recognized, because denying such capacity ultimately amounts to denying fundamental entitlements of victims.

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\(^3\) See Andorno, Roberto, op. cit., at 10; Resolution 41/120 of the General Assembly of the United Nations; Helsinki Final Act of 1 August 1975 of the Conference on Security and Co-Operation in Europe; Preamble to the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993; Preambles to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.


On the other hand, the peremptory principle of equality and non-discrimination, with which all international norms must be consistent, also demands protecting victims from all abuses, including corporate ones, in an effective way, and corporate social responsibility strategies may fail to do so and thus must be complemented by binding strategies. Otherwise, victims of corporations will be discriminated against, especially if the domestic law of the host countries, that is to say those in which corporations operate, is unable to protect from corporate abuses or to ensure the reparation of victims: a substantive prohibition of corporate misdeeds will authorize third States and international organs to condemn them and eventually to take action, apart from the symbolic impact it may have on corporate conduct and attitudes.

Furthermore, the principle of equality binds non-state actors themselves, including businesses, and prohibits them from discriminating against human beings, and it also guides how human rights provisions are to be interpreted and applied.

It must be noted that unintended and indirect discrimination are prohibited as well. Consequently, since individuals in the same fundamental substantive situation must be protected with an equivalent degree of effectiveness, it must be ensured that in practice victims of corporate violations have an effective access to meaningful remedies –as those to which victims of violations attributable to other actors-, taking into account that all victims deserve adequate legal protection regardless of who attacks them.

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17 Ibid., paras. 100-101.
18 Ibid., paras. 100, 140, 146; article 28 of the African (Banjul) Charter on Human and Peoples’ Rights.
19 See Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 83, 94, 96; Human Rights Committee, General Comment No. 18, Non-discrimination, 10 November 1989, paras. 1-3, 12.
21 Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 89-93.
Another pertinent basic feature of the international protection of human rights law is their universality. While it is frequently understood as requiring their protection in every State regardless of contrary attitudes, the term itself suggests that it demands a complete protection of human rights: not only geographically, but also in the ratione personae dimension, that is from every participant in violations, including businesses.

Protection from corporate abuses, on the other hand, must not be limited to just some human rights, taking into account that businesses -as all State and non-state entities- can act against every human right, for instance by intimidating those who want to exercise them.

For the reasons discussed in this section, it can be argued that the foundation and basic features of international human rights law demand full and effective protection from all abuses, including corporate ones. Hence, if State duties or corporate social responsibility strategies are insufficient to ensure it changes must be introduced.

HOW INTERNATIONAL LAW CAN DEAL WITH CORPORATE ABUSES

For protection to be complete, it must be given from all forms of corporate participation in violations, be it complicity, perpetration or else, being it important to consider that non-state actors can be complicit in violations of States or other entities.

23 See Vienna Declaration and Programme of Action, adopted on 25 June 1993, paras. 1.1, 1.5, 1.6 and 1.37.
24 Ibid.
25 Similarly, see Pariotti, Elena, op. cit., at 96.
As to the possible forms of protection, international law can address non-state abuses indirectly and directly, i.e. regulating the duties of authorities to prevent and respond to corporate abuses and directly regulating or supervising the conduct of businesses, for instance imposing duties to respect human rights on them.28

In addition to this, the ways in which international law can deal with corporate conduct can be further classified in three ways:

1. Firstly, when examining whether certain corporate conduct is or can be detrimental to the enjoyment of human rights in order to assess whether authorities (States or not, as for instance the European Union) have properly prevented or responded to those threats in an effective and appropriate manner (regulating or sanctioning the conduct, among others). One example of this possibility is found in the Elmi v. Australia case.29 It must be noted that there may be cases in which the respective authority does not breach the law due to its having behaved diligently but nonetheless there is a corporate violation that must be addressed for the victims to be protected. In this regard, it must be recalled that the international responsibility of authorities in connection with


non-state threats often emerges only if there has been a lack of due diligence (the standard of that diligence is greater when authorities generate risks of non-state violations), and so is not engaged with every non-state violation of human rights. In such events, if corporations take advantage of the different personality of members of a business group, or of different norms of host and home states, among others, and effectively challenge, elude or circumvent internal controls, it cannot be said that State obligations are sufficient to protect victims and ensure their reparations, since the State will have no responsibility. Given the uncertainty of voluntary approaches and how they can be set aside, in those events it is important to give direct entitlements to individuals to claim against the corporate offenders.

2. For the aforementioned reasons, corporate participation in violations of human rights is legally relevant insofar as it affects legal goods and individuals, and must be branded as internationally unlawful: in some events this is already recognized in lex lata (e.g. regarding violation of customary peremptory norms or international humanitarian law or criminal provisions). Regulating the prohibitions and duties of corporations permits their conduct to be directly examined and criticized in international human rights legal terms.

