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# Human Rights and transnational corporations: the need for a law-based regulation

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**Human Rights and transnational  
corporations: the need for a law-based  
regulation**

2017-2018

Master Politiques et Pratiques des Organisations Internationales

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## **Introduction**

This work finds origin in two strong interests of mine: on the one hand the international human rights law and on the other hand the question of Business Ethics and Corporate Social Responsibility.

The study of the problematic relationships between the power of transnational companies and the respect of human rights is an excellent way to conciliate those two interests. This topic is obviously vast - it is even more since we live in an era of economic globalization in favor of private companies – and complex since it positions at the crossroads between different disciplines: naturally international law but also moral philosophy, political science and so on.

The ambition of this work is to reflect this heterogeneity of points of view while approaching the relationships between human rights and transnational companies from a practical, theoretical and critical angle. More concretely, this work has been elaborated with the concern to present a pertinent analysis. In the light of the different historical developments of international public law regarding human rights, and the increase in the power of transnational companies, what has been done to ensure that the current draft treaty on transnational companies with respect to human rights progresses towards effectiveness?

The first chapter is an illustration of disastrous consequences that occur because of the bad behavior of a transnational company. This chapter allows us to understand the social and political roles held by transnational companies as well as the challenges caused by the regulation of their activities in the world.

The second chapter, more theoretical, aims at providing a general background for the issues of violations of human rights by transnational corporations. Through the acceleration of the process of economic globalization, we understand the emergence of new political non-state actors, in particular transnational companies. Their particular nature, their political and economic impact lead them to commit abuses regarding the respect of human rights (social, economic and cultural rights).

Once we realize the challenges raised by the influence of transnational companies, we can ask ourselves what kind of answer we can provide them. The third chapter, on the theoretical plan, questions the regulation of transnational companies. With the help of the three disciplines that

are law, economy and moral philosophy we will present the three answers that are the absence of regulations, the auto-regulation and the regulation by legal norms.

The fourth chapter takes the side of the regulation by legal norms. We will defend the idea that non-state actors have also international obligations regarding human rights, and we will analyze the different international instruments made for transnational companies. Our last part will insist on the negotiation of a binding draft treaty.

## **I. Violations of human rights in Guatemala: Canada's mining industry and the right to health of indigenous peoples.**

When Spanish conquistadors arrived in 1523 in Guatemala, the country entered the capitalist world, emerging first as an agricultural export economy. Following that, in response to globalization, Guatemala moved toward a resource-based economy. Then, indigenous peoples had to face centuries of oppression and marginalization. This made them vulnerable to the extractive industry in Guatemala.<sup>1</sup> Among the companies present here, we will focus on the Canadian transnational mining corporations (TNMCs).

In this first part, we will explore the extent to which international human rights instruments are used in order to ensure that Canadian TNMCs working in Guatemala respect, protect, and fulfill the right to health of indigenous peoples. We will observe the complexity of the situation since the health of these communities is inextricably linked to traditional and ancestral lands and territories. On the one hand, we will describe Canadian TNMCs in Guatemala with respect to indigenous peoples' health and lands. On the other hand, we will analyze the situation with the help of the international human rights framework and we will criticize its implementation by Canadian stakeholders.

### **A. Historical approach of Canadian TNMCs in Guatemala and their impacts**

For Deneault and Sacher, the observation is clear: Canada's mining industry displaced indigenous peoples from their lands within its borders for profit, and by the mid-20th century, Canada began exporting this exploitative approach to Latin America.<sup>2</sup> Indeed, back into the Civil War in Guatemala (1960–1996), the Canadian International Nickel Company (INCO) created a domestic Guatemala subsidiary and negotiated with the Guatemalan government for creation and control of El Estor nickel mine. In order to secure the mining site as required by

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<sup>1</sup> Samantha Fox, *History, violence, and the emergence of Guatemala's mining sector*, Environmental Sociology, 2015, p. 152

<sup>2</sup> Alain Deneault, William Sacher, *Imperial Canada Inc.: Legal haven of choice for the world's mining industries*, Vancouver Talonbooks, 2012, p. 9.

