The Legal Liability of Transnational Corporations: Between Extraterritorial Obligations of States and Universal Justice

La responsabilidad jurídica de las empresas transnacionales: Entre las obligaciones extraterritoriales de los Estados y la justicia universal

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Abstract: The paper focuses on the possibilities of accountability of transnational companies, which operate in a "value chain" in different States and jurisdictions around the world. To this purpose, we propose a change in paradigm from solitary sovereignty to solidarity sovereignty, based on the duty of cooperation between the various state jurisdictions, in order to optimize the theoretical-practical understanding on the theme of extraterritoriality and universal justice. In the first part, the paper highlights the pertinence of the theme from a contemporary perspective. In the second part, the paper proposes a liability framework for transnational companies based on the duty of cooperation, which recognizes that

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this duty applies to both home States, where the large corporations are domiciled, as well as the host States.

Keywords: Transnational corporations. Duty to cooperate. Extraterritorial obligations. Solidarity sovereignty. Universal justice.

Resumen: El trabajo se centra en las posibilidades de rendición de cuentas de las empresas transnacionales, que operan en una "cadena de valor" en diferentes Estados y jurisdicciones del mundo. Para ello, proponemos un cambio de paradigma de la soberanía solitaria a la soberanía solidaria, basado en el deber de cooperación entre las distintas jurisdicciones estatales, con el fin de optimizar la comprensión teórico-práctica sobre el tema de la extraterritorialidad y la justicia universal. En la primera parte, el trabajo destaca la pertinencia del tema desde una perspectiva contemporánea. En la segunda parte, el trabajo propone un marco de responsabilidad para las empresas transnacionales basado en el deber de cooperación, que reconoce que este deber se aplica tanto a los Estados de origen, donde están domiciliadas las grandes corporaciones, como a los Estados receptores.

Palabras clave: Empresas transnacionales. Deber de cooperar. Obligaciones extraterritoriales. Soberanía solidaria. Justicia universal.

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Summary

4. Final Considerations

1. Introduction

The globalization process was able to integrate and promote the interaction of different efforts related to economic activities, but this process still faces great obstacles for the construction of institutional cooperation spaces for the global protection of human rights.

Based on this contrast between the two processes, the paper aims to identify mechanisms of business developments that translate into hindrances to the construction of universal justice.

The proximity of the differences between the processes of mundialization and globalization are key references for reading this text. Thus, one operates in a way as to highlight that the integration of economic activities is conveniently broken, if one considers the free market perspective, for the accountability for human rights violations.

In order to further investigate such asymmetries, we propose, at first, to study the relations and implications of the constitution of corporate groups and the lack of accountability within the production chain of transnational companies. The paper also scrutinizes elements that can confront and open paths of hope for the effective protection of human rights.

Even though the studies on extraterritoriality and universal jurisdiction date back a few decades, we understand that until a treaty on business and human rights is adopted, there are severe challenges to hold corporations accountable for human rights violations. Thus, improving the standards of application of extraterritoriality and universal jurisdiction, in the absence of a binding instrument, is the proposal that will guide the second part of the text. Our proposal is that a profound shift from the paradigm of solitary sovereignty to that of solidary sovereignty, in which the duty of cooperation is rooted, could significantly contribute to improve

the levels of theoretical and practical understanding on the subject of extraterritoriality and universal justice.

2. Part 1: Two Challenges to Holding TNCs Accountable for Human Rights Violations: Who Responds?

Transnational companies are legal entities that operate in several territories. Such expansion occurs, for example, in the form of incorporated groups or so-called "chains" of companies. We will deal with two challenges. First, the matter of "who" in a group of companies should be held responsible for harmful acts to third parties (1.1). Second, on the problem of recognizing or not a "zone of influence" when human rights violations derive from acts of companies that are members of the production chain (1.2.).

a. Challenge 1: The (not) curious paradox of grouping together to disperse

Transnational corporations have assumed a central role in global trade since the 70s in the last century.[3] They belong to private actors' groups that hold a significant power of influence over the world economy and a relevant impact on many national economies. Indeed, it is not unknown that in many cases, faced with the economic and political weakness of many States, corporations assume a strategic and decisive role. Such strength determines regulations and state aid that are not only openly aimed at favoring them economically, but also that are conniving and complacent with their illegal conduct. The members of such groups may take the form of subsidiaries, branches, consortiums, etc., which are intended to

[3] Saldanha, Jânia Maria Lopes. *Do direito soft ao direito hard em matéria de responsabilidade jurídica das empresas transnacionais por violação de direitos humanos in* Bolzan de Morais, José Luis (Org.). *Estado e Constituição. O " fim" do Estado de Direito.* Florianópolis: Empório do Direito/Tirant lo Branch, 2018, p. 208-231.

promote or develop a product or brand in the same country of origin of the mother-company or in other country. The latter invariably exercises control and imposes management practices and policies on the affiliated companies, which must strive to gain maximum advantage from the governments of the countries in which they are established.

When dealing with the subject, Surya Deva[4] says it is necessary to redirect the theory of corporate law, given its fundamentality for the promotion of human rights. In fact, if we intend to humanize the actions of companies, a good path is that changes happen from the inside. First, because companies must abandon their attempt to build an image solely linked to the maximization of profits. Second, because the issue of limited and independent liability cannot be understood today without considering the fact that corporations buy shares in other companies.

There are several difficulties to be faced. The first concern is determining who is accountable in a group of corporations. The emergence and expansion of economic groups is nothing more than a response to the demands of the capitalist model that emphasizes the logic of de-spatialization and competitiveness. The group, then, is a business policy instrument designed to promote and increase competitive capacity, productivity, internationalization of activities, and to disperse risks.

José Engrácia Antunes[5] posits that a group of companies presents a unity of economic-business action in which its members are subject to a central economic authority that acts in the interest of the whole. In general, even when gathered in a group, each company is autonomous to answer for its acts. Therefore, the mother-

[4] Deva, Surya. *Empresas y derechos humanos: ¿momento de ir más allá del "presente"?* in Garavito, César R. (Ed.). *Empresas y derechos humanos em el siglo XXI. La actividad corporativa bajo la lupa, ente las regulaciones internacionales y la acción de la sociedad civil.* Buenos Aires: Siglo Veintiuno Editores, 2018, p. 106.

[5] Antunes, José Engrácia. *Os Grupos de Sociedades.* 2. ed. Coimbra: Almedina, 2002, p. 22.

company, even though it must exercise the duty of vigilance that imposes liability in advance,[6] continues to be legally recognized as independent from the branches,[7] considered autonomous or, at least, this is the recognition that transnational companies incessantly seek in the visible intention of avoiding their civil, criminal and administrative liability for the acts of their branches, subsidiaries, affiliates, etc. However, the Judiciary of the United Kingdom, recently, when judging the cases Lungowe v. Vedanta[8] and Okpabi v. Shell[9] opened an important and positive path about the duty of care of parent companies in relation to subsidiaries.

Groups of companies then present a curious *mélange*, that is, a sort of economic dependence and legal independence from their mother-companies[10]. The subordinate companies must respond to the same management power, which is based either on the possession of a controlling financial stake, or on a contract that establishes such dependence, or on the force of facts.[11] In these times of extreme competitiveness, groups have a strategic performance and a structural constitution in tune with the demands of the

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[6] Cuzacq, Nicolas. *Le devoir de vigilance des societés mères et des donneurs d'ordre* in Martin-Chenut, Kathia. Quenaudon, René de. *RSE saisie par le droit. Perspectives interne et internationale.* Paris : Pedone, 2016, p. 456.

[7] Ouassini Sahli. Meriem. *La responsabilité de la société mère du fait de ses filiales.* Thése, Paris, 2014. Available at: https://tel.archives-ouvertes.fr/tel-01249559/document. (Access on: March 26th, 2021).

[8] Supreme Court of the United Kingdom. Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents). [2019] UKSC 20. Available at: https://www.supremecourt.uk/cases/uksc-2017-0185.html (Access on april 10th, 2021) and HO, Tara Van. Vedanta Resources Plc and another v. Lungowe and Others. *The American Journal of International Law,* v. 114-1, p. 110-116.Avaiable at: https://www.cambridge.org/core/journals/american-journal-of-international-law/article/vedanta-resources-plc-and-another-v-lungowe-and-others/E73B51B86B0EFF9434CF9E2FFBD69B68. (Acess April 11th, 2021).