Such labelling has additional important consequences: it empowers and authorizes different participants in the international society, as authorities, to uphold the norms against corporate abuses, and legitimizes the initiatives of actors that criticize corporate misdeeds, empowering their arguments since it endows them with the power of criticizing abuses of human rights and international law, which are stigmatized.

31 On the notion of participants in the “international legal system”, i.e. regarding international legal procedures and dimensions, see Rosalyn Higgins, Problems and Process: International Law and How We Use It, Oxford University Press, 2004, pp. 49-50.
On the other hand, indicating that corporate participation in violations is unlawful in substantive terms is important given the expressive function of law,\textsuperscript{33} which signals to everyone about the unacceptable character of that participation and can thus lead to changes in the attitudes of corporations and social actors,\textsuperscript{34} for instance due to the desire to not appear as disregarding accepted legal tenets and human rights responsibilities with a binding foundation, since accusations in that regard can harm the image of corporations and potentially expose them to sanctions.\textsuperscript{35} Moreover, regarding non-state violations as internationally unlawful can trigger processes of socialization to discourage violations; and makes it possible, even if host States fail to prohibit or tackle non-state violations due to their weakness, for other authorities (State or not) to address them because of their being unlawful under international law, making them thus unlawful everywhere, that is to say, it allows the use of mechanisms based on allegations of breaches of human rights or international law.\textsuperscript{36} Those reasons, and processes that exert pressure on compliance, make advisable to adopt instruments on corporate responsibilities under international law, which have another advantage: they can dispel doubts and settle debates on whether corporations have international human rights obligations, which is an issue debated by some (both corporations and States) that attach priority to profit over human concerns.

In my opinion, corporate conduct must be considered as unlawful under international law at the very least when it implies involvement in the following types of


violations: violations of jus cogens and of international criminal law; massive or systematic violations; and violations with especially appalling or worrisome features, given the urgent need to protect victims. The first two categories are already prohibited under international customary law. John Ruggie also takes into account the seriousness of violations, arguing that they must be dealt with in normative terms to tackle “governance gaps.” That being said, I posit that every violation in which a corporation participates must generate its responsibility due to the effects described above. This does not mean that international bodies must check every one of them -they can still pay special attention to the serious ones-, but their being considered to be prohibited permits and bolsters different initiatives.

The direct prohibition of corporate or other non-state participation in abuses under international law implies that the conduct of businesses can be examined in light of it. This examination can even be conducted by international bodies or agents. Such supervision can be conditioned to the fulfilment of certain requirements. For example, the conduct of the UNMIK was analyzed by the Human Rights Committee because it administered a territory, given the need to ensure that the human rights of the population of that territory are protected regardless of who administers it.37

Conversely, the international supervision of corporate conduct can be a direct and unconditioned, as would have happened if the proposal to make corporations subject to the jurisdiction of the International Criminal Court had been successful -it must be stressed that international criminal law can outlaw violations of human rights and so protect them-.38

It is important to turn to the analysis of the argument that, acknowledging the limits of State obligations and responsibility, corporate social responsibility and other voluntary approaches and principles, as those contained in codes of conduct, could be sufficient to ensure the respect of human rights by corporations.

It is true that voluntary initiatives can contribute to shaping corporate culture and attitudes or even be the inspiration of future legal reforms, taking into account that human rights and the strategies to promote them have not only legal and judicial but

37 See Human Rights Committee, Concluding Observations on Kosovo (Serbia), CCPR/C/UNK/CO/1, 14 August 2006, paras. 4, 8-22.
also ethical, social and other dimensions,\textsuperscript{39} reason why initiatives to refer to them, for instance in agreements or internal statements (e.g. as communications or agreements in which the European Union has participated, or agreements entered into by Canada)\textsuperscript{40} must be commended. Nevertheless, it cannot be ignored that voluntary initiatives have shortcomings, some of which are specially troublesome or relevant.

Among those limitations, the following can be mentioned: their very voluntary nature implies that they can be set aside by their addressees without any direct legal repercussion (they may eventually produce indirect legal effects);\textsuperscript{41} affected individuals often lack access to remedies and mechanisms with prospects of effectively protecting them and leading to the declaration of the breach of corporate duties;\textsuperscript{42} or they can being invoked merely to improve the image of a corporation with no real commitment to the respect human rights.\textsuperscript{43} For those reasons, voluntary initiatives must be complemented by legally binding legal processes, such as regulation and supervision based on international law. The conditions and possibilities of that regulation which will be explored in the next section.