INCO's contract, the Guatemalan military forcibly evicted indigenous peoples from the region, during which 3,000 to 6,000 indigenous individuals were killed.<sup>3</sup> In 1997, Guatemala passed the Mining Law, drafted with the assistance of INCO executives, which opened Guatemala to TNMCs without substantial protections for indigenous peoples. More generally, TNMCs turned to Latin America for low-cost operations and less strict environmental laws. Currently, "Canadian TNMCs are involved in 50–70% of mining activities in the region" according to the Working Group on Mining and Human Rights in Latin America.<sup>4</sup>

Deneault and Sacher talks about "the hands off approach"<sup>5</sup> taken by Canadian lawmakers and politicians regulating Canadian TNMCs abroad. It contributes to make Canada a hub where the half of the world's publicly listed mining and exploration companies are headquartered. Furthermore, the Canadian government uses its diplomatic services to facilitate Canadian TNMC activities abroad. Indeed, according to Deneault and Sacher<sup>6</sup>, shortly after a 2004 community meeting about the Marlin Mine operated by the Canadian TNMC Goldcorp Inc. in Guatemala, the Canadian ambassador in Guatemala published a local newspaper article promoting the Canadian mining sector as socially and environmentally responsible. Such a claim is highly contestable in light of a 2014 report by the Observatory of Mining Conflicts in Latin America, which identifies 198 cases of human rights violations associated with Canadian TNMC projects.<sup>7</sup>

Environmental and health impacts:

Since it needs mass amounts of water and clearing of lands, the dumping of waste rocks, mining is highly destructive to and demanding of the environment. Furthermore, the use of explosives and equipment increases the risk of occupational injuries and fatalities.

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<sup>3</sup> Samantha Fox, op. cit., p. 157

<sup>4</sup> Working Group on Mining and Human Rights in Latin America, *The impact of Canadian mining in Latin America and Canada's responsibility : Executive summary of the report submitted to the Inter-American Commission on Human Rights*, 2014, p.3

<sup>5</sup> Alain Deneault and William Sacher, op. cit., p. 16

<sup>6</sup> Ibid, p. 17

<sup>7</sup> Working Group on Mining and Human Rights in Latin America, op. cit., p. 3

Simultaneously, miners endure prolonged exposure to silica and coal dust, increasing their risk of chronic health problems.<sup>8</sup>

The accumulation of heavy metals in crops, fish, and livestock by-products through soil and water pollution extends the health risks of mining to the inhabitants of mining areas. In gold mine the leaching process uses water and cyanide. The leftover product from this process, called tailings, is stored in dams that can overflow during heavy rainfall or earthquakes and that have high amounts of heavy metals, which can be detrimental to neurological, dermatological, pulmonary, and cardiovascular health.<sup>9</sup> Investigations found that water sources downstream from the Marlin Mine were contaminated with heavy metals and that local inhabitants had higher amounts of aluminum, manganese, and cobalt in their blood.<sup>10</sup>

#### Economic impacts:

According to Zarsky and Stanley<sup>11</sup>, mining projects are often presented to indigenous communities with promises of economic growth. At the national level, mining projects bring economic benefit to Guatemala through royalties, tax payments, and the purchasing of equipment and supplies. However, these economic benefits do not necessarily reach indigenous communities living near mines. An analysis of the Marlin Mine found that the two nearby communities received only 5.1% of the revenue.<sup>12</sup> Ninety percent of the revenue flowed to outside businesses, contractors, and, to a lesser extent, the national government.

One way that mining projects compromise the economic vitality of nearby indigenous communities is by removing their access to land and water resources, which they rely on for subsistence farming and livelihood.<sup>13</sup> Even when these communities have access to lands, the quality and quantity of agricultural yields can be compromised by water scarcity, land

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<sup>8</sup> Lyuba Zarsky and Leonardo Stanley, *Searching for gold in the highlands of Guatemala: Economic benefits and environmental risks of the Marlin Mine*, Medford, MA Tufts University, 2011, p. 12

<sup>9</sup> Working Group on Mining and Human Rights in Latin America, op. cit.