[9] Supreme Court of the United Kingdom. Okpabi and others (Appelants) v. Royal Dutch Shell PLc and another (respondents). Avaiable at: https://www.supremecourt.uk/press-summary/uksc-2018-0068.html. (Acess on April 17th, 2021)

[10] Kocher, Margarithe; Leroux, Emmanuel; Nicoli, Pedro. *Groupe* d'entreprises in Martin-Chenut, Kathia. Quenaudon, René de. *RSE saisie par le droit. Perspectives interne et internationale.* Paris: Pedone, 2016, p. 151.

[11] Ouassini Sahli. Meriem. *La responsabilité de la société mère du fait de ses filiales*, *op. cit.*, p. 20.

markets. The submission to a directive unit indicates the gradual weakening of the idea of independence of the group's members. However, in most state regulatory systems, and even at the level of global normativity, there are still numerous challenges to define, to identify and to establish limits and standards of responsibilities of this unit. This leads to problems related to the extent and depth of intra and extra-group responsibilities.

It must be recognized, therefore, that such alleged or existing legal independence is barely accommodating to the reality of the managerial and economic control imposed by the parent-company. Such separation has a precise objective, which is to facilitate the evasion of the parent-company's liability. Within the European Union, for example, only Germany, Portugal and the United Kingdom have internal rules that frame the liability of companies that are part of groups.[12]

Besides this difficulty, another problem is the autonomy of the partners or shareholders in relation to the legal entity they are a part of. In terms of the actions of transnational companies, the most critical point is related to the difficulty of imposing responsibility when a company is a shareholder of another company, in this case, the mother-company, which, after all, is the one that should respond for the harmful acts of the shareholder or of the company belonging to the group. Therefore, in the same way that it is possible, in many situations, to hold the partners responsible for the acts of the legal entity, by using the mechanism of lifting the corporate veil, it is also possible to hold the parent-company responsible for the acts of its subsidiaries. For example, Fabrizio Marrella[13] warns about the

[12] Soudain, Tennessee. *La responsabilité des entreprises en matière de droits de l'homme. Droit*. Université de Strasbourg, 2018. Available at : https://tel.archives-ouvertes.fr/tel-02057594/document. (Acess on March 25th, 2021).

[13] Marrella, Fabrizio. Protection internationale des droits de l'homme et activités des sociétés transnationales. Rcadi, 385, p. 325. Available at : https://iris.unive.it/retrieve/handle/10278/3689673/192798/1%20-%20MARRELLA%20-%20RCADI%20385%20ACCADEMIA%20AJA%20Dir%20int%20priv.pdf. (Access on: March 27th, 2021)

difficulty of this event because most States continue to invoke the *Barcelona Traction* case. For him, this means maintaining the separation between the companies belonging to a transnational group, as is done in the United States and Canada. However, we find progress in The Netherlands, whose courts have decided to lift the corporate veil even in the presence of close ties between the mother-company and the subsidiaries located abroad.[14]

If in the domestic sphere, as in Brazil[15], for example, the case law has recognized the possibility of lifting the social veil of companies for labour affairs, thus relativizing the dogma of the separation between the moral person and the natural person of the partners, the path remains to be built in the case of lawsuits that call into question the violation of human rights committed by transnational companies that are part of a group. In this context, finding a more intelligent solution to the real imbroglio that presents itself today, in the same proportion that companies deny their responsibilities, is not only urgent but also a measure that would bring more feasible chances for the victims of human rights violations to obtain reparation for the damage suffered. It is about opening the courts to the reality of this global actors' performance, recognizing that the creation of these groups aims to promote dispersion and confusion regarding possible responsibilities for human rights violations.

In fact, the results at the international level are not entirely auspicious. In the DOE vs. Unocal[16] case, which concerned human rights violations that occurred during the construction of a gas pipeline undertaken by a subsidiary company of Unocal in Myanmar, the victims were not able to access that State's justice system. The Federal Court of California decide that it could not use

[14] This was the case with the Shell group's conviction for ecological damage in Nigeria due to insufficient pipeline protection. Marrella, Fabrizio. Protection internationale des droits de l'homme et activités des sociétés transnationales, *op. cit.*, p. 326.

[15] Kocher, Margarithe; Leroux, Emmanuel; Nicoli, Pedro. Groupe d'entreprises, *op. cit.* p. 151.

[16] International Crimes Database (ICD). John Doe I *et al.* v. UNOCAL Corp. *et al.* case. Available at: http://www.internationalcrimesdatabase.org/Case/992/Doe-I-et-al-v-UNOCAL-et-al/. (Access on: March 27th, 2021).

the technique of lifting the social veil to recognize and hold Unocal responsible for human rights violations committed by the subsidiary company because of the lack of proof of unity of interest between the distinct entities.

It is plausible to think that if the theoretical discussion about soft law and hard law is not addressed, this type of claims will proliferate even more in the years to come. As César Garavito states, it is possible to combine polycentric legislative mechanisms - such as soft law, corporate codes of conduct, etc - with centralized mechanisms - such as treaties or mandatory domestic laws - thus adopting an "ecosystemic"[17] perspective that, in practice, minimizes the differences between soft law and hard law. It is noticeable that there is still a very low level of willingness among companies to incorporate human rights norms into their decision-making processes and that they see them much more as matters of principle than as economic-political requirements.

To the design of multi-layered moral entities organized in a network that goes beyond national borders, a counter-design must be presented, whose features should conform to new international normative frameworks that accompany the geometry of the network and thus impose effective responsibilities.

b. Challenge 2: The (ir)responsibility of the mother-company, the use of the production chain, and the denial of the zone of influence

The pace of production of goods accompanies that of the consumption by mass society. In increasingly shorter periods of time, products are made available for commerce, from the most basic everyday utensils to the sophisticated products in the world of

[17] Garavito, César. Empresas y derechos humanos. Um marco conceptual y um mapa de estratégias regulatórias in Garavito, César R. (ed.). Empresas y derechos humanos em el siglo XXI. La actividad corporativa bajo la lupa, ente las regulaciones internacionales y la acción de la sociedad civil., *op. cit.*, p. 66.

information and communication technologies and automobiles powered by so-called clean energy.

To meet these needs of the consumer world, production chains[18], as economic structures linking the primary producer, manufacturers, distributors of products and services, on a local and global scale, have evolved in a decentralized manner greatly facilitated by information and communication technologies.

In the same proportion that competition between companies for domination of the market for products and services has expanded, production chains have become more complex and transnationalized. Their existence is a clear proof that the products sold, whatever they may be, require other products and services from foreign origin.

To the extent that companies do not manufacture all the components of the products they offer to the consumer market, they depend more and more on the production chains composed by other companies. However, if the existence of these companies that make up the plural production chains increases production, satisfies the consumer market, generates jobs and wealth, and is responsible for more than 80% of world exports[19], it also produces risks and damages, whether in terms of its economic and environmental sustainability, or in terms of the negative level of human rights protective standards.

On the other hand, the structure of globalized commerce, which has played a leading role in many domains for TNCs, indicates the economic and administrative dependence of the companies that are

[18] Also called value chain. The phenomenon expresses the fragmentation of the production processes of goods and services in the globalized world. Although the expression "value chains" has a broader meaning, we will use "production chains" or "productive chains" because it is more understandable to the reader. See: Homa. Center for Human Rights and Business. Value chains and the impacts on corporate accountability for human rights violations. Research Notebooks, vol. 1, n. 5, 2018. Available at: http://homacdhe.com/wp-content/uploads/2018/08/Cadernos-de-Pesquisa-Homa-Cadeias-de-Valor.pdf. (Access on: March 27th, 2021).

[19] *Idem, ibidem*. p. 5

part of the production chains in relation to those companies. The countless episodes of human rights violations in production chains have given rise to the debate about whether responsibility for such violations can be imposed on the large companies that benefit from the labor and products supplied by the production chains, and whether States have extraterritorial obligations when facing the conduct of these private actors.

An enormous difficulty can be noticed, on a practical level, to impose responsibility on large companies that benefit enormously from the products supplied by production chains when they violate human rights. From the point of view of labor rights, for example, it is nothing new that States loosen the requirements of companies that establish themselves on their territories, nor is the fact that these private actors from the most diverse branches practice countless violations that affect individuals in their dignity, which undoubtedly goes against the guidelines of the International Labor Organization on decent work.