**CONDITIONS TO CREATE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF BUSINESSES**

Different requirements must be satisfied to create corporate human rights obligations under international law. Logically, the first step is for them to be created by the sources of international law -either primary or secondary ones, as through resolutions of the Security Council, which can impose duties on non-state actors-.\textsuperscript{44}


\textsuperscript{40} Gatto, Alexandra, op. cit., pp. 432-454; Inter-American Commission on Human Rights, Hearing on the Impact of Canadian Mining Activities on Human Rights In Latin America, held on the 28th of October, 2014, available here: \url{https://www.youtube.com/watch?v=OWYue8FPgZY}


\textsuperscript{42} See Reinisch, August, op. cit., pp. 52-53; Gatto, Alexandra, op. cit., at 431; Corporate Responsibility, the corporate responsibility coalition, “Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities”, briefing paper for the UN Secretary General’s Special Representative on Business and Human Rights, 2010, at 4.

\textsuperscript{43} See Ibid.

\textsuperscript{44} ‘Secondary law’ is a term borrowed from European Union Law. See “Sources of European Union law”, available at: \url{http://dx.doi.org/10.12957/rqi.2015.15366}
Regarding treaties, the negotiators could require the consent of corporate addressees for them to be bound (see, in comparison regarding other non-state actors, article 96.3 of Protocol I to the Geneva Conventions of 1949), but that is not necessary and corporate duties of corporations can be enacted without requiring their consent.

Additionally, fundamental rights\(^{45}\) and guarantees have to be respected for the regulation of corporate duties to respect the rule of law. Among them, the principle of legality stands out (but is not the only one), requiring that knowledge of the content of duties is foreseeable and accessible, happens with the regulation of all non-state duties (one case that discusses this in relation to individuals is the Kononov v. Latvia case).\(^{46}\)

Another substantive requirement is that the corporate obligations respect jus cogens.

Finally, it can be said that the obligations in question can be had by the respective corporations logically, factually and normatively, taking into account that, as other entities, they must have the capacity to have legal burdens in order for them to possess them.\(^{47}\)

If the conditions to create a corporate obligation are satisfied, those bound by it will become subjects of international law due to their being its addressees.\(^{48}\) After all,  


While human rights are those of individuals based on their inherent worth, other entities may have rights of a fundamental importance, the content of which sometimes may resemble that of certain human rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms permits applications of non-state entities that consider themselves as victims of violations contrary to that treaty, and the choice of words of the instrument’s title can be construed as implying that non-individual entities may have fundamental rights but certainly not the former, due to their not being human. Supporting the ideas on the features of human rights expressed in this paragraph, see Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 9; Alvarez, José E., "Are Corporations “Subjects” of International Law?", Santa Clara Journal of International Law, Vol. 9, 2011, pp. 9-11, 17-19; Finnis, John, "The Priority of Persons", in Jeremy Horder (ed.), Oxford Essays in Jurisprudence, Fourth Series, Oxford University Press, 2000, pp. 6-9.\(^{46}\)

See European Court of Human Rights, Grand Chamber, Case of Kononov v. Latvia, Judgment, 17 May 2010, paras. 185-187, 205-213, 235-239.\(^{47}\)


See Klabbers, Jan, International Law, Cambridge University Press, 2013, locations 2533-2540 (kindle edition); Portmann, Roland, Legal Personality in International Law, Cambridge University Press,
international law can directly regulate non-state conduct without the mediation of internal legal systems.49

Another important aspect is that international law can regulate duties of non-state actors - among which corporations are included - expressly or by implication, without expressly referring to those actors.50 Just international organizations have those capacities that are necessary for the achievement of their goals,51 the respect of human rights might be accompanied by implied obligations that are correlative the respect of those rights.

The previous arguments defend the idea that it is possible for corporations to have international human rights obligations. Furthermore, the creation of those obligations is not only possible but also consistent with the evolutionary character of human rights and international law, with the evolution in the understanding of the notion of legal personality,52 and also important to defend human dignity.


51 See Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing, 10 November 2010, paras. 44-49; Inter-American Court of Human Rights, Case of the Constitutional Court v. Peru, Judgment (competence), 24 September 1999, paras. 31-33.

After all, it is important that all entities are bound to respect human rights: individuals, because they ultimately commit violations;\textsuperscript{53} and collective or group actors, as corporations, because their resources and dynamics often permit, facilitate or worsen violations, reason why they must have legal responsibility as well.\textsuperscript{54}

I will now turn to explore international human rights obligations that corporations have in lex lata and the content of other obligations that they can have.