<sup>10</sup> Niladri Basu et al., *A combined ecological and epidemiologic investigation of metals exposure amongst indigenous peoples near the Marlin Mine in western Guatemala*, *Science of the Total Environment* 409/1, p.6

<sup>11</sup> Lyuba Zarsky and Leonardo Stanley, op. cit., p. 14

<sup>12</sup> Ibid, p. 22

<sup>13</sup> Working Group on Mining and Human Rights in Latin America, op. cit.



intensification, and pollution of soil and waterways due to mining. In communities surrounding the Marlin Mine, the worsened conditions for agriculture and farming forced many indigenous individuals to pursue migrant work in Mexico, the United States, and the coast of Guatemala.<sup>14</sup>

## B. Human rights abuses

On 28 March 2011 a group of 11 Guatemalan women filed a lawsuit in Superior Court in Ontario, Canada, against Hudbay Minerals and its subsidiary HMI Nickel Inc. The women alleged that the companies were complicit in the gang rapes suffered by the women at the hands of security personnel hired by the defendant companies.<sup>15</sup> The women claim that the gang rapes occurred in January 2007 during forced evictions of members of the Mayan Q'eqchi' community living in El Estor, a Guatemalan city.

The plaintiffs are part of El Estor's Mayan Q'eqchi' community. Most of this community has never accepted the legitimacy of the mining concession and land rights granted by the Guatemalan Government for the Fenix project. The plaintiffs argue that the concession is on their ancestral land and was granted to Hudbay without adequately consulting the Q'eqchi' community. They have protested the development of the project and opposed the removal and resettlement of their homes and community.

In addition to the March 2011 lawsuit filed against Hudbay Minerals, a lawsuit was filed in September 2010 by the widow of a Q'eqchi community leader, Ich Chamán, who was severely beaten and shot in 2009 during a protest against the Fenix mine. His widow, Angelina Choc, claims that security guards from the Fenix project violently beat and shot Chamán, who was unarmed, and killed him. (Ms. Choc is also a plaintiff in the March 2011 lawsuit described above). The plaintiff alleged that Hudbay Minerals failed to take adequate precautions to ensure human rights abuses would not be perpetrated by its security personnel<sup>16</sup>.

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<sup>14</sup> Ibid

<sup>15</sup> The case is available on the Business & Human Rights Resource Centre at: <https://www.business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0?page=3>

<sup>16</sup> Ibid

On 10 December 2011, another lawsuit was filed against Hudbay Minerals in Canada by a survivor of a shooting incident at the Fenix project. The plaintiff, who became paraplegic as a result, alleges that in September of 2009 he was shot at close range in an unprovoked attack by the chief of security for Hudbay's Fenix project<sup>17</sup>.

On 18 June 2014, another lawsuit was filed in Canada against a Canadian mining company, Tahoe Resources. The Guatemalan complainants were seeking damages for injuries allegedly suffered during a shooting outside the company's Escobal silver mine in April 2013. In this case, the residents of the Guatemalan town where the mine is located, San Rafael La Flores, alleged that they were injured when Tahoe's security personnel opened fire on them during a peaceful protest against the mine over concerns about its potential impact on their water supply and the lack of meaningful consultation with the community about the project.<sup>18</sup> The complainants claimed that the shooting was intentional and a premeditated attempt by mine security personnel to suppress local opposition. The plaintiffs alleged that Tahoe Resources implicitly or explicitly authorized the conduct of its security personnel.

In these lawsuits, private security personnel hired by subsidiaries of these TNMCs are alleged to have injured, gang-raped, and murdered indigenous individuals protesting mining activities and forced evictions. In these cases, TNMCs did not consult with indigenous communities about their mining activities. Meaningful consultation requires that TNMCs obtain free, prior, and informed consent from indigenous peoples before and throughout mining operations. Failing to obtain such consent is a longstanding trend of Canadian TNMCs in indigenous Guatemalan communities. Therefore, the relationship between the forced eviction of indigenous peoples and consultation and consent, in the context of Canadian TNMCs in Guatemala, will be the focus of this right to health analysis.

