A Critical Analysis of Business Declarations and Statements from a Human Rights Perspective

Un análisis crítico de las declaraciones y la regulación aplicables a las empresas desde la perspectiva de los derechos humanos

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Abstract: Recent developments in the business and human rights field demonstrate an eagerness to come up with stronger and mandatory regulations addressed at corporations in the internal realm, required by international norms. This is seen as conducive to the necessary protection of human dignity, which therefore can be seen as insufficiently achieved at the moment. Given the existence of voluntarily-accepted initiatives on corporate-conduct regulation created by businesses themselves or by third parties which are yet not (legally) mandatory, it is necessary to consider whether the previous perception is exaggerated or accurate. The article explores this and identifies that voluntary initiatives may indeed produce positive effects that increase the likelihood of a responsible business conduct from a human rights perspective if certain conditions are met, among others by interacting with other regimes in a multi-level manner. However, it also observes that they are unreliable and in no way replace or eliminate the need of coming with mandatory

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corporate obligations, being there a risk of their being invoked in ways that bluewash the reputation of those endorsing those initiatives and diverting attention away from the necessity of stronger regulations.

Keywords: business and human rights, social responsibility, voluntary standards, effective protection, normative interaction.

Resumen: Desarrollos recientes en el ámbito de las empresas y los derechos humanos ponen de manifiesto el deseo de crear una regulación vinculante más fuerte de la conducta empresarial en el plano interno, que se exija por medio de normas internacionales, para proteger mejor la dignidad humana, que no está suficientemente defendida en el presente. Dada la existencia de iniciativas libremente aceptadas por las empresas sobre la regulación de su conducta, creadas por ellas mismas o por terceros, que no obstante no son jurídicamente obligatorias, conviene preguntarse si la anterior ambición es exagerada o acertada. El artículo examina esta cuestión y concluye que las iniciativas voluntarias pueden ciertamente generar efectos positivos que incrementen la posibilidad de conductas empresariales responsables a la luz de los derechos humanos si se cumplen ciertas condiciones; por ejemplo, interactuando con otros regímenes en dinámicas multinivel. Sin embargo, también sugiere que las mismas iniciativas son poco confiables y no eliminan en absoluto la necesidad de crear obligaciones empresariales, dados los riesgos de que se empleen para simplemente mejorar la reputación de quienes participan en ellas y para distraer sobre la necesidad de adoptar regulaciones más fuertes.

Palabras clave: empresas y derechos humanos, responsabilidad social, estándares voluntarios, protección efectiva, interacción normativa.

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1. Introduction

Even though some have argued that private ordering manifestations such as business codes of conduct (S. Prakash Sethi and Donald H. Schepers 2014, 194; Barak D. Richman 2017, 21, 29-32, 57, 379; Khaled Fayyad 2018) can be positive factors in terms of the respect of human rights, external regulations, especially 'institutional ones', are indispensable in light of the limits and shortcomings of self-regulation. It is those external regulations which can often prompt true change given the accountability risks their lack of observance entails. This is so because, in this regard, it has been found that "[t]he assumption that companies with codes will less frequently violate laws is not valid. Companies will have additional reasons for developing a business code when they face the threat of legal action" (Kaptain and Schwartz 2008, 121). As evidence of this, the Danish Institute for Human Rights indicated, in September 2020, that the failure of important businesses to align themselves with expectations on the respect of human rights and disclosure or documentation about their compliance with Guiding Principles highlighted the necessity to have legislation imposing such obligations on them (Danish Institute for Human Rights 2020).

In that regard, it may be preliminary stated that 'voluntary' standards, even if they may have some positive implications in terms of the respect of human rights, cannot replace mandatory norms. Voluntary responsibilities can be understood as such from a *legal* point of view when "there are no international (legal) laws by which businesses could be brought to court, tried, and (if found guilty of a human rights violation) punished" (Brenkert 2016, 294).

After exploring what human rights-relevant statements businesses can formulate —whether adopted by the companies themselves or created by third parties and accepted by them—, the article will explore both their possible positive impact as well as their weaknesses. The article will explain why there is a risk of having these voluntary pledges used as mere propaganda in order to 'bluewash' or 'window dress' reputations, diverting attention away from necessary mandatory regulations. The article will also explore ways in which the aforementioned statements can interact with other initiatives to strengthen the observance of human rights demands –provided that they are not the sole initiatives relied on. In relation to the possibility of interactions, for example, the European Union Regulation 2017/821 of 17 May 2017, "laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas", indicates in article 4.b that importers of minerals or metals are under an obligation ("shall") to:

> *[I]ncorporate in their supply chain policy standards against which supply chain due diligence is to be conducted consistent with the standards set out in the model supply chain policy in Annex II to the OECD Due Diligence Guidance.*

Furthermore, Doug Cassel has mentioned that gradual proximity between voluntary instruments such as the Guiding

Principles on Business and Human Rights[3] and domestic *hard law* may contribute to eliminating gaps that fosters impunity (Cassel 2019).

The article will explore these questions by looking at the legal demands of protection set forth in the evolving field of business and human rights under international law, both under hard law and soft law. The article will focus on *lex lata* requirements and the ways in which declarations are limited, even if consistent with existing positive law, by failing to establish sufficiently meaningful obligations on corporations. This is examined from a critical and *lex ferenda* analyses that draw from studies of codes of conduct and theoretical inquiries, as made clear by references to bluewashing, human dignity and corporate capture, among others.