**THE CURRENT AND POSSIBLE CONTENT OF CORPORATE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS**

In current positive international law there is an obligation of everyone that can act contrary to it to refrain from violating or contributing in the violation of jus cogens norms, some of which protect human rights.\textsuperscript{55} Corporations have the capacity to participate in their violations, and so have the duty to not do so.\textsuperscript{56}

The implied obligation to respect peremptory human rights exists because of the following factors:

1. The principle of effectiveness\textsuperscript{57} coupled with the absolute prevalence of jus cogens,\textsuperscript{58} outlawing all contrary conduct and manifestations. Concerning this, in
the Furundzija case it was held that jus cogens prevails over and sanctions every contrary normative and factual manifestation, whoever its author is.\textsuperscript{59}

2. The fact that jus cogens protects community goals and interests, which, as argued in the Reparation for Injuries case, can have an impact on international legal subjectivity and on the presence of legal capacities of non-state entities (e.g. international organizations).\textsuperscript{60} Law can regulate not only rights but also duties, and when duties are necessary for achieving international legal goods, especially the most important ones with a community value,\textsuperscript{61} they can implicitly bind all potential offenders. Furthermore, those duties can be possessed according to the notion of inherent capacities; and obligations flowing from peremptory law are erga omnes and so have a vertical dimension with effects in relation to non-state entities.\textsuperscript{62}

3. The correlation between rights and obligations in international law\textsuperscript{63} lends support to the idea that, at the very least, peremptory human rights must be protected by the existence of correlative obligations, at least implicitly. This is supported by the opinion of the European Court of Human Rights that entities as individuals cannot ignore duties to not violate human rights even if, unlike States, they are not expressly their addressees. Authors as Jordan Paust have
argued that some human rights guarantees may be protected by implicit corresponding non-state duties;\(^{64}\) and others have argued that norms and legal practice reveal that non-state entities are bound to respect human rights enshrined in peremptory law.\(^{65}\)

In addition to the duty to respect jus cogens (which binds all entities due to their being potential offenders), there may be other international human rights obligations of corporations, the creation of which is advisable because they may participate in the violation of any human right and not every one of them is protected by peremptory norms.\(^{66}\) The special rights and needs of protection of vulnerable individuals and the unique features of corporations must be taken into account to better regulate corporate obligations.\(^{67}\)

International human rights obligations of corporations can be: 1) implied or express; 2) formally found in different branches of international law (developments in one of them can inspire progress in the others);\(^{68}\) 3) obligations of means or of result

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\(^{66}\) See Human Rights Committee, General Comment No. 29, op. cit., para. 11; Antonio Gómez Robledo, El Ius Cogens Internacional: Estudio histórico-critico, op. cit., pp. 166-172.


\(^{68}\) After all, norms from different so-called branches actually protect shared legal goods, showing that divisions between those branches are not hermetic and many of their norms belong to one same corpus juris, and thus that developments in one of them can be replicated or serve as inspiration in others. See Clapham, Andrew, Human Rights Obligations of Non-State Actors, op. cit., at 73; Brownlie, Ian, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations, Martinus Nijhoff Publishers, 1998, pp. 65-66.
(e.g. a duty to make internal policies consistent with human rights); and negative (forbidding acting against human rights) or positive, commanding them to do something (they will likely be due diligence obligations).

Positive human rights obligations of corporations can certainly be created and can be compatible with a system of human rights, the foundation of which is human dignity. They can regulate demands in relation to events or roles in which requiring protection by corporations is sound, for instance when there are legitimate expectations of that protection, as can happen when a company: a) has a position of guarantor - e.g. if it handles a prison or hospital; b) has functions or powers with a direct impact on the enjoyment of human rights, as the provision of water; c) creates a risk of violation, in which case it should prevent it from materializing; d) is found to have violated human rights and has a positive duty to repair; or e) when the enjoyment of a human right

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69 See article 4 of the Convention on the Rights of Persons with Disabilities in conjunction with articles 42 through 45 thereof; and article 59.2 of the European Convention on Human Rights in light of the analysis of the customary obligation to adjust regulations to demands of international human rights law presented in: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 77; paragraph 15 of the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.


72 On the use of the notion of the position of guarantor and the obligations of those in it as used in international human rights law, see Inter-American Commission on Human Rights, Press Release 14/10, “IACHR Deplores Acts of Violence in Prisons in Brazil”; Inter-American Commission on Human Rights, Press Release 19/12, “IACHR Deplores Deaths in Fire in Honduras Prison.”


74 This criterion has been expressly invoked in order to examine State compliance with human rights obligations when States create a risk of a non-state violation, being it considered that duties to prevent and respond to them become stricter. See Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, Judgment, 31 January 2006, paras. 125-126. Supporting the consideration that non-state entities that generate a risk of a violation may be obliged to neutralize it, see Eser, Albin, “Individual Criminal Responsibility: Mental Elements—Mistake of Fact and Mistake of Law”, Reprints from: Antonio Cassese et al. (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, 2002, at 819; United States Court of Appeals for the Seventh Circuit, Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC, Decision of 11 July 2011, pp., 20-22.
directly and urgently depends on corporate action, as may happen in some emergency situations;

The obligation to repair is quite important, because frequently full and effective reparations will not be possible unless corporations involved in abuses participate in them. This makes regulating primary obligations of them important, since they will be bound by secondary rules\(^75\) that, among others, command reparations, if they breach the former.