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<sup>17</sup> *ibid*

<sup>18</sup> The case is available on the Business & Human Rights Resource Centre at: <https://www.business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala?page=1>

### C. International human rights framework

Following the cases that has been explained, the forced eviction of indigenous communities from their lands is an example on how mining in Guatemala has the potential to affect a number of “indivisible, interdependent, and interrelated” human rights, including the right to health, according the UN World Conference on Human Rights.<sup>19</sup> Indigenous understandings of health highlight “the harmony that exists between individuals and communities and the universe that surrounds them,” because “human beings, nature, and the collective history of the ancestors are indivisible from each other.”<sup>20</sup> Indigenous health is “closely related to the wellbeing of the land”, which makes mines that are environmentally destructive and intrusive to lands a direct risk to indigenous peoples’ health in Guatemala.

The right to health, indigenous land rights and State extraterritorial obligations to TNMC conduct:

In 1966, the right to health was explicitly recognized in article 12 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights<sup>21</sup>. In 2000, the Committee on Economic, Social and Cultural Rights (CESCR) made a more comprehensive definition of the right to health in the General Comment 14. In paragraph 27 of General Comment 14, the CESCR states that because “in indigenous communities, the health of the individual is often linked to the health of the society as a whole”<sup>22</sup>, the right to health of indigenous peoples must “consider that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.”<sup>23</sup> The Inter-American Commission on Human Rights emphasizes that indigenous peoples experience “extreme misery when disconnected from their lands and that

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<sup>19</sup> United Nations, World Conference on Human Rights: Vienna Declaration and Programme of Action, Vienna, Une 1993, A/CONF.157/24, art. 5

<sup>20</sup> Ethel Wara Alderete, *The health of indigenous peoples*, World Health Organization, Geneva 1999, p. 45

<sup>21</sup> International Covenant on Economic, Social and Cultural Rights, 1966, art. 12, paragraph 1.

<sup>22</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2004/4, 2000.

<sup>23</sup> *Ibid.*, paragraph 27

states have an obligation to rectify situations where indigenous peoples' health has been compromised in relation to land access"<sup>24</sup>.

#### Indigenous land rights:

According to the OHCHR, there is no explicit human right to land. "There is currently no explicit reference to a general human right to land under international human rights law."<sup>25</sup> Rather, "several international human rights instrument link land issues to the enjoyment of specific substantive human rights. References to land are made in relation to the right to food, equality between women and men, and the protection and assistance of internally displaced persons, as well as the rights of indigenous peoples and their relationship with their ancestral lands or territories."<sup>26</sup> Indigenous peoples' right to health is linked to their use of land for collective purposes. According to OHCHR, "land tenure security can be understood as certainty for the recognition and protection of a person's rights to land, especially in the event of specific challenges. At a minimum, land tenure security should protect occupants/users against forced eviction, harassment and other threats related to land regardless of the type of tenure."<sup>27</sup> However, these communities may be confronted to forced evictions because their land tenure security is fragile, in part because they have customary land tenure that is not always recognized legally speaking. Without stable land tenure security, indigenous peoples' right to health cannot be enjoyed.

International human rights law upholds a minimum standard of land tenure security to protect against forced evictions. The UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 7 on the right to adequate housing declares that "The State

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<sup>24</sup> Inter-American Commission on Human Rights, *Indigenous and tribal peoples' rights over their ancestral lands and natural resources: Norms and jurisprudence of the inter-American human rights system* (2010), para. 158.

<sup>25</sup> Office of the United Nations High Commissioner for Human Rights, *Land and Human rights: Standards and applications*, 2015, p.3

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.”<sup>28</sup>

The CESCR identifies indigenous peoples as a vulnerable group overly subject to forced evictions. “The Committee calls [...] to ensure that indigenous people are effectively protected from forced evictions from their ancestral lands and that they are properly compensated, should such evictions take place.”<sup>29</sup>

State extraterritorial obligations to TNMC conduct:

The United Nations’ Guiding Principles on Business and Human Rights (UNGPR) that is non-binding declared in its principle 2 that states “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>30</sup> Indeed in their commentary they precise that: “at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.”<sup>31</sup>