2. Notion and Relevance of Voluntary Business and Human Rights-Related Regulations

Standards that are voluntarily-accepted by businesses and have human rights relevance can have a self- or hetero-normative nature. The former takes place when businesses 'commit' to regulations created by themselves or a group of businesses in which they participate; and the latter phenomenon is that in which third actors adopt regulations that a business declares it will observe (Pérez-Prat Durbán 2008, 33). They can be hence originally created by the addressees themselves or by third parties, later endorsed by a given corporation, and can be distinguished from public regimes in which standards are *imposed* on corporations regardless of their volition. According to Carola Gilinski:

> *[P]ublic international regimes are complemented by a multitude of hybrid or private transnational regimes addressing human rights, social and environmental issues.*

[3] Guiding Principles on Business and Human Rights, United Nations, commentary to Principle 12

> *The latter range from arrangements between public or international bodies and private stakeholders over purely private multi-stakeholder approaches 8 to unilateral self-regulatory instruments adopted by business organisations or individual businesses. Self-commitments accompanied by management systems have often been elaborate and detailed, in particular those related to the health, safety and environmental management of corporations including their subsidiaries (Gilinski, 2017, 16).*

In both cases, that is to say, self- or externally-created standards accepted by businesses, standards may be found in a single or in complementary instruments. One interesting element in regard to all of them, not fully explored so far, is that while they are 'voluntary' in terms of not enshrining legal obligations *directly* arising from them, these can lead to having indirect legal effects, as will be explored further below. In the meantime, it merits mentioning how some authors have drawn attention to the social expectations related to corporate impact on the enjoyment of human rights (Brenkert, 2016, 283, 302; Clapham and Jerbi, 2001, 339, 341, 347-349).

There are multiple ways of classifying business-endorsed statements from a human rights perspective: it can be by author or by the form they take. As to the former, it is possible to distinguish those created by the businesses adopting them —a form of self-'regulation'— from those created by third parties —eg: international organizations, certification bodies, sector initiatives, or others—, which may be called "external" initiatives or codes", which in the end are all those created by third parties in hetero-normative dynamics and later endorsed by (target or third) businesses. For example, in an attempt to highlight the role and possible contribution of the private sector in equitable and sustainable growth and to help foster responsible business conduct and prevent negative impacts on human rights, decent work and environmental protection, the ILO, the OECD and the UN have developed the following three instruments:

- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration),
- OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines),
- UN Guiding Principles on Business and Human Rights (UN Guiding Principles).

As to the different possible manifestations of voluntary regulations, in addition to codes of conduct as such, voluntary commitments can also be found in practices related to social labeling, making statements of quality or of the observance of certain elements in a given process, operation, or manufacturing of a product (Gatto, 2005, 425-430).

All such statements may deal with issues that are relevant from a human rights perspective. Concerning codes themselves, Muel Kaptein and Mark S. Schwartz have argued that the expression *business codes* is to be preferred to others sometimes used in practice. This is so because it is more encompassing of different possible normative manifestations. According to them, business codes can be defined as:

> *[C]ollections of rules and regulations […] developed* by and for *a given company […] the code applies to those who represents the company […] as a formulation of* behavioral prescriptions *for doing business, is for all those people that make the business work and run, which includes at least the management and employees of the company […] The adjective "business" also implies that a business code prescribes, in a more or less coherent way, multiple behavioral items that are* relevant for the company *(Kaptain and Schwartz, 2008, 112-113).*

Business codes are understood as an expression of (private) standards set by non-state actors (Noortmann and Ryngaert, 2010, 1-

5; Peters, Koechlin and Fenner, 2009, 23). S. Prakash Sethi and Donald H. have considered that "[a] voluntary code of conduct is in the nature of "private law". As was mentioned previously, these types of voluntary regulation can have synergies and interaction with public policies and public voluntary and mandatory standards from a human rights perspective (SHIFT, 2019; Blackwell and Vander Meulen, 2016, 68; Carrillo-Santarelli, 2018, 42-43; Human Rights Council 2016, para. 12). But even if such positive interactions can take place, voluntary private regulations do not displace the necessity nor the effects of binding (external) regulations. After all:

> *The private law character of voluntary codes does not reduce the obligations of the [sponsoring organizations], whether they are individual companies, industry sectors, or other types of groups. Rather, it increases their burden to ensure that skeptical critics and public-at-large believe in the responses and performance claims of the SOs (Prakash Sethi and Schepers, 2014, 194).*

In regard to the content that business codes can have, from a human rights perspective, it may happen that they expressly refer to them or touch upon aspects that are relevant for the sake of their respect. Oftentimes they touch on corporate social responsibility matters, but these are to be distinguished from human rights considerations and should not be equated. Although both can contribute to the satisfaction of human needs, human rights address basic demands, whereas social responsibility may deal with social benefits that neither excuse nor deny the possible commission of human rights abuses. They are different concepts (Cantú Rivera, 2019, 5).