**CORPORATE RESPONSIBILITY AND THE FULL REPARATIONS OF VICTIMS**

The protection and wellbeing of human beings and victims must guide the analysis of every legal process,\(^76\) and this is no different when assessing issues of responsibility and reparations.\(^77\) Concerning them, it must be noted that apart from the fact that responsible actors must repair,\(^78\) victims are entitled to full reparations.\(^79\) Therefore, if victims cannot be fully repaired unless corporate participants in violations participate in reparations, it follows that those actors must have the duty to repair, a condition of which is their having primary obligations: social or non-legal


\(^{78}\) See article 31 and Chapter II of Part Two of the articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission.

\(^{79}\) See the Basic Principles and Guidelines on the Right to a Remedy and Reparation (the very title of which is quite telling), especially but not exclusively Principle 18 thereof; and Saavedra Alessandri, Pablo, “Las Reparaciones en el Sistema Interamericano de Derechos Humanos”, pp. 4, 14-16, available at: http://www.usergioarboleda.edu.co/instituto_derechos_humanos/material/cv/reparaciones.pdf (last checked: 05/04/2014); van Boven, Theo, op. cit., pp. 2-3, 5.
Responsibilities are not sufficient, because they do not ensure that corporations have an obligation to repair and thus permit their refraining from doing so with no legal consequence.  

Truly, sometimes reparations cannot be full unless the corporations that participated in a violation, even as accomplices, do not repair victims. This can be the result of limitations in compensations according to what participants in violations owe victims in relation to their own contribution to damage, reason why not obliging corporations involved may lead to the absence of full compensation. The absence of full reparations could also be related to the component of satisfaction: for instance, for apologies to be truly meaningful for victims and have a full psychological effect they must be given by all entities involved in a violation; or for the whole truth surrounding a violation to be revealed it may be necessary for a company that is the only one to know part of it to reveal it.

The previous considerations are also relevant in relation to another consequence of responsibility: the guarantees of non-repetition. Common sense indicates that they must be given by all actors involved in a corporation, be them companies or not, to seek that they do not participate in similar violations in the future.

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84 See paragraph 18 and 23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation; Saavedra Alessandri, Pablo, op. cit., pp. 3 and 14; and articles 30 and 48.2.a of the articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission, and 30 and 49.4.a of the Draft Articles on the Responsibility of international organizations adopted by the International Law Commission in 2011.
It may be asked if corporate responsibility could somehow undermine the international responsibility of States. Concerning this, State obligations will not disappear, as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights recognized in their first paragraph. This is because in international law different entities can be responsible in connection with one same violation when each of them breaches its duties: those responsibilities will then coexist, as discussed in doctrine and case law.  

Each entity, including corporations -with their separate personality- responds for how it participated, e.g. as a perpetrator, accomplice or participant in joint illegal enterprises, among other possibilities. That is why the possible coexistence of responsibilities or companies and other actors is not contrary to the individualization of international responsibility, since they will respond for their own acts. 

The article will now turn to examine what initiatives and strategies can be employed to supervise corporate conduct in light of international human rights standards and encourage compliance with them.

MECHANISMS AND STRATEGIES TO STRENGTHEN THE RESPECT OF HUMAN RIGHTS STANDARDS BY CORPORATIONS

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For their rights to not be merely theoretical and illusory, individuals have a right to an effective legal protection of their fundamental entitlements – including protection from non-state abuses\(^8\) and reparations when corporations violate their rights. Yet, since in international law substantive law is sometimes not accompanied by procedural guarantees\(^9\) it is important to explore what lawful and proportionate mechanisms can be used to protect human beings from possible corporate abuses, bearing in mind that non-judicial strategies can play an important but not exclusive role.\(^90\)

Different initiatives and strategies can be used, each having its own strengths and weaknesses in a global landscape, reason why they must complement each other in a multi-level and multi-actor fashion.\(^9^1\) After all, domestic, transnational and global actors and strategies have pros and cons in relation to legitimacy, flexibility, bias or effectiveness in some regards;\(^9^2\) and cooperation between different actors is crucial to protect shared interests.\(^9^3\).

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\(^{8}\) See Clapham, Andrew, Human Rights Obligations of Non-State Actors, op. cit., pp. 74-75; Lauterpacht, Hersch, op. cit., pp. 27, 34.


Some of the strategies that can be resorted to are: a) preventative, whereas others seek to respond to violations; some may be b) based on adjudication and others help to bridge accessibility gaps by means of conciliation and other alternative dispute resolution processes -being both options useful for alleged victims and alleged corporate abuses to ascertain if an allegation is true or not-; c) some initiatives may seek to address the effects of violations, and others seek to deal with and prevent some causes of corporate violations, for instance by disseminating the content of corporate responsibilities, being education an important element of the promotion and observance of international law.