With the introduction of General Comment 24, the Covenant “establishes specific obligations of States parties at three levels – to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State’s national territory, and outside the national territory in situations over which States parties may exercise control.”<sup>32</sup> In the context of TNMC, the Covenant insists “that States parties’ obligations under the Covenant did not stop at their territorial borders. States parties are required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central

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<sup>28</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, available at: <http://www.refworld.org/docid/47a70799d.html>

<sup>29</sup> CESCR, *Concluding Observations on Ecuador*, UN Doc. E/C.12/1/Add.100 (2004), paragraph 53

<sup>30</sup> Office of the United Nations High Commissioner for Human Rights, *Guiding principles on business and human rights: Implementing the United Nations “protect, respect and remedy” framework*, 2011, p. 3, principle 2.

<sup>31</sup> Ibid.

<sup>32</sup> CESCR, *General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc. E/C.12/GC/24 (2017), paragraph 10

administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.”<sup>33</sup>

Under General Comment 24, the extraterritorial obligation to respect requires states to refrain from interfering. The document states that:”the extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant.”<sup>34</sup>

TNMCs are directly concerned with these obligations that concern states’ foreign policies, legislation, diplomacy and trade agreements and their manner to regulate the extraterritorial human rights conduct of businesses. “The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.”<sup>35</sup>

The paragraph 32 of General Comment 24 declares that States are subject to direct responsibility if they fail to take steps to prevent a violation of Covenant rights. “Whereas States parties would not normally be held directly internationally responsible for a violation of economic, social and cultural rights caused by a private entity’s conduct, [...] a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation, and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable.”<sup>36</sup>

TNMC obligations to the right to health:

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<sup>33</sup> Ibid, paragraph 26

<sup>34</sup> Ibid., paragraph 29

<sup>35</sup> Ibid., paragraph 30

<sup>36</sup> Ibid., paragraph 32

Principle 11 of UNGP is clear. It states: “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>37</sup> In the commentary, the document specifies that this responsibility “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.”<sup>38</sup>

Furthermore, TNMCs are held responsible for their behavior with the stakeholders with which they make business. “The responsibility to respect human rights requires that business enterprises seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>39</sup>

Ultimately, existing standards are non-binding under international human rights law. However, as will be discussed later, the United Nations Human Rights Council is leading a working group “on transnational corporations and other business enterprises with respect to human rights” that has the mandate to develop an “international legally binding instrument” which would operate under international human rights law to regulate the activities of transnational corporations.

Consent:

The Indigenous and Tribal Peoples Convention of the International Labor Organization affirms that indigenous peoples “shall not be removed from the lands which they occupy”<sup>40</sup> Furthermore, “Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.”<sup>41</sup>

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<sup>37</sup> Office of the United Nations High Commissioner for Human Rights, *Guiding principles on business and human rights: Implementing the United Nations “protect, respect and remedy” framework*, 2011, p. 13, principle 11.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid, paragraph 13b.

<sup>40</sup> International Labor Organization, *Indigenous and Tribal Peoples Convention*, 1989, Art. 16

<sup>41</sup> Ibid.

Paragraph 12 of CESCR’s General Comment 24 reinforces those protections against forced evictions. “The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. Indigenous peoples’ cultural values and rights associated with their ancestral lands are particularly at risk. States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.”<sup>42</sup>

Generally, the rights framework does not directly compel TNMCs to obtain consent from indigenous peoples for use of their lands. Paragraph 53 of the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people specifies that a “feature of the due diligence incumbent on companies whose activities have a potential impact on indigenous peoples is identification of indigenous forms of ownership and use of land, territories and natural resources, a question of vital importance to the effective enjoyment of human rights by indigenous peoples.”<sup>43</sup>

But instead, TNMCs are accountable to whichever definitions of consent are enforced by host states or the states in which the companies are domiciled. The result is that TNMCs operating or domiciled in a state that does not mandate consent can proceed with activities that violate indigenous peoples’ land rights.