The argument that social responsibility and human rights responsibility of businesses are not identical and may lead to different outcomes in terms of accountability has been persuasively explained by several authors. For example, Catherine Coumans has explained how they have a completely different mentality, considering how in practice corporate social responsibility is seen as

embraced by businesses when they considered as "good for business", whereas the "[r]espect of human rights, on the other hand, is an imperative on all corporations to *do no harm*" (Coumans, 2017, 5). In turn, Anita Ramasastry, who has argued that:

> *CSR focuses on individual company decision making—what human rights scholars and activists might view as an ´a la carte view of human rights. Thus, the key ingredient that CSR lacks is a consistent framework focused on businesses and their role with respect to human rights protection or promotion (Bauer 2011: 175). Businesses are, of course, constrained by societal expectations and market forces, but this does not lead to a consistent approach to human rights protections in their operations (Ramasastry, 2015, 239).*

Indeed, private regulation may identify conducts relevant for businesses, for instance, in terms of negative impacts on the enjoyment of human rights which must be avoided and repaired. For example, Guiding Principle 15 states that "to meet their responsibility to respect human rights, business enterprises should have […] A policy commitment to respect […] A human rights due diligence process […] Processes to enable the remediation of any adverse human rights impacts".

Having said that, businesses may refer to their commitments, policies, and responsibilities that are pertinent from a human rights perspective by means of initiatives that differ from business codes. When talking about self "private regulation" in this context, business codes are but one possible expression. In our opinion, this is echoed in Guiding Principle 16, which indicates conditions that are expected of all such expressions, encompassed under the broader category of 'statements'. The commentary to it says that "[t]he term "statement" is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations" –which is undoubtedly important from the perspective of the principle of good faith.

Even though some may consider that the statements to which the principle refers are exclusively 'political' in the sense that they express mere intentions to commit to a given standard, we find that declarations and other forms can precisely be "means" to indicate conduct to which the corporations commit or refer in terms of its being expected from them. Such statements, in turn, are not automatically legally binding. Accordingly, this idea coincides with what we have been arguing about different ways in which human rights expectations may be set by corporations themselves –which may in turn fall short of protection needs.

Principle 16 sets forth that "for embedding their responsibility to respect human rights, business enterprises should express their commitment through a statement of policy". This is followed up by an indication of some elements that should be observed when making such expressions of self-regulation, including among others: approval "at the most senior level of the business enterprise"; being informed by "internal and/or external expertise"; stipulation of expectations of personnel, partners, and other parties linked to operations, products or services; public availability and internal and external communication; being reflected in "operational policies and procedures necessary *to embed it* throughout the business enterprise" (emphasis added, which to my mind highlights the possible influence of statements in corporate culture). That said, the Guiding Principles acknowledge that other conditions may be pertinent, as is made clear when the commentary to Principle 16 refers to "other appropriate means", the need that businesses strive towards coherence with the respect of human rights, and the taking into account of the specificities of each corporation's operations.

While it is true that Guiding Principle 16 recommends and encourages the adoption of statements with human rights elements (by mentioning how, in order to embed their responsibility to respect those rights, "business enterprises *should* express their commitment" through them, emphasis added), there are encouraged but not obliged or even not legally "required" to do so.

Conversely, all businesses are "required" to respect human rights (often in soft law terms), per Guiding Principle 13, which in turn leads to due diligence demands (Principle 17).

Even though empirical studies have not reached unanimous conclusions as to the effectiveness of business codes and factors which may increase compliance, some of them suggest features that can have an impact on it. This includes self-regulation, understood and perceived by agents of the business actor (workers, etc.) as having been adopted by directives taking into account both the objectives of the company and "external codes" and expectations of communities and third parties (Kaptain and Schwartz 2008, 118-119).

There are other factors that, according to some studies, can increase the effectiveness of business statements and codes which are not expressly enshrined in Guiding Principle 16. One of them is related to consistency in practice and assessment of adequacy, indicating that mere adoption is not enough. It has been seen, for example, that whenever directive or managerial levels do not show real commitment to these voluntary statements, when there is not a constant update of their content, when codes are too vague and broad without addressing specific challenges and expectations related to concrete operations, when there is not sufficient monitoring, when evaluation of adequacy is missing, or when there are no meaningful consequences in the event of breach, the likelihood of statements having a positive impact on practice and corporate culture is seriously diminished and may lead to mere propaganda–which some consider may happen with the Global Compact.[4] Furthermore, it must be noted that John Ruggie himself

[4] Kaptain and Schwartz 2008, 119, 122 ("Weller (1988) even considers a relationship between the frequency of revisions and the effectiveness of codes"); Prakash Sethi and Schepers 2014 196-198; Schwartz 2004, 332; Rodríguez Garavito 2007, 28, 35; S. Prakash Sethi and Schepers 2014, 199-200, 206-207.

identified such culture as a relevant factor in the shaping of business conduct, as will be explored in greater detail below.[5]

The previous considerations suggest that when evaluating the adoption of statements and business codes, it is pertinent to bear in mind some of the analyses that have been carried out in relation to National Action Plans, insofar as they shed light on similar demands. This is so because, even if public policies and voluntary statements or commitments have a widely different nature in terms of their features and (legal) effects, certain factors that increase the effectiveness and (positive) impact of the former may likewise enhance the relevance of the latter. As to National Action Plans from this perspective, it is pertinent to consider how Humberto Cantú Rivera has studied, for instance, that:

> *[P]ublic policies must go through permanent and continuous cycles of analysis, implementation and assessment, in an effort to try to resolve the issues that may exist in a specific society […] [there is a] need for the NAP to address some of the specific areas of concern for the state, thus having a more tailored approach to the national context and situation (Cantú Rivera, 2019, 8, 19).*

In relation to the issue of culture and its interrelationship with (human rights-relevant) business statements, mentioned above, it is worth pointing out that their adoption and implementation may pave the way for the shaping of expectations of corporate conduct that internal (business) and external actors can have, the more so if they are adopted by directives, recalled and promoted by agents of the business, and/or invoked in dynamics in which communities and actors in the supply chain and others participate (Sherman III 2019, 5-6, 11, 14).