Apart from this, d) some mechanisms can have a binding outcome, and others one that is not mandatory but can contribute to shaping corporate attitudes, for instance by shaming offender companies or indicating standards to be followed in relation to corporate abuses in reports or studies (that NGOs or international and national bodies can issue), permitting companies to be contacted, or by using codes of

93 See Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of the Court), available on: https://s3.amazonaws.com/s3.documentcloud.org/documents/362198/ecthr-statement-of-requests-for-interim-measures.txt (last checked: 06/02/2014), where it is mentioned that “For the Court to be able effectively to perform its proper role in this area both Governments and applicants must cooperate fully with the Court.”


95 In the context of international humanitarian law, see: Kalshoven, Frits and Zegveld, Liesbeth, Constraints on the Waging of War (3rd edn.), International Committee of the Red Cross (ICRC), 2001, pp. 139-140.


conduct with human rights elements with the goal of achieving internalization or changes in corporate culture.

Finally, some strategies seek to e) supervise corporate conduct and others promote new regulations or commitments (and corporations, NGOs or other actors could somehow even help in drafting standards or have an indirect influence on their emergence). 

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CONCLUSIONS

Developments in international law and human rights have certainly contributed to the humanization of law by placing essential interests of human beings in a central place and reinforcing the protection of human beings when domestic controls are either unavailable or ineffective. Still, there is still much left to be done for that protection to truly reach every victim and person in need, and this requires, among others, acknowledging and responding to the facts that corporations can participate in human rights violations and that State-based and voluntary initiatives to address that participation are often insufficient, reason why binding strategies must be adopted. Different legal and non-legal processes of regulation, supervision, enforcement, persuasion, dissuasion, and others must be properly handled, because all of them can have an impact on the improvement of the protection of human rights.


The emergence of an international protection of human rights originally responded to the idea that protection from State abuses could not rely exclusively on internal legal systems.\textsuperscript{99} Likewise, domestic and voluntary strategies of protection from corporate and other non-state abuses can be insufficient as well,\textsuperscript{100} due either to the fact that States may fail to protect victims despite their best efforts or to their non-binding character, events in which victimization and suffering will not be addressed and impunity could be encouraged. Moreover, domestic legal systems may fail to adopt or uphold norms on corporate and other non-state responsibilities in their internal law – despite being required to,\textsuperscript{101} reason why an international regulations can prevent the presence of such gaps, prohibiting (or requiring the prohibition of) corporate participation in abuses everywhere and authorizing action by different actors and authorities (e.g. by NGO shaming or State or European Union regulation), signalling that corporate violations of human rights are unlawful and forbidden. In light of the suffering of victims and legal possibilities, the question is not if corporations actors must or can have human rights responsibilities that do not depend on the whim of State legislators or on their capacity to face or struggle with companies that can challenge them with their power or legalistic arguments, but rather how to provide international protection.

Direct international legal engagement with corporate conduct not undermine State duties, which remain thanks to the possibility of coexistence of obligations and responsibilities of entities with different natures, as examined in this article. The express recognition and condemnation of non-state violations actually highlight State obligations to prevent and respond to corporate abuses, perhaps even in extraterritorial terms (as when States create a risk of corporate violations with effects abroad or make efforts for abuses in which companies registered in them participate to be silenced). Additionally, existing international human rights systems will not be strained, with

\textsuperscript{99} See Portmann, Roland, op. cit., pp. 254.
\textsuperscript{100} See Bellal, Annyssa and Casey-Maslen, Stuart, op. cit., pp. 186-187.
corporate threats to human dignity being addressed in a multi-level and multi-actor framework that uses different mechanisms and strategies.

In fact, far from weakening human rights, direct international protection from corporate abuses, both in substantive (which must be developed and already exists in some cases, e.g. concerning jus cogens and international criminal law) and sometimes even in procedural terms, will help to prevent the erosion of the legitimacy of the system, whose nature as a framework of human rights could be –rightly- questioned if only some victims are protected and considered as having fundamental entitlements and victimhood, which could be understood as attaching more importance to some possible offenders than to the rights holders themselves, who must be the protagonists. Worse, failure to criticize and condemn non-state participation in violations called as such could be seen, for instance, as endorsing corporate offenders when international standards seem to (sometimes in an imbalanced way) protect them in other fields, such as investment. Furthermore, corporate responsibilities in no way legitimize or empower companies: being called a human rights violator exposes an actor to criticism, and its being a duty-holder encourages and allows others to scrutinize its actions.