Timid or nonexistent social regulations and the production of goods at low cost favor high environmental, social, and human liabilities at the local level. In many cases the vulnerability is double-sided and therefore the production of human rights violations is even more perverse. Companies belonging to Zara's[20] supply chain in Brazil not only violated labor rights but also took advantage of the extreme social weakness of Bolivian immigrants, who comprised the vast majority of the industry's employees. This is just one of the cases that confirm data provided by the ILO[21] indicating that irregular migrants are the most vulnerable victims precisely because this

[20] Brasil Econômico. IG. Zara é responsabilizada por trabalho escravo e pode entrar na "lista suja". November 14th, 2017. Available at: https://economia.ig.com.br/2017-11-14/zara-trabalho-escravo.html (Access on: March 28th, 2021).

[21] International Labour Office. Global Estimates of Modern Slavery: forced labour and forced marriage. Geneval, 2017. Available at: https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf, p. 30. (Access on: March 28th, 2021)

condition of legal fragility encourages companies to practice extortion, physical and sexual abuse.

In similar cases, the TNCs deny responsibility for acts of companies belonging to the production chain. The repeated violations of human rights around the world find in the protective asymmetry of these rights between different countries one of their strongest reasons, a factor that enables and seduces the illegal action of companies, perpetuating the trail of impunity of the members of the production chains.

According to the ILO[22], about 40 million people are victims of modern forms of slavery, and among them, 25 million are subjected to forced labor, and among them, one in five victims are children. The production chains are prodigious in producing such violations with state approval. It is recalled that in the Rana Plaza tragic case, in Bangladesh, the deplorable working conditions to which workers were submitted to, added to the terrible conditions of the workplace's structures, resulted in the death of approximately 1,100 workers.

Large corporations also invoke the non-existence of a "zone of influence" to exclude their responsibility for the actions of the actors in the production chains. This issue lies at the heart of the problems related to corporate social responsibility. In this sense ISO 26000[23] defines the zone of influence as a “range of political, contractual or economic relationships through which an organization has the ability to affect the decisions or activities of other organizations or individuals.” Hence, through voluntary due diligence processes, companies must permanently assess the risks of their activity and, as ISO 26000 suggests, identifying the sphere of influence will allow

[22]International Labour Office. Global Estimates of Modern Slavery: forced labour and forced marriage. Geneval, 2017. Available at: https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf, p. 4. (Access on: March 28th, 2021)

[23] Organisation internationale de normalisation. Iso 26000:2010. Lignes directrices relatives à la responsabilité sociétale. Available at: https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:fr. (Access on: April 5th, 2021).

verification of the entity's "good governance"[24], above all, over the entire production chain.

To explain it, good lessons derive from the holistic conception[25] of company developed by the Court of Justice of the European Union, for whom all the activities of a company must be taken into account. All its cogs are considered to apply the law to its "good economic perimeter". In the Cassa de Risparmio di Firenze[26] case, the Luxembourg Court stated that economic unity exists when one entity exerts a decisive influence over another or other legal entities that compose it, either when it holds control of the share capital or when it exercises control by interfering directly or indirectly in the economic activity carried out by the subsidiary.

Resorting to the notion of the extraterritorial obligation of the State and universal justice may constitute another great challenge, possible to be founded on defensible theoretical grounds, but difficult to implemented in practice. However, difficulty is not synonymous with impossibility.

3. Part 2: Extraterritorial Obligations of States and Extraterritorial/Universal Jurisdiction: The Double Face of the Duty to Cooperate

The first question is whether States can be held responsible for extraterritorial acts of TNCs (2.1). The second is whether, in addition

[24] Ferrari. Julie. La société mère peut-elle voir sa responsabilité engagée dans le cadre de la RSE? *Revue Lamy. Droit des affaires, nov. 2012, p. 77.* Available at: https://vigo-avocats.com/wp-content/uploads/article/s4/id390/1593dcbc55fa307fe85ae0dca6071b56.pdf. (Access on March 7th, 2021).

[25] Berrod, Frédérique. Ullestad, Antoine. Le droit de l'Union européenne et la notion d'entreprise: donner un sens juridique à l'exercise de l'activité économique in Martin-Chenut, Kathia. Quenaudon, René de. *RSE saisie par le droit. Perspectives interne et internationale.* Paris : Pedone, 2016, p. 144.

[26] Eur-Lex. Ministero dell'economia e delle Finanze c. Cassa di Risparmio di Firenze et autres. Arrêt 10 jan. 2006, affaire C-222/04, par. 112, p. I-358. Available at: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62004CJ0222&from=EM. (Access on: March 30th, 2021).

to this State responsibility deriving from international human rights bodies, the difficulty/denial of access to jurisdiction for victims of human rights violations through actions or omissions of TNCs in the State of the facts or in the State where the corporations are located, opens the door to the exercise of universal jurisdiction (2.2).

a. Extraterritorial Obligations of States: Share and Cooperate

To better organize the exposition, this topic aims to identify duties of responsibility sharing between States that lead to a cooperative jurisdiction. To this end, an attempt will be made to identify the foundations of extraterritorial responsibility for human rights violations based on the foundations of the international responsibility of States. This objective is organized in two stages. In the first stage, we intend to investigate the foundations of extraterritorial responsibility, and in the second stage, considering the perspective of solidary sovereignty, we will investigate the duty of cooperation between States concerning the acts and emissions of TNCs.

The extraterritorial responsibility of States for human rights violations and their international responsibility

The above descriptions show that one of the highly complex marks of globalized society is the production of human rights violations in a structural way, whose pattern repeats itself in different States. States, alongside large corporations[27] assume the authorship of such violations. Their active or inactive conduct can influence or produce effects on the observance and respect of human rights in other States. We are, hence, facing a situation of extraterritoriality. Therefore, the possibility of extraterritoriality to control excesses and

[27]Schutter, Olivier de. *Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations.* Available at: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf . (Access on March 30th, 2021)

violations of human rights by transnational companies is a necessary measure to guarantee access to justice for victims, which must be above the dogma of sovereignty due to the universalizable nature of human rights[28].

Take as an example the Maastricht Principles[29] on the extraterritorial obligations of States in the field of ESCR - Economic, Social and Cultural Rights - which define the extraterritorial obligations of States (Art. 8). They determine the scope of jurisdiction in the sense that States have the duty to respect, protect, and enforce ESCR in situations where their actions have predictable effects on the enjoyment of these rights, both inside and outside their territory. For this reason, the document lists the bases of protection for ESCR that states must create (Art. 25).

The Report on Business and Human Rights: Inter-American standards[30] prepared by REDESCA - Special Rapporteur on economic, social, cultural and environmental rights of the IACHR - Inter-American Commission on Human Rights - recognizes a basis for exercising a degree of jurisdiction with extraterritorial effects on the protection of human rights derived from their obligations to regulate, prevent and oversee the actions of businesses operating

[28] Marrella, Fabrizio. Protection internationale des droits de l'homme et activités des sociétés transnationales, *op. cit.* p. 157-165.

[29] Principios de Maastricht sobre las Obligaciones Extraterritoriales de los Estados en el Área de los Derechos Económicos, Sociales y Culturales. Available at: https://www.fidh.org/IMG/pdf/maastricht-eto-principles-es_web.pdf. (Access on March 30th, 2021).Check the commentary on these principles: Schutter, Olivier de *et. al. Principios de Maastricht sobre las obligaciones extraterritoriales de los Estados en el área de los derechos económicos, sociales y culturales*. México: UNAM, 2016, p. 33. Available at: https://archivos.juridicas.unam.mx/www/bjv/libros/9/4228/3.pdf. (Access on March 30th, 2021).

[30] Inter-American Commission on Human Rights. Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (Redesca). Informe Empresas y Derechos Humanos: Estándares Interamericanos, 2019. Available at: https://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf. (Access on March 30th, 2021).

outside their territory and whether or not these are accountable under international law[31].