Additionally, the invocation of statements in processes of interaction in which businesses participate may also produce

[5] Sherman III 2019, 3-10, 12-14, 16-18; Human Rights Council 2010, paras. 19, 33-43; Human Rights Council 2008, paras. 27, 29-32, 105.

expressive effects, linked to the motivation of behaving in certain fashion when the business actor in question ends up internalizing the message and acting with spontaneous observance (Remiro Brotóns, *et al*, 50). This can also be achieve by incorporating these pledges in its daily operations(Cooter, 2000, 3, 17, 19; Zartner, 2017; Goodman and Jinks, 2009; Hongju Koh, 2005; Capie, 2008, 87-89), which include not only possible altruistic aspirations but also changes triggered by the desire to participate in the observance of human rights standards. The resulting attitudes may, in turn, increase the likelihood of businesses refraining from harming the enjoyment of *any* (Human Rights Council, 2008, para. 6) human right and acting diligently in order to seek the avoidance of abuses (Bonnitcha and McCorquodale, 2017, 931-933) –even beyond what the statement itself says, by virtue of their making the business actor in question more receptive to human rights demands, which go beyond those found in statements and domestic laws. In relation to this, John F. Sherman III has stressed the:

> *[F]oundational role of culture in supporting a key aspect of responsible business conduct […] corporate culture consists of shared norms and values that explain how things are actually done in a company. They are not aspirational, but authentic. Having and sustaining the right culture is critical to a company's ability to meet its goals, since 'culture eats strategy for breakfast.' Shaping and sustaining the right culture is a top down, bottom up process that involves the participation of the board, senior executive leadership, middle management, and workers (Sherman III 2019).*

Business codes or statements –or hetero-standardization— meeting conditions set forth under Guiding Principle 16 or identified in studies on their positive impact can, on the one hand, contribute – to a greater or lesser degree— to the generation of a corporate culture that is consistent with human rights. In addition to this, if positive their content and implementation may serve to set examples of some things that international or domestic policies and

regulations may emulate. This can happen, for instance, when they go beyond existing legal requirements, evincing gaps in laws when the threshold of the latter is too low from a human rights perspective. In this regard, it has been argued by Radu Mares that beyond "remov[ing] discretion from corporate decision-making" for clear abuses, the law may have legal gaps, which in turn can lead to the possibility of "managerial discretion" and hence, "[f]ar from making CSR irrelevant, such laws will build in the interaction between the legal and CSR spheres" (Mares 2010, 248). Moreover, according to Nadia Bernaz, what she calls private modes of regulation:

> *[M]ay be able to achieve important results, especially in contexts where states are unable or unwilling to adopt and enforce legislation that would be protective of human rights. While holding corporations accountable for human rights violations through public law means is fraught with difficulties, as shown in the previous chapters in this Part, transnational private regulation provides a welcome – albeit limited – framework to engage with the private sector on human rights issues (Bernaz, 2017, 225).*

After all, as the commentary to Guiding Principle 11 recalls, corporate responsibility to respect human rights "exists over and above compliance with national laws and regulations". Accordingly, corporate initiatives may temporarily and to some degree "fill" normative gaps in relation to their operations, considering that "initiatives by companies, industry groups, and regional and global bodies [can] call for creating voluntary standards in those aspects of corporate conduct that are inadequately addressed in prevailing legal and regulatory mandates" (Prakash Sethi and Schepers, 2015, 202). Indeed, it may happen that private actors act as normative entrepreneurs or agenda-setters, as has been studied in relation to the expressive effects of norms (Anderson and Pildes, 2000, 1514-1520; Strudler, 2001; Sunstein, 1996, 2034). However, there is an inherent risk in non-legally binding voluntarily-accepted standards:

as Hugo Saúl Ramírez-García and Juan Francisco Díez Spelz have argued in another context, there is a risk that voluntary frameworks are "something […] businesses […] consider only in good times. During bad times there are other priorities […] potentially at the expense of ethics" (Saúl Ramírez-García and Francisco Díez Spelz, 2020, 315).

Having said this, the exposure of the inadequacy of domestic (and other) regulations by means as those described here should compel law-makers to reform the law in an adequate manner from the perspective of the better protection of human dignity. It may even happen that voluntary initiatives are better than positive State law but insufficient in turn from the perspective philosophical and/or international demands.

This by no means must be understood as a suggestion that corporate statements are sufficient initiatives in and of themselves in order to bring about the respect of human rights by corporations –far from it. But they may operate as *one* of multiple interacting elements towards that goal, helping to bring about social change, in which it is often the case that different social actors cooperate –consciously or not. As Amartya Sen has expressed, due to "the importance of communication, advocacy, exposure and informed public discussion, human rights can have influence without necessarily depending on coercive legislation" (Sen, 2004, 345).

The *possibilities* provided by voluntary statements notwithstanding, there are serious shortcomings and risks they have which make them ill-suited to be considered sufficient strategies that would supposedly —and falsely— make binding external regulations needless, offsetting the benefits which statements may produce if they are present in isolation. Conflicts of interest, lack of enforcement, and other aspects cannot be forgotten, as will be analyzed next.