The fact that sometimes non-state actions against human dignity and human rights are called as abuses\textsuperscript{102} must not lead one to think that they do not amount to violations, having been expressly called as such by authors and bodies as the Inter-American Court of Human Rights. This idea is logically applicable to corporations; and in fact sometimes State conduct contrary to human rights is called as amounting to an abuse, but no one doubts that it is a violation.\textsuperscript{103}


It must never be forgotten that all victims have inherent worth and deserve and are entitled to protection, regardless of who violates their rights, what nature or ideologies offenders spouse, or whether the offender can generate profit or create employment: this is demanded by the human dignity that every single entity with a human nature has, and which must be recognized by law.\footnote{This consideration, in my opinion, both founds and is required by the right to the recognition of recognition as a person “before the law”, which the following sources explain: articles 6 of the Universal Declaration of Human Rights, 3 of the American Convention on Human Rights, 16 of the International Covenant on Civil and Political Rights, and XVII of the American Declaration of the Rights and Duties of Man, among others (the last cited article says that “[e]very person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights”); Inter-American Court of Human Rights, Case of the Girls Yean and Bosico v. Dominican Republic, Judgment, 8 September 2005, paras. 176, 179-180.}

Truly, a system based on human dignity calls for universal protection in terms that are comprehensive. Some alternative theoretical proposals of human rights foundations also call for protection from non-state abuses, but do so in a more limited manner and their positive contributions can be perfectly accommodated in a framework based on human dignity.\footnote{See, for instance, the theoretical proposal found in: Goodhart, Michael, “Human Rights and Non-State Actors: Theoretical Puzzles”, in George Andreopoulos et al., Non-State Actors in the Human Rights Universe, Kumanarian Press, Inc., 2006. Despite being quite interesting and calling for greater protection from non-state violations of human rights, the theory could fail to protect every right founded upon human dignity from all non-state violations, because some interpretations of that conception could lead to leaving victims of entities without a position of authority or of abuses of power out of the scope of human rights protection.}

This study defends that international law and human rights law can (and should) directly address corporate participation in violations, which is contrary to the interests and rights they enshrine and protect;\footnote{On the notion of international and global legal goods, see: Carrillo-Santarelli, Nicolás, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., pp. 832-840.} and that to respond to this need accordingly it is possible for them to directly regulate corporate (and other non-state) duties, among other strategies. This is evinced by the fact that international law does address non-state conduct both directly and indirectly in order to protect human dignity and human rights, as happens with norms of international criminal law, of international humanitarian law, norms that protect refugees, and even some norms of international...
human rights law expressly called as such, among others\textsuperscript{97} (all rights protecting human dignity are human rights and belong to human rights law);\textsuperscript{98} confirming that international law\textsuperscript{99} can directly protect human rights from non-state threats. Some of those norms even envisage direct non-state obligations and permit the supervision of non-state conduct in light of human rights standards by international bodies, as happens with the European Convention on Human Rights or the Convention on the Rights of Persons with Disabilities and its Optional Protocol.\textsuperscript{100} This confirms both that international law can directly regulate non-state obligations and that the field of human rights encompasses all norms protecting them, not just those called as such expressly.

That being said, as expressed at the beginning of the presentation of these conclusions, there is still much left to be done to truly and fully protect all victims. Hence, gaps must be filled, and it is possible to do so. International law can change, and human rights law must evolve regarding protection from corporate conduct. It is important to bear in mind that if an entity lacks certain international human rights obligations, it can have them in the future.\textsuperscript{101}

All victims suffer, whoever they are and whoever offenders are. Denying the existence or legal relevance of corporate abuses under human rights law and the need


\textsuperscript{99} International law, in my opinion, should be more properly called jus gentium, given how it regulates intra-gentes and inter-gentes aspects, among others such as cosmopolitan, human and collective dimensions. See Gómez Robledo, Antonio, Fundadores del Derecho Internacional (Vitoria, Gentili, Suárez, Grocio), Universidad Nacional Autónoma de México, 1989, pp. 14-15, 98-99; Rafael Domingo, ¿Qué es el derecho global?, Thomson Aranzadi, 2007, at 71-72; Remiro Brotons, Antonio et al., Derecho Internacional, McGraw-Hill, 1997, pp. XLV-XLVI.


\textsuperscript{101} See United States Court of Appeals for the Second Circuit, Kiobel v. Royal Dutch Petroleum, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, at 49.
to legally respond to and prevent them contradicts the bases of positive State duties and the foundations and basic features of human rights law, and also constitutes an affront to the victims of non-state violations, because it is unacceptable to consider that human rights law has nothing to say directly and without domestic legal mediation when a human being is killed by someone hired by a company, that somehow and for arcane and highly artificial theoretical reasons his right to life is supposedly not violated, or that victims of abuses in a labor context, as some children, or populations affected by irresponsible corporate behavior, allegedly have no human rights entitlements to request protection, when the opposite is true: protection from corporate abuses is required by law. Sometimes this is done in an indirect fashion that can fall short of their needs, but since international law can offer a more intense and direct protection from violations and threats attributable to non-state entities, it must do so, because victims may find no effective remedies otherwise. This is what the inspiration and idea of human rights, which are not called mere rights against States—which is but part of their mission—and their legal embodiment, demand. Part of their inspiration is that of solidarity with all human beings and victims and condemnation of abuses against human dignity, after all.\textsuperscript{112} That being said, corporations can also be very positive actors and promote the enjoyment of human rights,\textsuperscript{113} for instance generating employment and promoting responsible behavior or human rights standards, and that must not be forgotten either.