One of the recurring issues not only in determining but compelling States to hold TNCs accountable for human rights violations is the definition of domicile. The different conceptions of domicile in different domestic legal systems have facilitated the invocation of *forum non conveniens* by States that export TNCs, either to abdicate their responsibility to provide jurisdiction or to refrain from holding these private actors accountable for acts that extraterritorially violate human rights. In this sense, one can see that the Maastricht Principles fail to address this problem. But it seems appropriate to throw a little hope into this void. The second revision of the Draft[32] of the international binding instrument to regulate human rights and the activities of transnational corporations and other business enterprises expands the traditional concept of domicile of companies by considering it as: a) the place of incorporation; b) the statutory place of the head office; c) the central administration and; d) the main place of business.

This definition, however, does not rule out other more favorable and comprehensive approaches that may be included in future regulatory texts. Such a definition is the result of great efforts by human rights defenders to put an end to the problem of the refusal of TNCs to assume responsibility for acts committed by their subsidiaries, branches, collaborators and actors in the production

[31] Fédération Internationale pour les Droits Humains. Principios de Maastricht sobre las Obligaciones Extraterritoriales de los Estados en el Área de los Derechos Económicos, Sociales y Culturales, especially 11th and 12th principles. Avaiable at https://www.fidh.org/IMG/pdf/maastricht-eto-principles-es_web.pdf. (Access on March 30th, 2021).

[32] It was published in August 6th, 2020. Oeigwg chairman ship second revised draft. legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (Access on March 30th, 2021).

chain that violate human rights, as demonstrated in the first part of this paper.

This concern is part of the need to broaden the concept of jurisdiction because there are acts or omissions that can generate the international responsibility of the State even if their effects occur outside its territory. In its Consultative Opinion 23[33], the Inter-American Court of Human Rights (IACrHR) stated that the concept of jurisdiction does not only cover acts committed within the territorial space of the State. More broadly, there are situations that involve the extraterritorial practice of acts or omissions over whose victims the State has authority or over which it exercises some kind of control. This is the case of migrants, refugees, victims of trafficking, forced migrants, groups that call on the States of origin to give them maximum protection, even if they are in another territory. In the field of civil and political rights, the UN Human Rights Committee has broadened the meaning of jurisdiction foreseen in the Covenant on Civil and Political Rights, recognizing that it may refer not to the place[34] where a certain violation of rights occurred but rather considering the relationship of the person with the State regarding the alleged violation of rights.

Indeed, the dynamics of the globalized world and the unprecedented expansion of private actors in the form of transnational networks require, yet, a broader conception regarding extraterritorial state obligations. Even in the absence of effective

[33] Inter-American Court of Human Rights. Consultative Opinion 23/17 from 15th of November, 2017, par. 23. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf. (Access on March 30th, 2021).

[34] Inter-American Commission on Human Rights. Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (Redesca). Informe Empresas y Derechos Humanos: Estándares Interamericanos, 2019, op. cit. parágrafo 151. Also: Office of the High Commissioner Human Rights (OHCHR). López Burgos c. Uruguay. UN Doc. CCPR/C/13/D/52/79, July, 1981. A reference may be found in: Schutter, Olivier de *et. al*. Principios de Maastricht sobre las obligaciones extraterritoriales de los Estados en el área de los derechos económicos, sociales y culturales. México: UNAM, 2016, p. 33. Available at: https://archivos.juridicas.unam.mx/www/bjv/libros/9/4228/3.pdf. (Access on March 30th, 2021).

control or direct authority over a particular person or situation, States can, through their actions or omissions at the domestic level, influence or produce effects outside their territory on the enjoyment of human rights. This is, in fact, a real possibility when the affectation of these rights occurs as a consequence of the acts of TNCs, actors whose behavior is not directly taxed to the States, but for whom the existence or absence of internal regulations is a determinant of their extraterritorial conduct. In fact, the duties to protect and enforce that the Maastricht Principles indicate to States in the field of ESCR, as well as the duty to protect and guarantee that the UN Guiding Principles[35] on Business and Human Rights establish for human rights in general, leave no doubt that States must regulate, prevent and monitor the actions of companies that are domiciled in their territory but that act across borders.

The Report presented by the Working Group on Mining and Rights in Latin America[36] to the IACHR, after analyzing the conduct of Canadian companies in the sector in Latin America, highlighted that the weakness of Canada's domestic laws to prevent and sanction human rights violations resulting from mining activities, provoked national and international reactions for Canada to adopt effective mechanisms to "respond to allegations of serious human rights violations outside its territory" committed by these private actors.

The IACHR aware of the complaints of the civil society of several countries in the Americas about the conduct of the TNCs and the

[35] United Nations. Principes directeurs relatifs aux entreprises et aux droits de l'homme. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_fr.pdf Access on August 14th, 2020.

[36] This Working Group is composed of the Latin American Observatory of Environmental Conflicts -OLCA- (Chile); the José Alvear Restrepo Lawyers Collective -CAJAR- (Colombia); the Due Process Foundation -DPLF- (regional); the Honduran Center for the Promotion of Community Development – CEHPRODEC - (Honduras); the National Assembly of Environmentally Affected People - ANAA - (Mexico); the Marianist Association of Social Action (Peru) and the Muqui Network (Peru). Working Group on Mining and Human Rights in Latin America. The Impact of Canadian Mining in Latin America and Canada's Responsibility, p. 29. Available at: http://www.dplf.org/sites/default/files/informe_canada_resumen_ejecutivo.pdf. (Access on March 30th, 2021).

complacency of the state entities regarding their predatory activities, recognized the need to take into account the various levels of involvement of a multidimensional nature, both in the States of origin and in the States receiving the TNCs.

In the Report[37] on Indigenous Peoples, Afro-descendant communities and natural resources, the IACHR considered that human rights abuses and violations committed by corporations can result in the international responsibility of a State when their acts and omissions can generate human rights violations outside their territories. This, by the way, was the first time the IACHR had the opportunity to speak out on the extraterritorial scope and application of human rights in the contexts where companies that exploit extractive and development projects operate.

One of the central points of this problem is often motivated by the fear of States to lose the investment contracts signed with these private actors. In fact, interests focused on development, therefore, cannot serve, per se, as a justification for making investment contracts more flexible, and these contracts must be implemented taking human rights into account so as not to weaken them at the domestic and international levels. In this sense, home States must adopt protocols and monitoring measures abroad for their corporations. From a global and state perspective there are precedents and movements in favor of taking the extraterritorial obligations of States seriously.

- Towards extraterritorial obligations of States?

Many UN bodies and mechanisms have expressed concern about the behavior of transnational corporations. Since the 1970s, the expansion of the neoliberal economic model, the establishment

[37] Inter-American Commission on Human Rights. Pueblos indígenas, comunidades afrodescendientes y recursos naturales: protección de derechos humanos en el contexto de actividades de extracción, explotación y desarrollo, 2015, paragraphs 14; 76-81. Available at: http://www.oas.org/es/cidh/informes/pdfs/IndustriasExtractivas2016.pdf. (Access on March 30th, 2021).

of dictatorships on several continents and the development of technology, especially in the field of information and communication, promoted the proliferation of large corporations around the world. Therefore, the concern with the extraterritorial application of state obligations regarding the behavior of TNCs is present in the UN agenda[38].

The Human Rights Committee recognizes the extraterritorial obligation of States with respect to the actions of corporations. In 2019[39], the Committee considered that States have a responsibility to exercise due diligence[40] to ensure that activities adopted by private individuals and private entities under their jurisdiction, whose conduct is not directly attributable to them, but which have a direct impact on the right to life of persons outside their territory, effectively respect the right to life. It is a matter of recognizing the horizontal effect[41] of human rights, which imposes on private parties the duty to respect them and allows them to be invoked in disputes between them. This effect imposes on States the duty to adopt the necessary measures to prevent violations of such rights. Previously,

[38] Saldanha, Jânia Maria Lopes. Do direito *soft* ao direito *hard* em matéria de responsabilidade jurídica das empresas transnacionais por violação de direitos humanos in Bolzan de Morais, José Luis (Org.). Estado e Constituição. O "fim" do Estado de Direito, *op. cit.*

[39] Office of the High Commissioner Human Rights (OHCHR). Observación General 36. UN Doc. CCPR/C/GC/36, 3 de december, 2019, paragraphs 22 and 26. Available at: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_SP.pdf. (Access on March 30th, 2021).