3. The Limits and Flaws of Voluntary Statements from a Human Rights and Business Perspective

Without ignoring that voluntarily-created or -accepted statements or standards that do not directly create legal obligations, both with a political nature and when they generate expectations from other perspectives, may generate some positive effects, as explored above, they also suffer from limitations from a human rights perspective. It has been stated by the Office of the United Nations High Commissioner for Human Rights and agents of the Global Compact that, in relation to the filling of gaps that positive law can have:

> *Voluntary initiatives are not a panacea to this problem. They are primarily an effort to fill the gap and therefore must be formed and fashioned in such a way as* to simulate improvement *in public policy so that the root causes of the problem are tackled. Enhancing the contribution of business to sustainable development is a complex goal that* requires a range of different methodologies. *In this context,* both regulatory and voluntary approaches play an important role. The Global Compact is designed to complement, and not substitute, regulatory frameworks *by encouraging voluntary, innovative corporate practices (United Nations Global Compact and Office of the High Commissioner for Human Rights, n.d., emphasis added).*

Likewise, it is important to address the issue of enforcement via third-party review. Voluntary statements, insofar as they may not generate direct obligations, may not always be invoked before authorities in order to ask them to require their observance. Thus, they do not necessarily satisfy the need of having access to remedies. This said, sometimes in their adoption, or afterwards, internal or external review mechanisms may be set up or accepted. The importance of there being binding external regulations and access to the judiciary has been mentioned by the Committee on Economic,

Social and Cultural Rights (Committee on Economic, Social and Cultural Rights, 2017, paras. 38-39, 51). Likewise, the second draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (published in 2020) indicates that, based on the facts of each case, both States are to hold corporations liable under criminal, civil, and administrative jurisdiction; and that victims must have effective access to remedies before not only non-judicial mechanisms but also, importantly, before "their courts" in the pertinent jurisdiction(s), as is mentioned in articles 6 through 8.

All of these considerations are relevant from the perspective of Guiding Principles 26 and 27, which consider it important for there to be domestic and international, jurisdictional and extrajudicial recourses and remedies. On the other hand, it is interesting to note initiatives on human rights and business arbitration,[6] considering how voluntarily-accepted standards may be deemed to be reviewable if the parties to it so choose. Given their features, it is possible to draw attention to how the bindingness, independence, and due process guarantees of both applicants and defendants in arbitration and other means of settlement of disputes can improve the perspective of protection in relation to statements.

Conversely, it is possible to look at the fact that the inobservance of voluntary statements does not *directly* engage responsibility and the correlated access to justice of victims of legal transgressions as problematic reasons why they cannot be deemed sufficient to bring about corporate human rights respect.

Moreover, power asymmetries between corporate actors and victims, identified by César Rodríguez Garavito as a problematic factor when studying business codes (Rodríguez Garavito 2007, 5-7, 13), also detract from the positive impact they could have, making reliance on them and the consideration of claims of their breach uncertain and thus not enough –apart from the fact that the content

[6] For instance, see The Hague Rules on Business and Human Rights Arbitration 2019.

of standards themselves may be subpar from a perspective focused on human dignity.

On the other hand, even though it was argued above that voluntarily-accepted standards –be them made in codes of conduct and other statements, or generated by third parties and accepted by corporations in a hetero-regulation dynamic— could help to bring about business culture changes, it may also happen that they fail to do so. As has been explored by Jim Deloach:

> *While a written code formalizes certain aspects of the organization's commitment to ethical behavior and is an integral part of the governance process, it is neither a panacea, nor a substitute for a commitment at all levels of the organization to align personal interests with the organization's interest (Deloach, 2016).*

Concerning social and cultural changes, it cannot be ignored either that norms may produce expressive or symbolic effects –all the more so when normative agents trusted by social actors are behind them (Sunstein, 1996, 2025, 2030-2031). Certain business codes could very well include provisions or be the result of experiences that States or even international law itself may support, encourage, or imitate –for instance, when they refer to the Guiding Principles or other initiatives (as some codes of conduct of businesses operating in Latin America do (Carrillo-Santarelli and Arévalo-Narváez, 2017, 105-108), including Ericsson, Coca-Cola, Telefónica, and others), that States maybe have not internalized, which can in turn prompt the adoption of National Action Plans or mandatory business and human rights standards (including direct obligations) in States lacking them, after the visibilization of their demands leads to calls for action by stakeholders and normative agenda-setters even if the companies themselves fail to honor and live up to them.

In such events, businesses or third parties creating hetero-regulation of a voluntary nature may find themselves turning (perhaps unwittingly!) into norm entrepreneurs. For instance,

private codes of conduct in the banana industry in Latin America serve as an example of internal principles that are used as a legitimating strategy and a complement to external efforts of certification that seek to address social, labour and environmental standards (FAO, 2017; Prieto-Carrón, 2006, 8; Prieto-Carrón and Larner, 2010, 38-55; Iglesias Márquez and Felipe Pérez, 2015, 122). On the other hand, domestic and international legal systems had better not simply reiterate, be satisfied with, or uncritically endorse voluntary standards of the sort discussed in this article, considering that the latter may be unambitious, mere propaganda, reflect the selfish interest of those adopting them, or otherwise fail to provide progressive development in relation to existing gaps or even a codification of existing requirements of expected conduct.