#### D. Canadian stakeholders and the rights framework

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<sup>42</sup> CESCR, *General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc. E/C.12/GC/24, 2017, paragraph 12

<sup>43</sup> James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc. A/HRC/15/37, 2010, paragraph 53



Canada does not have domestic laws that oblige TNMCs to uphold human rights obligations in other countries or provide a mechanism to prevent and potentially remedy violations of the right to health of indigenous peoples. Instead of that, Canada has implemented “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad (CSR Strategy)”.<sup>44</sup> This CSR Strategy states that “companies are expected to align with CSR guidelines and will be recognized by the CSR Counsellor’s Office as eligible for enhanced Government of Canada economic diplomacy. As a penalty for companies that do not embody CSR best practices and refuse to participate in the CSR Counsellor’s Office or NCP dispute resolution processes, Government of Canada support in foreign markets will be withdrawn”.<sup>45</sup>

So according to what we have discussed above and in accordance with the CSR Strategy, Canadian companies in Guatemala are expected to respect indigenous peoples’ right to health by considering how mining affects lands. However, neither the UNGP nor the “OECD due diligence guidance for meaningful stakeholder engagement in the extractive sector” propose consent obligations. This situation makes indigenous peoples vulnerable to right to health violations.

This is because Canadian TNMCs are primarily accountable to the domestic law of the countries where they operate with regard to obtaining indigenous peoples’ consent. According to the executive summary of Oxfam and the Due Process of Law Foundation, “Right to Free, Prior, and Informed Consultation and Consent in Latin America”, the 1985 Constitution of Guatemala “does not contain provisions on prior consultation, although it does include certain rights related to indigenous peoples.”<sup>46</sup>

So it is not a legal violation under Guatemalan law to fail to obtain consent from indigenous peoples.

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<sup>44</sup> Department of Foreign Affairs and International Trade of Canada. This document is available at : <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

<sup>45</sup> Ibid.

<sup>46</sup> Due Process of Law Foundation and Oxfam, *Right to free, prior, and informed consultation and consent in Latin America: Progress and challenges in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru*, 2015, p. 3.

So, Canadian TNMCs are not obligated under international human rights law or Canadian law to respect, protect, or fulfill the right to health of indigenous peoples in relation to their lands. With the introduction of General Comment 24, there is potential to strengthen Canada's extraterritorial obligations by regulating the conduct of TNMCs and broader domestic systems that enable TNMCs to violate human rights in international contexts. These actions, guided by indigenous Guatemalans, Canadian civil society advocates, and expert committees, should strive to ensure that indigenous conceptualizations of health as indivisible from land are realized through corresponding indivisible rights in international human rights law.

## **II. Globalization, economic deregulations and corporate social responsibility under the light of human rights**

### **A. State and non-state actors according to the classical vision of human rights**

Heir of the international law system from the sixteenth century, the international regime of human rights is based on the principle of the central responsibility of the State. Indeed, international law considers that the States only have a legal personality and that they are the only actors capable to produce legal norms that regulate the relationships between States, whose instruments are international treaties. Moreover, international law considers that States are the only recipients of those binding legal norms. Although international was limited to the relationships between States, this conception will evolve during the second half of the twentieth century.

After the Second World War, this dominant conception of international relations is revolutionized by the conception of the international regime of human rights in 1948 with the signature of the Universal Declaration of Human Rights. The tragedies of the first half of the twentieth century reinforced the will of the international community to guarantee the individual rights against the abuses of totalitarian and authoritarian States.

According to Chris Jochnick, “half a century ago, governments had far more control over the political, social and economic conditions within their countries. States had the responsibility of guaranteeing human rights on the presumption that they, and they alone, were capable of doing so”<sup>47</sup>. So fifty years ago, the State was at the core of this new philosophy. Main holders of public authority, the States have to respect, protect and promote human rights.

The emergence from 1945 of the international regime of human rights is part of what we can name a classical vision of human rights, with individualism and liberalism, advocating the respect of civil and political rights by States. In the spirit of this political philosophy, it is paramount that States don’t interfere in the private sphere of the individual or other non-state actors. The prevailing perception is that only States, at the international level, can be found guilty of human rights abuses.