[40] See recent analysis over the subject at: Besson, Samantha. Droit international des institutions. Cours Diligence et néglicence en droit international. Collège de France, 11/02/21. Available at: https://www.college-de-france.fr/site/samantha-besson/course-2021-02-11-10h00.htm. (Access on March 29th, 2021). Also in: Besson, Samantha. Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!*ESIL Reflections,* vol. 9, n. 1, April/ 2020. Available at: https://esil-sedi.eu/wp-content/uploads/2020/04/ESIL-Reflection-Besson-S.-3.pdf. (Access on March 28th, 2021).

[41] The doctrine of the horizontal effect of fundamental rights, which for us are human rights, was born in the German legal system. The European Court of Human Rights bases the application of this theory on the doctrine of positive obligations of States. See: Deliyanni-Dimitrakou, Christina. L'effet horizontal des droits sociaux selon la jurisprudence de la CJEU et la pratique des juridictions nationales. Revista jurídica de los derechos sociales. Vol. 7, n. 1, enero-jul. 2017, p. 105.

when analyzing Germany's 2012 periodic report[42] on the Covenant on Civil and Political Rights, the Committee warned that Germany should increase remedies for victims against German companies that operate abroad and violate human rights. It should also set clear expectations that such private actors in its territory and under its jurisdiction respect the Covenant.

The UN Committee on Economic, Social and Cultural Rights has consistently raised concerns about the activities of TNCs outside the territory of the State in which they are domiciled. This body has repeatedly recommended States to adopt clear measures, in accordance with international normative frameworks, so that these private entities conduct periodic evaluations of the effects of their activities on human rights abroad, ensuring that victims have effective access to remedies and national courts in the State of origin of these companies. It is worth noting the remarks that the Body addressed to Canada, a country that is known to be a major exporter of TNCs, especially those in the extractive sector. During Canada's sixth periodic report[43], the Committee highlighted the absence of evaluations, prior to the negotiation of international trade or investment agreements, about the effects that such contracts have on human rights. In addition, it recommended Canada to adopt effective internal mechanisms to investigate complaints against TNCs operating abroad and adopt legislative measures to guarantee access to domestic courts for victims.

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[42] Office of the High Commissioner Human Rights (OHCHR). Observaciones finales sobre el sexto informe periódico de Alemania, aprobadas por el Comité en su 106° período de sesiones. UN Doc. CCPR/C/DEU/CO/6. 13 de novembro de 2012, par. 16. Available at: https://undocs.org/es/CCPR/C/DEU/CO/6. (Access on March 31th, 2021).

[43] Committee on Economic, Social and Cultural Rights (CESCR). Observaciones finales sobre el sexto informe periódico del Canadá. UN Doc. E/C.12/CAN/CO/6, March 23rd, 2016, paragraphs 15-16. Available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW4yzVsFh%2Fjl1u%2Ft0KVExfQT6EfAENdSjJTaz3raPv3QWT3Y59q3zadXvBYMpLNW5%2FoEL%2BTnG1JemJikNsL7iIOstoyNzlBTZ56GleM700DSd. (Access on March 31th, 2021).

Also, in General Observation n° 24/2017[44], the Committee drew attention to the expansion of TNCs linked to large investment projects, which requires States to pay special attention to the issue of extraterritorial human rights obligations on them. These extraterritorial obligations of States, due to business activities in other countries, involve many ESCR issues, such as the right to water, to work, to health, to social security, and to equitable living conditions. The extraterritorial nature of these obligations stems from the fact that the obligations under the Covenant on Economic, Social and Cultural Rights are expressed without any restriction on territory or jurisdiction, according to the Committee.

Within the European Union, the Committee of Ministers adopted Recommendation CM/Rec[45] (2016)3. This document recommends that States require their companies to respect human rights abroad, that they adopt due diligence procedures, and that national courts recognize their competence to provide access to victims of human rights violations committed by companies domiciled in their territory or exercising jurisdiction over them. This is a call to avoid the application of the *forum non conveniens*[46]

[44] Committee on Economic, Social and Cultural Rights (CESCR). Observación general núm. 24 (2017) sobre las obligaciones de los Estados en virtud del Pacto Internacional de Derechos Económicos, Sociales y Culturales en el contexto de las actividades empresariales . UN E/C.12/GC/24, par. 25-28. Available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiumBy835dMBXxx3qbFbFIQsxmftFUOg56%2F9JM1LMnnqJ1PRyKELBcKJtCKvrXnf%2FIH. (Access on March 31th, 2021).

[45] Conseil de l'Europe. Comité des Ministres aux Etats membres. Recommandation. CM/Rec(2016)3. March 2nd, 2016. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad6. (Access on March 31th, 2021).

[46] Criticism of the application of this doctrine when the facts involve human rights violations by NTCs goes back decades. See: Mcgarity, Thomas O. Bhopal and the export of hazardous technologies. Texas International Law Journal, v. 20, 1985. More current critique, on the Chevron v. Ecuador case, see: Erichson, Howard M., 'The Chevron- Ecuador Dispute, *Forum Non Conveniens*, and the Problem of Ex Ante Inadequacy', Stanford Journal of Complex Litigation, Vol. 1(2), 2013, p. 418. Martin-Chenut, Kathia. Perruso, Camila. El caso Chevron-Texaco y el aporte de los proyectos de convención sobre crímenes ecológicos y ecocidio a la responsabilidad penal de las empresas transnacionales in Cantu-Rivera, Humberto. Derechos humanos y empresas. Reflexiones desde América Latina. / Inter-American Institute of Human Rights. -- San José, C.R. : IIDH, 2017 , p. 357.

doctrine which, throughout the history of jurisdictional competence, has attributed to a court the power not to receive a case over which it would have jurisdiction, a decision protected by the literal interpretation of the internal rules of international jurisdiction. The usual argument used by national courts that dismissal of the claim would avoid overloading them with suits whose parties are non-domestic, serves as a protective shield for corporations that violate human rights. The French Due Diligence Act[47] of 2017, the first European law aimed at framing TNCs to protective human rights standards, can be considered a positive response to the CM/Rec. (2016). It was followed by a law[48] -not yet into force- passed by the Dutch Senate in May 2019 that provides for a duty of care regarding child labor.

At the end of 2019, the Parliamentary Assembly of the European Union presented Recommendation 2166/2019, whose content demonstrates the real concern of the European bloc about the conduct of companies. The creation of the online Platform for Human Rights and Business[49] whose operation began in November 2019, expresses the efforts to enable dialogue and the exchange of experiences between member-States.

The issue of States' extraterritorial obligations, in the context of the Americas, has occupied the attention of the inter-American human rights[50] system in the face of the different responses that state

[47] Republique Française. LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. Available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id. (Access on March 31th, 2021).

[48] Hoff, Anneloes. Oxford Human Rights Hub. Dutch child labour due diligence law: a step towards mandatory human rights due diligence. Available at: https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/.(Access on March 31th, 2021).

[49] Conseil de l'Europe. Coopération intergouvernementale en matière de droits de l'homme. Plateforme en ligne pour les droits de l'homme et les entreprises. Available at: https://www.coe.int/fr/web/human-rights-intergovernmental-cooperation/plateforme-en-ligne-pour-les-droits-de-l-homme-et-les-entreprises. (Access on March 31th, 2021).

[50] Figueroa, Roberto Luis Bravo. La responsabilidad internacional de los estados de origen las industrias extractivas: Aproximación a las obligaciones extraterritoriales del

entities present. This signaling originates in one of the countries that most host mining TNCs, Canada. According to the Mining Association of Canada[51], in 2013, more than half of the mining companies around the world were registered on the Toronto Stock Exchange. The expansion of mining from the 21st century onwards has multiplied social conflicts in the territories where large mining corporations are based in the global-south. Most of them are registered in Canada.

Although there are, even today, countless obstacles in the path of victims of human rights violations to justice, numerous lawsuits have been filed by plaintiffs from the global-south before Canadian courts. These claims have represented a challenge to such obstacles, to the role of law, and to the expansion of borders.

The Canadian courts in 2016 rejected the claim of *forum non conveniens* brought by the mining company Nevsun Resources Ltd in the context of a claim brought in the courts of British Columbia by refugees from Eritrea, alleging that Eritrean workers were subjected to forced labour during the construction of a gold mine in Bisha in 2008. The claim was a class action lawsuit based on customary law. In order to reject the argument of *forum non conveniens*, the court understood that it had jurisdiction over the case because the company is domiciled in Canada. This is the first case involving the practice of modern slavery in Canadian courts. It was also the first time that the Canadian courts recognized that a corporation can respond to a civil action for violation of customary law. This decision was confirmed by a majority of the Supreme Court of Canada[52] on

derecho a la consulta en el marco del sidh. American University International Law Review: Vol. 32 : Iss. 4 , Article 4. Available at: http://digitalcommons.wcl.american.edu/auilr/vol32/iss4/4. (Access on March 31th, 2021).