In relation to the limits of private regulation, there is a healthy skepticism found in law and literature expressions as that of Corban Addison's *A Harvest of Thorns*, a novel in which it is portrayed how voluntary declarations may be nothing but public relations and image exercises without meaningful impact, if priority is not attached to them, unlike happens in relation to profit ambitions. An interesting passage from the book addressing this says how some discussions have:

> *turned from profits to losses, from trading on our positive brand image and generating historic fourth-quarter sales, to piecing together the shards of our corporate dignity and shoring up investor confidence before our market cap falls off a cliff […] The story Presto had delivered to the world, a story about authorized suppliers and color-coded lists and the company's unwavering commitment to worker safety, was not merely a half-truth packaged for public consumption. It was a bald-faced lie (Addison, 2017).*

Among others, as will be explained in the following pages, there are at the very least three risks of considering voluntary statements as sufficient to allay demands of stronger business and human rights regulations. They are a) their mere strategic use to bring about a

positive image that diverts attention away from calls for obligations and gain contracts or customers; b) corporate capture, i.e. excessive influence over public decision-making; and c) creating the belief that stronger international regulation in the form of treaty or customary law is supposedly unnecessary –the contrary is true, given coordination imperatives.

As to the first danger, it is possible to say that the fact that businesses are often oriented towards profit above all may persuade their agents to think that a mere *appearance* of rights respect is sufficient to reap economic benefits, regardless of whether their commitment -crucial in terms of the effectiveness of statements—[7] is real or not. Furthermore, some studies point out that marketing and other strategies may simply be an attempt to manipulate the public and consumers,[8] taking advantage of the fact that individuals may not act with full rationality, information, or freedom (Efstathiou, 2017). Risks of manipulation require authorities to not be deceived about claims related to an alleged sufficiency of voluntary standards that would make binding regulations unnecessary; recalls how important it is for corporate claims to be critically examined and verified, both by authorities and civil society –whose work and initiatives must be protected. Altogether, voluntarily-accepted standards (in self- or hetero-regulation dynamics) may fail to produce real effects if they are used as mere propaganda efforts, as discussed so far. In this sense, it has been said that:

> *Business codes do not influence behavior because […] "those to whom it is addressed and who need it the most will not adhere to it anyway […] Moreover, business codes are viewed as mere window-dressing […], providing "superficial and distracting answers" (Kaptain and Schwartz, 2008, 112).*

[7] It has been said that "Strong outcome effectiveness depends on the serious commitment of business actors, top management in particular, and must involve not only external communicative efforts but also strong and strategic leadership inside the organizations involving the strategic measurement of goal attainment and effective employee trainings". In: Jastram and Klingenberg 2018, 782.

[8] Vid. Monbiot 2018, criticizing texts as: Joreiman, Liu and Kareklas 2016.

The former dynamics may be the result of the lack of "teeth" of mere voluntary declarations, insofar as the lack of direct obligations generated by them impedes those affected by corporate conduct violating human rights which simultaneously contravenes codes or statements from accessing to justice and claiming on the basis of such contravention. Thus, other standards must be invoked –and it may be that domestic laws are lacking in that regard. That being said, it should not be ignored that statements may produce interesting indirect effects in terms of the protection of good faith –domestically, consumer or other laws could be pertinent as well, but their scope and reach are likely limited to only some of those affected. From the perspective of international law, the International Law Association has said in relation to this that:

> *Many non-State actors, e.g. corporations …commit themselves to upholding international law. However, they tend to do so as a matter of policy/soft law than as a matter of hard law. In so doing, they may avoid legal accountability. There may nevertheless be doctrines and principles that could be used to harden these soft commitments into hard law (duty of care/negligence/ corporate organization/legitimate expectations/good faith/unilateral act…) (International Law Association, 2008, 3).*

There may be other legal implications and effects produced by (publicly known) statements. For example, the United Kingdom's Supreme Court held in the Vedanta case that published statements of businesses may be taken into account when examining the degree of intervention in the operations of a subsidiary (United Kingdom Supreme Court, 2019, paras. 55, 58-59).

In relation to misleading initiatives that are nothing but mere window-dressing or bluewashing, it can be said that the risk of such things happening is the greater the less independent and impartial supervision of compliance there. Estefania Amer examined this in relation to a case of voluntary hetero-regulation as the Global Compact, finding that:

> *[C]ritics report that (a) the UNGC principles are incomplete and vaguely defined and (b) their implementation is company-controlled and there are no external verification or sanction mechanisms […] the fact that companies do not have to report on each of the 10 principles is a significant deficiency […] that increases the risk of "bluewashing." The vagueness of the principles and the lack of clear reporting guidelines also result in a high level of heterogeneity in the COP's content, format, and quality that facilitates "bluewashing" […] by selectively disclosing positive information about their implementation of UNGC principles, while omitting negative information on their failings in the domain of CSR […] even UNGC advocates […] report that, apart from the COPs and the public scrutiny of the business participants' behavior, little else prevents these participants from "bluewashing" […] literature reports that private actors, such as NGOs and other civil society members, consumers, the media, and investors, are able to pressure companies to become more socially and environmentally responsible (Amer, 2015, 6-7, 9).*

In sum, even though it is certainly possible that voluntary commitments may interact with binding initiatives in complementary ways and generate *some* positive effects, as has been explained in previous pages, it is also true that it has several shortcomings, among which one can count the possibility that the existence of voluntary statements is invoked or taken advantage of in ways that divert attention away from the actual necessity of coming up with external (mandatory, domestic and/or international) regulation. In this regard, a recent study "shows that voluntary initiatives do reduce public support for new and stricter government regulation of corporate environmental and social behavior", but that in spite of this, "nevertheless […] voluntary initiatives may in fact be 'shallow', i.e. undemanding, and may thus be conveying inaccurate information to voters and other stakeholders (Kolcava, Rudolph, and Bernauer, 2020, 17-18).