\textbf{A NECESSIDADE E POSSIBILIDADE DE UMA ABORDAGEM VINCULADA DAS RESPONSABILIDADES DAS CORPORAÇÕES INTERNACIONAIS POR VIOLAÇÕES DE DIREITOS HUMANOS}

\textbf{Resumo}

Todas as vítimas de violações não-estatais, incluindo as corporações, têm direito a uma proteção total. No entanto, sob paradigmas estato-cêntricos e voluntários de responsabilidade social, violações causadas por corporações podem permanecer


\textsuperscript{113} See Pariotti, Elena, op. cit., at 105.
impunes e as vítimas abandonadas. Isso seria contrário à fundação e aos princípios fundamentais do direito internacional dos direitos humanos, à dignidade humana, à equidade e à universalidade. À luz disto, o artigo discute porque a lei internacional permite criar obrigações diretas das corporações por violações de direitos humanos e que estratégias para promover e proteger os direitos humanos por parte de potenciais abusos das corporações podem ser utilizadas.

**Palavras-chave:** Entidades não estatais; obrigações internacionais; proteção da dignidade humana; análise centrada no indivíduo do direito internacional; Negócios corporativos e direitos humanos.

**BIBLIOGRAPHY**


BROTÓNS, Remiro, Antonio et al., Derecho Internacional: Curso General, Tirant Lo Blanch, 2010.


COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/4, 11 August 2005.

CORTÉS, José Manuel. Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional, Instituto Andaluz de Administración Pública, 2008.


_____Case of Al-Adsani v. The United Kingdom, Judgment, 21 November 2001.


_____Case of Opuz v. Turkey, Judgment, 9 June 2009.

_____Case of Rantsev v. Cyprus and Russia, Judgment, 7 January 2010.

_____Case of Sufi and Elmi v. the United Kingdom, Judgment, 28 June 2011.

_____Fourth Section, Case of Hajduová v. Slovakia, Judgment, 30 November 2010.


FIELDING, Alex. Sainovic Appeal rejects ‘specific direction’, but was it necessary?, Beyond The Hague: Thoughts on international justice from The Hague and beyond, 24 January 2014, available at: http://beyondthehague.com/2014/01/24/sainovic-appeal-rejects-specific-direction-but-was-it-necessary/ (last checked: 05/04/2014).


GARCÍA VILLEGAS, Mauricio. De qué manera se puede decir que la Constitución es importante, in Álvarez Jaramillo et al., Doce ensayos sobre la nueva Constitución, Diké, 1991.


HIGGINS, Rosalyn. **Problems and Process:** International Law and How We Use It, Oxford University Press, 2004.


HUMAN RIGHTS COMMITTEE. **Concluding Observations on Kosovo (Serbia),** CCPR/C/UNK/CO/1, 14 August 2006.

_____**General Comment No. 18,** Non-discrimination, 10 November 1989.

_____**General Comment No. 29,** States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

_____**General Comment No. 31,** The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004.


_____**Resolution 15/9 adopted by the Council,** Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9, 6 October 2010.


INTER-AMERICAN COMMISSION OF HUMAN RIGHTS. **Hearing on the Impact of Canadian Mining Activities on Human Rights In Latin America,** held on the 28th of October, 2014, available here: https://www.youtube.com/watch?v=OWYue8FP9ZY


_____**Press Release 19/12,** IACHR Deplores Deaths in Fire in Honduras Prison.


Case of Castillo-Petruzzi et al. v. Peru, Judgment, 30 May 1999.

Case of González et al. (“Cotton Field”) v. Mexico, Judgment, 16 November 2009.

Case of Jessica Lenahan (Gonzalez) et al. v. United States, Case 12.626, Merits Report No. 80/11, 21 July 2011.


Case of the Constitutional Court v. Peru, Judgment (competence), 24 September 1999.


Case of the Pueblo Bello Massacre v. Colombia, Judgment, 31 January 2006.


Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03.


Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja to the Preliminary Objections Judgment of the International Court of Justice of 1 April 2011 in the Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation).


Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing, 10 November 2010.


MERON, Theodor, The Humanization of International Law, Martinus Nijhoff, 2006


Trabalho enviado em 16 de fevereiro de 2015.
Aceito em 18 de fevereiro de 2015.