[51] Mining Association of Canada (MAC). Acts & figures of the canadian mining industry - 2016. p. 6. Available at: https://mining.ca/wp-content/uploads/2019/03/Facts-and-Figures-2016.pdf. (Access on March 31th, 2021).

[52] Canada. Supreme Court of Canada. Nevsun Resources Ltd. v. Araya. February 28th, 2020. Available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do. (Access on March 31th, 2021).

February 28th, 2020, when it decided that the customary law invoked by the plaintiffs is part of Canadian law.

Another conflict involving a Canadian mining company was presented before the Canadian courts. It was the case of Garcia v. Tahoe Resources. This company was accused of being responsible for the actions of security personnel against seven Guatemalans who were protesting against the mine in 2013. In 2014 the victims filed a lawsuit in the British Columbia courts. In the first instance the argument of *forum non conveniens* was accepted and later rejected, in 2017, when the court[53] recognized that it had jurisdiction to decide the case because there was a serious risk that the Guatemalan court would not prosecute the company. This was a strong signal of recognition of the State's extraterritorial obligation. In the year 2019 the Canadian company Pan American Silver Corp bought Tahoe and, in the same year, reached a settlement[54] with the victims. It acknowledged that their right had been violated and apologized for it. This was unprecedented, as it was the first time that a Canadian mining company had done so. Unfortunately, this may have been just a gesture to confuse and cover up the struggle of the Xinka indigenous people for the protection of their territories against the extractive industry at the Escobal mine, as the company's actions do not move in the direction of open dialogue with the communities.[55]

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[53] Court of Appeal of British Columbia. Garcia v. Tahoe Resources Inc., 2017 BCCA 39 January, 2017. Available at: https://www.bccourts.ca/jdb-txt/ca/17/00/2017BCCA0039.htm. (Access on March 31th, 2021).

[54]. Agence France-Presse. Guatemala: une société minière canadienne a violé les droits de manifestants. July 30th, 2019. Available at: https://www.lapresse.ca/affaires/entreprises/2019-07-30/guatemala-une-societe-miniere-canadienne-a-viole-les-droits-de-manifestants. (Access on March 31th, 2021) and Pan American Silver. Pan American Silver Announces Resolution of Garcia v. Tahoe Case. July, 31th, 2019. Available at: https://www.panamericansilver.com/news/news-releases/detail/84/2019-07-30-pan-american-silver-announces-resolution-of-garcia-v-tahoe-case. (Access on March 31th, 2021).

[55] Moore, Ellen. Tough questions and no answers from Pan American Silver. Earth Works. May 8 th, 2020. Available at: https://earthworks.org/blog/tough-questions-and-no-answers-from-pan-american-silver/. (Access on March 31th, 2021).

In fact, Canada has made efforts to bring its companies in line with international standards. The country has created CORE[56] - Canadian Ombudsperson for Responsible Enterprise, whose mission is to monitor possible human rights abuses by Canadian companies in the garment, mining, oil and gas industries. However, a crisis that erupted in 2019 due to the resignation of 14 representatives of human rights bodies who are members of a Government of Canada advisory committee, has put CORE's activities under suspicion. On such a fact, Surya Deva[57] stated that without powers the ombudsman will have nothing to add to change the situation of these companies. In March 2021, the CORE began to receive complaints against Canadian companies operating abroad.

Some courts in Global North countries have recognized the possibility of hearing cases in which the facts have occurred outside the territory in which transnational corporations are domiciled, as is the case in Germany[58] and the United Kingdom,[59] Switzerland and

[56] Canada. Canadian Ombudsperson for Responsible Enterprise. Core Ocre. Available at: https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng.(Access on March 31th, 2021).

[57] Jolin-Dahel, Leïla. Entreprises canadiennes: un ombudsman sans pouvoir à Ottawa. Le Devoir. July 26th, 2019. Available at: https://www.ledevoir.com/politique/canada/559450/entreprises-canadiennes-l-ombudsman-doit-avoir-des-pouvoirs-d-enquetes-reitere-l-onu. (Access on March 31th, 2021).

[58] This is the Huaraz case (Saul v. RWE), a lawsuit by a Peruvian farmer against the German energy company RWE. The German court accepted the case and is awaiting evidence produced in Peru. The German court's decision is recognized as a step taken towards the logic of global climate justice. Available at: https://germanwatch.org/en/huaraz. (Access on March 31th, 2021).

[59] The reference is to the case of Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. This is about events that occurred in Zambia involving the European company and 1826 citizens of Zambia. The company was accused of environmental damage and damage to property. In 2016, the High Court held that the claimants could bring their case in England despite the fact that the alleged tort occurred in Zambia, where the claimants and KCM are domiciled. This decision was upheld on appeal by the Court of Appeal in October 2017. And in April 2019 the Supreme Court unanimously rejected a further appeal by the defendants, upholding the Court of Appeal's decision. Supreme Court of the United Kingdom. Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents). [2019] UKSC 20. Available at: https://www.supremecourt.uk/cases/uksc-2017-0185.html (Access on april 10th, 2021).

France.[60] In fact, the action of home States may have a relevant influence on the behavior of these private actors, generating extraterritorial effects on the enjoyment of human rights. France's due diligence law[61] is considered a model for the implementation of this goal and an international experience that can encourage States to adopt similar laws.

- Solidary sovereignty and the duty to cooperate: grounds for States' extraterritorial obligation for TNCs acts/omissions

The obligation of States to make companies under their jurisdiction respect human rights will be implemented to the extent that they have institutions and normative regulations that impose human rights-compatible behavior on them. This, by the way, is one of the great challenges for the consolidation of institutional cosmopolitanism and for global justice theorists.

Institutional cosmopolitanism[62], considered perhaps the most evolved form of Kantian cosmopolitanism, displays characteristics that relate directly to the reflection presented here. A new concept of sovereignty, the democratization of decision-making, and the reform of institutions are those characteristics that combine with the duty of cooperation of States. This spirit of cooperation[63] is the antidote to the spirit of competition that dominates globalization and motivates the actions of States and transnational companies. Cooperation, one might say, is the basis of the duty of solidarity that finds a legal basis in, for example, the Declaration of Philadelphia of 1944, as well as in

[60] Thorgeirsson, Sif. L'accès aux recours judiciaires pour les violations des droits de l'homme commises par des entreprises se rétrécit. Open Democracy. January 26th, 2015. Available at: https://www.opendemocracy.net/en/openglobalrights-openpage-blog/lacces-aux-recours-judiciaires-pour-les-violations-des-dr/. (Access on april 10th, 2021).

[61] République Française. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, *op. cit*.

[62] Lourme, Louis. Pourquoi le cosmopolitisme institutionnel ? *In :* Policar, Alain (Dir.). Le cosmopolitisme sauvera la démocratie ? Paris: Classiques Garnier, 2019, p. 93-108

[63] Delmas-Marty, Mireille. *Aux quatre vents du monde. Petit guide de navigation sur l'océan de la mondialisation.* Paris : Seuil, 2016, p. 91.

Article 22 of the Universal Declaration of Human Rights and in Article 27 et seq. of the European Charter of Fundamental Rights.

Alain Supiot[64] rightly points out that all provisions that make it easier for a legal or natural person to escape the duties inherent to the principle of solidarity offend human rights and must be sanctioned. This reflection shows that it is precisely at the intersection between the need to give practical substance to solidarity and cooperation and the actions of transnational corporations that the categories dealt with in Part 1 of this paper acquire concrete relevance. The theories of the corporate veil, value chains, zone of influence, and due diligence, constructed on the basis of domestic relations and national rights, are no longer sufficient to explain globalized relations. Therefore, measures of prevention, supervision, and responsibility should be applied, as well as those that facilitate victims' access to justice, allowing them to receive effective compensation and assistance based on solidarity and cooperation.