This is especially worrisome if existing positive law in a given level of governance is nonexistent or problematic due to vagueness or lack of conformity with the demands of an effective protection of human rights, or when there is no satisfactory enforcement and supervision of corporate respect and remedies that victims have access to.

This argument coincides with the studies of Barak yD. Richman in his book *Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*, in which it is argued that the effectiveness of private regulation and the trust in it is greater provided that there is institutional supervision and implementation of its provisions, as seen historically in relation to the so-called *lex mercatoria* (Richman, 2017, 357-358). Likewise, César Rodríguez Garavito has found that power asymmetry between States, businesses and individuals make it necessary for guarantees and protection in favor of victims to be provided institutionally (Rodríguez Garavito, 2017, 24-25).

In relation to this, several authors agree on the importance of an independent oversight of compliance with undertaken commitments –be they initiatives created by those committing to them in self-regulation manners, or in third-party-created standards to which businesses commit afterwards. According to Khaled Fayyad for instance:

> *The success of the Kimberley Process depends, in large part, on voluntary participation, self-policing and peer-review […] Without an independent entity to provide effective oversight and enforce the certification requirements, states are left with little* incentive to adhere to them *(Fayyad 2018, emphasis added).*

In order to understand why deficient or even useful statements may divert attention away from required external regulation, it is important to consider one –but by no means the only— dynamic which may play a role leading to this. This is the concept of notions

as "*cooptación*" (Rodríguez Garavito, 2017, 12, 14, 17) or "corporate capture", which has been described as:

> *[T]he means by which an economic elite undermine the realization of human rights and the environment by exerting undue influence over domestic and international decision-makers and public institutions (ESCR-Net, 2019).*

Corporate capture may be pursued by businesses seeking to avoid or change external regulation in ways that benefit their (economic and other) interests which are inimical to a proper human rights protection when it is perceived as having an impact on profit or other benefit expectations, which explains why regulation must be considered in a democratic manner attaching more importance to the protection of human dignity in processes with publicness features. This is no mere theoretical observation. The second draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (published in 2020) mentions in article 6.7, for example, that:

> *In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to* protect these policies from the influence of commercial and other vested interests of business enterprises, *including those conducting business activities of transnational character (emphasis added).*

According to some, businesses have in the past raised objections to the possibility of their conduct being subject to external regulation or standards –but not to benefiting from fields as foreign investment law… of course. Perhaps their opposition has not always been open but, for instance, publicly relying on alleged lack of necessity or deficiency as to consultation (which is ironic, since comparatively international criminal law does not ask those engaging in conduct forbidden under it whether they agree for their acts to be deemed unlawful, and abusers saying that for their abuses

to be outlawed they must be asked first is somewhat shameless) As some have explained:

> *strong objections raised by business against the Draft Norms [on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights] proposed view of human rights as direct international legal obligations led to the collapse of this initiative. Business's objections were importantly self-interested in nature (Fayyad, 2019).*

Apart from the danger of letting the content of standards on business and human rights be determined by those conflict-interested actors who are supposed to be their addressees, which hence may be interested in their having low demands (Sethi and Schepers, 2014, 200) or a lack of enforcement, there may be not only a false signal sent to social actors that those voluntary guidelines make external regulation unnecessary,[9] but also a distraction diverting attention away from the fact that businesses already have, in my opinion, implied obligations under international peremptory law and certain customary norms, as argued by authors as Roland Portmann and Jordan Paust (Portmann, 2010, 153, 166, 280; Paust, 2002, 812-817, 821-825; Paust, 2004, 1242-1243), or by arbitral and human rights bodies, as different as an ICSID Tribunal and the Inter-American Commission on Human Rights (ICSID, 2016, paras. 1159-1161; Inter-American Commission on Human Rights, 2019, para. 178).

A cost-benefit analysis carried out by some businesses may make them consider that it is preferrable to adopt voluntary standards to "encourage the authorities to relax onerous regulations and controls" (Kaptain and Schwartz, 2008, 111). If successful, this not only prevents society and human beings from having protection

[9] It has been said that voluntary statements "engender public trust through ''reputation effect'' […] From the public's perspective, voluntary codes avoid the need for further governmental regulation with the prospect of onerous regulatory conditions". Source: Ibid., 195.

from corporate abuses, but also prevents the internalization (Mattei, Antoniolli, and Rossato, 2000, 515-516; Faust 2008, 840-841) of meaningful human rights consideration by corporations themselves, thwarting the potential cultural impact of statements –confirming the relevance of multi-level strategies in which public action is present and the objective of unconditionally protecting human dignity from *any and all* violations, regardless of the identity of the aggressor, be it State, corporate, or otherwise (Inter-American Commission on Human Rights, 2019, para. 184; Carrillo-Santarelli, 2017, 20, 34-36, 41, 48, 53, 57, 69).