This scenario described above compels us to affirm that without harming the recognition of the extraterritorial obligation of the States that export TNCs and according to the international human rights protection system, it is up to the host/host State to endeavor to avoid human rights violations, such as adopting the same measures, producing legislation in harmony with international human rights standards regarding the actions of large corporations.

The strengthening of justice, the existence of due diligence laws, as well as labor laws protecting workers' rights and others that regulate corporate responsibility, as well as the adoption of NAPs - National Action Plans - so that companies fulfill their duty of respect, are minimal measures to reduce human rights violations. This is a double-faced responsibility, that is, both of the home States where the large corporations are domiciled, and of the host States that host

[64] Supiot, Alain. *L'esprit de Philadelphie. La justice sociale face au marché total.* Paris : Seuil, 2010, p. 164

them. The latter, however, being generally located in the global-south, often suffer from the absence of fully consolidated democratic structures, depend on foreign investments, and are victims of corrupt governments, which is why they do not have enough power to prevent violations and their effects.

One of the direct consequences of this situation is the difficulty faced by victims in obtaining the reparation to which they are entitled to, either within or outside the justice system. The well-known "Chevron"[65] case is a striking example of these weaknesses of the host State, multiplied in countless other places around the world. In fact, we have to recognize the strong interest of the TNC home States, generally more powerful economically and politically, in canalizing the demands to the judicial and political spaces of the host States, often weaker. This is a strategy to avoid criticism and control, as well as to shield private transnational powers, investors, external credit agents, and large corporations from the instruments of justice. According to Nancy Fraser[66], this is a typical problem of the "who" of "abnormal justice", that is, to whom should the demands for justice be addressed and that, in the end, results in a problem of social justice represented by maladjustment.

In fact, we argue that there are shared responsibilities between the home and host State of TNCs, even though the standards and levels of such responsibilities may be different to the extent of the obligations corresponding to each of them. Moreover, the existence of a structural behavioral model of TNCs falls within the vast framework of global risks that, precisely because they have such a nature, cause the need for global political and legal responses. We argue, together with theorists of institutional cosmopolitanism[67],

[65] Martin-Chenut, Káthia; Perruso, Camila. El caso Chevron-Texaco y el aporte de los proyectos de convención sobre crímenes ecológicos y ecocidio a la responsabilidad penal de las empresas transnacionales, *op. cit.*, p. 355-370.

[66] Fraser, Nancy. Justiça anormal. *Revista da Faculdade de Direito da Universidade de São Paulo.* v. 108, jan./dez. 2013, p. 739-768

[67] Lourme, Louis. Pourquoi le cosmopolitisme institutionnel? *In:* POLICAR, Alain (Dir.). *Le cosmopolitisme sauvera-t-il la démocratie ?* op. cit., p. 93-108.

that this new concept of common and shared responsibilities demands the weaving of a new concept of sovereignty that should move from being voluntary and positive to being exercised as mandatory, solidary and reactive.

This solidarity model produces an important effect for the States. As the IACHR Report[68] indicates, in addition to the duty of respect and guarantee, state entities have a duty to cooperate. This duty can take on a double perspective. First, as a derivative of the general international frameworks protecting human rights that States must implement. Second, to guarantee that States and companies, whose behavior they can influence, do not hinder the enjoyment of human rights in other countries. A set of international norms and principles supports the assignment of this duty, such as article 26 of the American Convention on Human Rights, with respect to ESCR, and principles 10 "b" and "c" of the UN Guiding Principles on Business and Human Rights.

The spirit of competition[69], which stems from the excesses of entrepreneurial freedom and the appropriation paradigm[70] that constitute economic globalization, must be balanced with the spirit of cooperation that is intimately linked to solidarity. Then, the duty to cooperate must bring as a first consequence the renunciation by States of adopting flexible policies that encourage companies to exploit natural resources and violate human rights, and that promote the phenomenon of the "architecture of impunity".[71] Balance, then, will come from the passage from the model of solitary sovereignty, which is the leaven of neoliberalism that made competition the

[68] Inter-American Comission on Human Rights. Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (Redesca). Informe Empresas y Derechos Humanos: Estándares Interamericanos, 2019, op. cit., par. 169-170

[69] Delmas-Marty, Mireille. *Aux quatre vents du monde. Petit guide de navigation sur l'océan de la mondialisation.* Paris : Seuil, 2016, p. 89-93.

[70] Zarka, Yves-Charles. *O destino comum da humanidade e da terra.* São Leopoldo: Editora Unisinos, 2015, p. 21-39.

[71] Zubizarreta, Juan Hernández. *Las empresas transnacionales frente a los derechos humanos: historia de uma assimetria normativa. De la responsabilidade social corporativa a las redes contrahegemónicas transnacionales.* Madrid: Ed. Hagoa, 2009.

alpha and omega of economic development, to the model of solidarity that encourages cooperation and can realign national interests with the common interests of humanity. This is not only the legal but, above all, the ethical response for States to assume their extraterritorial obligations not only regarding the illegal actions of TNCs but, especially, because the doctrinal and jurisprudential interpretation of the legal-corporate categories mentioned in Part 1 still contributes enormously to the maintenance of the architecture of corporate impunity.

Taking a pessimistic view at what was stated above and imagining a difficult scenario for States to assume their extraterritorial obligations, would universal jurisdiction be another possible path? Far from claiming to be exhaustive about this problem, this is what we intend to analyze in the following section.

b. Universal Jurisdiction Competence: Crossing Borders, Building Bridges

For some years now, the UN has recorded manifestations from countries and interested observers on the status of universal jurisdiction. By Resolution 71/149 of December 13th, 2016,[72] the General Assembly instructed the Secretary General to prepare a report on the conditions of application of the principle of universal jurisdiction based on information from member-States and interested observers, especially regarding applicable international treaties concerning the matter, domestic law and the jurisprudence of courts. Only Germany, Australia, Austria, El Salvador, Finland, Senegal, Togo, and Ukraine responded. Observers who responded to the consultation were the International Committee of the Red Cross, the Council of Europe, and the UN Environmental Program. The answers submitted[73] by these countries clearly do not express the

[72] United Nations. General Assembly. Available at: https://undocs.org/en/A/RES/71/149. (Access on april 10th, 2021)

[73] Three from Central Europe, one from Eastern Europe, one from Latin America, two from Africa, and one from Oceania.

reality about the conditions for the existence of universal jurisdiction.

Australia reported that it had transposed the principle of universal jurisdiction into its domestic law for three groups of offenses: a) genocide, crimes against humanity, war crimes and torture; b) offenses relating to slavery and; c) acts of piracy and other acts of violence at sea. Austria merely referred to its own Criminal Code to demonstrate its adherence to the principle of universal jurisdiction. El Salvador recognized that universal jurisdiction is essential to the rule of law especially to prevent serious international crimes such as genocide, torture and war crimes. Finland reported that its Penal Code has been amended in the part relating to international criminal offenses regarding the adoption of counterfeiting and forgery crimes. Germany informed that under its International Law Crimes Code the principle of universal jurisdiction is applicable only to crimes of genocide, crimes against humanity, and war crimes.[74] Senegal's law does not limit the exercise of universal jurisdiction to genocide, crimes against humanity, and war crimes. It allows it to other crimes, such as attacks on the security of the State, counterfeiting the seal and the national currency, acts of terrorism, attacks, plots and other offenses against the authority of the State, the integrity of the national territory, acts of torture, among others. In matters of universal jurisdiction, Senegal has numerous instruments that may give rise to proceedings before the Senegalese courts. Togo's Criminal Code of 2015 states that Togo's jurisdiction may act for offenses such as genocide, war crimes, crimes against humanity, and the crime of apartheid. Ukraine reported on a draft law amending the penal and criminal procedure codes to institute criminal responsibility for crimes against humanity in accordance with the Rome Statute.

[74] With regard to the crime of aggression German jurisdiction only applies if the offense has a direct connection to Germany.