Jens Martens is another author who has studied problematic strategies employed by businesses related to bringing about nonexistent benefits of voluntary initiatives in order to oppose (direct and indirect) regulation of their conduct at the international level (Knox 2008, 18-31), finding that:

> *TNCs and their interest groups used various strategies to undermine the initial efforts of the UN to hold companies accountable […] The working group and its proposed Norms met with vehement opposition from corporate lobby groups […] they used the Global Compact to campaign against their adoption […] the ICC and the IOE described the proposed Norms as "(...) counterproductive to the UN's ongoing efforts to encourage companies to support and observe human rights norms by participating in the Global Compact." […] the United Nations has experienced several waves of efforts to introduce legally binding instruments to hold transnational corporations accountable and liable for violations […] All these efforts met with vigorous opposition from powerful business interests and some governments. Transnational corporations and their business associations had a significant impact on shaping the agenda and the discourse at the UN and in convincing Governments […] While opponents of legally binding instruments for TNCs declared the establishment of an international court for corporations absolutely unrealistic, investor-state dispute*

> *mechanisms have been established that enable TNCs to sue states […] Since the 1980s, corporate PR experts have been extremely successful in implementing "issue management" strategies that helped to present business enterprises as good corporate citizens willing to dialogue […] 'Multi-stakeholderism' became the flavor of the day […] in contrast to what was portrayed as old-fashioned state-centered "command and control" approaches [..] Labeling all actors 'stakeholders', as if all were equal and had the same interests, obscures the power imbalances […] [But there is still] evidence of ongoing human rights violations and aggressive lobbying strategies by transnational corporations (Global Policy Forum et al, 2014, 7, 9-11, 27-29).*

Civil society actors have a point when they draw attention to deficits of voluntary statements and initiatives, such as the fact that "non-binding, voluntary approaches that provide 'guidance' and recommend good corporate practice […] avoid sanctions and allow corporate abuse to continue" (Global Policy Forum et al 2014, 22).

4. Conclusions

As has been explored by thinkers as Michel Foucault, "power—rather than being centered on the state—was diffused across a great many "micro-sites" throughout society", reason why he "criticized mainstream political philosophy for its reliance on notions of formal authority" (Kelly, 2013). In terms of the field in which the present study is embedded, this insight is absolutely pertinent and necessary. Indeed, even though human rights law was traditionally thought (by some) to be concerned with only State abuses, authors as Andrew Clapham have argued why it must be concerned with protecting individuals from *all* abuses, as permitted *and* required by its underlying tenets (e.g. protecting human dignity), aspirations, and legal elements (Clapham, 2006).

Businesses are among those actors who can participate in violations and, in terms of what Foucault criticized, also hold power. Such power affects human beings throughout the world, including in the Americas, as has been poignantly drawn attention to by the Inter-American Commission on Human Rights in its recent and laudable 2019 report on business and human rights and Inter-American standards on the subject when saying something to the same effect in the sense that:

> *human rights, based on human dignity, in addition to seeking the full development of people and communities in their interaction with nature, stand as a shield for their effective* protection against oppression and abuses of power*, its essence is focused on the inherent value of human beings, and its defense must not depend on the source of the threat or violation (Inter-American Commission on Human Rights 2019, para. 195, emphasis added).*

Regretfully, the necessity of a robust protection in line with the preceding acknowledgment has not been sufficiently realized and, for a long time, was mostly neglected in spite of the fact that businesses have the capacity to negatively impact on the enjoyment of human rights, and have regrettably demonstrated it in practice sometimes. Be it because of mounting pressure or other factors, sometimes the adoption and endorsement of standards not coming from States but from themselves or third parties has been touted as a step in the right direction to address this. The question ensues as to whether this is satisfactory. In understood as a *step* that is by no means the most important one, one could argue that, provided certain factors of publicity, supervision, evolution, consultation, internalization, and more, exist, they can contribute to improve the likelihood of a responsible conduct and the provision of reparations. But even before this, they are to be understood as truly framed in a human rights narrative, not in a mere social responsibility discourse that shies away from proper accountability.

Altogether, after examining the forms that voluntary statements can take, this article has explored how in spite of some benefits that they may produce, relying on them alone is insufficient in terms of providing guarantees against the victims of human rights abuses attributable to corporations. Due to conflicts of interest, risks of erosion of public protection, access to justice considerations, and the importance of making sure that protective regulation is sufficient, a multi-level strategy in which the benefits of voluntary initiatives can be maximized, but which does not depend on their presence and can expose the flaws and lies they may have, is required in order to make sure that human beings are the protagonists and those protected in a business and human rights approach. Attaching greater priority to (for profit) corporate interests is what may happen otherwise, and that would be a travesty and a slap in the face of victims and what human rights law is supposed to stand for.

Even if they can generate some positive effects, especially when they are seen as isolated initiatives but rather interact with other initiatives in a multi-level framework, voluntarily-adopted standards are in themselves incapable of *ensuring* and guaranteeing that a framework of proper protection of human rights exists and, worse, may be taken advantage of in ways that "bluewash" reputations and perceptions of corporate conduct and mislead about the supposed lack of necessity of coming up with stronger domestic and, in our opinion, (even direct) international regulation addressing corporate conduct. No one denies that the latter *may* produce positive effects in terms of the enjoyment of rights, as in relation to employment, but it is high time that such facts does not divert attention away from the necessity of complementing them with other, better steps, considering their shortcomings, as has been explored in this article.

Perhaps there are no better closing words reflecting our arguments than these from Nadia Bernaz on the matter, which coincide with what we have argued throughout this text: "to say that voluntary initiatives are useless in addressing human rights concerns

would be an overstatement; to say that they are sufficient would be a lie" (Bernaz 2017, 225). Voluntary initiatives (can) help, but are insufficient. More needs to be done. They may remind about this, both by mentioning human rights concerns and by means of the observance of their limitations.

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