The exercise of so-called universal jurisdiction, invoked as a possible alternative to the omission or ineffectiveness of state jurisdictions, either to hold TNCs accountable for human rights violations or to repair the direct and indirect damages suffered by the victims, can be explained from the well-known Kiobel Case. Serious human rights violations were committed in the 1990s by a subsidiary of two oil companies, Shell and Royal Deutch Petroleum Co, in Ogoniland, Nigeria. These violations gave rise to a civil liability action brought by Nigerian refugees in the United States. The action was brought under the Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute originated in the Judiciary Act of 1789, which establishes that the federal courts of the United States have jurisdiction "to hear and determine any action for civil liability brought by an alien for violation of the 'law of nations' or a treaty signed by the United States. The lower court recognized its jurisdiction in the case. However, the Court of Appeals decided to reject it on the grounds that, in substance, the "law of nations" in the sense given by ATCA, cannot be applied to hold moral entities civilly liable. Therefore, the Alien Tort Statute could not be applied to justify "extraterritorial action" by U.S. jurisdiction. This decision was unanimously upheld by the United States Supreme Court in 2013.[75]

The decision of the Supreme Court inverted a jurisprudence consolidated in that country for decades and that was constantly contradicted by numerous foreign countries. This jurisprudence used to recognize that the United States federal courts had extraterritorial jurisdiction to judge acts committed abroad against foreign victims when there had been a violation of the law of the nations. The decision of the highest court in the United States has greatly weakened the use of the reverse *forum shopping* mechanism, in other words, the choice of extraterritorial action by the American

[75] Scotusblog. Suprem Court. Kiobel v. Royal Dutch Petroleum. Available at: https://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/. (Access on april 10th, 2021).

jurisdiction had as its central justification the protection of human rights.

One of the paradigmatic cases of jurisprudence in favor of the extraterritoriality of U.S. jurisdiction was the Filártiga vs. Peña Irala. It was a lawsuit brought in the American jurisdiction by the family of Joelito Filártiga against Américo Peña Irala,[76] General Inspector of Police during the Strossner dictatorship in Paraguay and perpetrator of acts of torture and killing of political opponents. U.S. courts have recognized extraterritorial jurisdiction when foreigners, even in another country, are victims of torture, as protection against such a crime is part of international customary law.

If, on the one hand, we can consider that the figure of universal jurisdiction originated with ATCA - the Alien Tort Claims Act, in the 18th century, on the other hand, we can recognize that the growing internationalization of human rights that took place at the end of the Second World War was the main reason why ATCA was taken out of its dormant state. Contemporary trends of legal cosmopolitanism[77] defend the use of universal jurisdiction, represented by the extraterritorial action of national jurisdictions, based on the principle of the protection of humanity and the fight against impunity.

However, if we recognize that risk of hegemonic application of jurisdictions from States considered "strong", the reason for the existence of universal jurisdiction, in what it expresses and implies delocalization and deterritorialization of justice, is to provide the greatest protection to the victims, individuals and vulnerable groups,

[76] United States Court of Appeals, Second Circuit Dolly M.E. Filartiga and Joel Filartiga, Plaintiffs-Appellants, v. Americo Norberto Pena-Irala, Defendant-Appellee n°. 191, Docket 79-6090 630 F.2d 876; 1980 U.S. App. LEXIS 16111 October 16, 1979, Argued June 30, 1980, Decided. Available at: https://ccrjustice.org/sites/default/files/attach/2017/09/Filartiga%20v.%20Pena-Irala%20-%20Decision%20of%2030%20June%201980.pdf. (Access on april 10th, 2021).

[77] Saldanha, Jânia Maria Lopes. Cosmpolitismo jurídico. Teorias e práticas de um direito emergente entre globalização e mundialização. Porto Alegre: Livraria do Advogado, 2018.

of serious human rights violations perpetrated by States and private moral entities, such as the TNCs.

Besides the known difficulties in implementing universal jurisdictional competence, the two largest being the principle of sovereignty and non-intervention in the internal affairs of States, there is a process of globalization of justice[78] underway, a reality that fosters the opening of national judicial systems to the dilemmas and problems that are common to humanity. Inasmuch as the doctrine with a humanist and humanitarian basis shows us that we inexorably share a common destiny, in the same way we cannot escape the inevitable succumbing to common risks.

To the powerful difficulties for national jurisdictions to effectively exercise extraterritoriality in the case of serious human rights violations committed by TNCs, we can add another of a theoretical and practical nature, that is, the feeling of uncertainty and transition regarding human rights and their future.[79] Although there are national and international normative frameworks that protect them, in many fields, such as corporate responsibility, there is much to be built. The criticism launched to the Ruggie Principles, which were considered insufficient, for example, for the extraterritoriality matter,[80] and the still unfinished process of making an international treaty for business and human rights, demonstrate the persistent normative weakness to address the power of large corporations.

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[78] Saldanha, Jânia Maria Lopes; Vieira, Lucas Pacheco. Diálogos interjurisdicionais. Porruá: México, 2016.

[79] Moyn, Samuel. O futuro dos direitos humanos. Conectas, vol. 11, n° 20, jun-dez, 2014. São Paulo, 2014, p. 61-69.

[80] Nolan, Justine. Mapping the movement: the bussiness and human rights regulatory framework. *In:* Baumann-Pauly, Dorothée. Nolan, Justine. *Business and human rights : from principles to practice.* E-book version. Abingdon, New York: Routledge, 2016, p. 37-38.

Despite these challenges, there are encouraging perspectives for the exercise of extraterritoriality. For Hervé Ascensio[81] it is an important instrument to be used to enforce human rights, especially with respect to the actions of TNCs. A possible path that would constitute the normative ecosystem proposed by Garavito[82] would be the construction of an international instrument in this field or, at least, in the absence of a provision for an international court, the mentioned treaty could contemplate such a possibility.

On the other hand, if universal jurisdiction, as Kathia Martin-Chenut[83] affirms, is not the ideal solution to solve all the problems that the recurrent corporate and state arguments related to *forum non conveniens*, the social veil, the irresponsibility for acts in the production chain, and the absence of a zone of influence, present, a possible way out would be to admit the possibility of its exercise by all countries. Faced with the risk of the hegemonic use of universal jurisdiction by the most powerful States, it is possible to affirm that it is a provisional solution while we work towards a global solution to make private economic actors accountable. Such a global solution could be an international treaty on business and human rights.

4. Final Considerations

The relevant fact for us to think about the problem of holding TNCs accountable for human rights violations through the exercise

[81] Ascensio, Hervé. L'Extraterritorialité comme instrument. Contribution aux travaux du Représentant spécial du Secrétaire général des Nations Unies sur les droits de l'homme et entreprises transnationales et autres entreprises. Available at: https://www.pantheonsorbonne.fr/fileadmin/IREDIES/Contributions_en_ligne/H._ASCENSIO/Extraterritorialite__droits_de_l__homme_et_entreprises.pdf. (Access on april 10th, 2021).

[82] Garavito, César Rodriguez. El futuro del campo de las empresas y los derechos humanos: uma visión ecosistémica. In: Garavito, César Rodriguez (ed.). Empresas y derechos humanos em el siglo XXI., op. cit. p. 283-287

[83] Martin-Chenut, Kathia. La recherche du juge competente: les défis posés par l'extraterritorialité in Martin-Chenut, Kathia. Quenaudon, René de. *RSE saisie par le droit. Perspectives interne et internationale.* Paris : Pedone, 2016, p.637.

of universal justice is precisely that the universal "feature" of jurisdiction definitively reverses the logic of its modern attachment to territory.

In addition, by giving way to claims by victims' representatives, universal justice breaks with the consolidated theory that the victim is the only one with standing to sue. And, if the thesis of the independence of the legal personality of parent companies with respect to subsidiaries, branches, and affiliates is solved, we will advance enormously regarding the responsibility of transnational corporations for human rights violations. Accepting the thesis of economic unity and the thesis of centralized management, as well as overcoming the allegations of inexistence of a "sphere of influence" in the activities of the production chains in order to hold those that derive the most financial profit from these global economic-productive structures responsible, would be important advances in defeating the weaknesses of universalism.

The transnationality of risks and damages and the trans-temporality of common destiny are the double face of the phenomenon of internationalization of law that allows the universal jurisdiction to be a possible way to move from the "architecture of impunity" to the paradigm of responsibility of transnational corporations. The inspiration can derive from the wise words of Mireille Delmas-Marty that we must overcome the worn-out dichotomies between universalism and sovereignty. To do this we must take advantage of the idea of hybridism, which consists in giving operationality to the principle of common and shared responsibility. In fact, a common responsibility imposed on actors on the international scene for human rights violations, such as transnational corporations and States, justify the extraterritorial sharing of jurisdiction under a universal justice form.

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