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<sup>47</sup> Chris Jochnick, *Confronting the Impunity of Non-State Actors : new fields for the promotion of human rights*, Human Rights Quarterly, vol. 21, 1999, p. 59

“As the Cold War developed, a stratification of human rights emerged based on ideological preferences. Thus Western powers emphasized the individualist civil and political rights agenda, as shown for example by the exclusive concentration of the European Court of Human Rights on such rights, while the Soviet bloc states and their allies emphasized economic, social and cultural rights as prerequisites which justified, where necessary, even the curtailment of civil and political rights for the improvement of the welfare of the people”<sup>48</sup>. As we can see with the analysis of Peter Muchlinski, the bipolar ideological conflict will help a more socialist conception of human rights to emerge.

Drawing on the analysis of Wesley Cragg<sup>49</sup>, we note that a “social contract” was established between States and private sector, from the second half of the twentieth century. According to this division of responsibilities, government authorities were the only one to ensure the defense and accomplishment of social welfare, while private companies had for only goal to generate wealth and maximize their profits.

Accelerating at the end of the eighties, the dynamics of economic and financial globalization will alter the deal by giving less weight to the factor of the State regulation, and giving more importance to market liberalization.

## B. Economic globalization, transnational companies and paradigm shift in the human rights’ field

New non-state actors have emerged and hold significant influential power, positive or negative, and substantial in the field of human rights. This new order reflects simply the redefinition of public and private powers in the light of the globalization process.

According to Rhys Jenkins<sup>50</sup>, this unprecedented power is allowed because of the increasing mobility that the private companies enjoy. In other terms, they can decide in what country or

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<sup>48</sup> Peter Muchlinski, *Human Rights and multinationals : is there a problem ?*, International Affairs, Vol. 77, 2001, p. 34

<sup>49</sup> Wesley Cragg, *Human Rights and Business Ethics : Fashioning a new social contract*, *Journal of Business Ethics*, vol. 27, 2000

<sup>50</sup> Rhys Jenkins, *Globalization, Corporate Social Responsibility and poverty*, International Affairs, n°81, 2005

what region they want to invest, establish the headquarters and the subsidiaries. They can choose their suppliers, they can easily transfer their capitals in another region, or relocate their activities. One of the criteria that help the private companies to make their choice is directly linked with the domestic law of the country where they operate. Thus, the majority of transnational companies choose to establish their production in countries that give them the best advantages, and the bigger room for maneuver, in matter of labor or environmental law. In return, several developing States, interested in foreign direct investment from transnational companies, dismantled their social systems.

Upendra Baxi formulated an interesting hypothesis about the development of international law in favor of transnational companies: the economic actors of the globalization process would tend to divert the initial definition of human rights, originally oriented towards human persons, to give it a new meaning in favor of their economic interests. “The new paradigm seeks to reverse the notion that universal human rights are designed for the attainment of dignity and well-being of human beings and for advancing the security and well-being of socially, economically and civilizationally vulnerable peoples and communities. The emergent paradigm insists upon the promotion and protection of the collective human rights of global capital in ways that “justify” corporate well-being and dignity even when it entails gross and flagrant violations of human rights of actually existing human beings and communities”<sup>51</sup>.

Based on this analysis, the idea of a reallocation of social responsibilities between States and transnational companies has emerged with the human rights’ question being the first priority.

“There is a good deal of evidence that widely shared expectations that globalization will lead to widely shared public benefits or goods have not been met and can no longer be guaranteed by the “hidden hand” of the market unregulated or undirected. There is also increasing evidence that globalization itself is undermining the capacity of sovereign governments to intervene with laws and regulations designed to ensure that expectations of public benefits from corporate activity are met”<sup>52</sup>

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<sup>51</sup> Upendra Baxi, *The Future of Human Rights*, Oxford University Press, Oxford, 2002, p. 132

<sup>52</sup> Wesley Cragg, *Human Rights, Globalisation and the Modern Shareholder Owned Corporation*, Kluwer Academic Publishers, Netherlands, 2004 p. 116

### C. Transnational company: attempt of a definition regarding its influence on human rights

There is no text in international law that gives the definition of a transnational company. The concept is dealt with only in the United Nations Conference on Trade and Development set of principles and rules which define transnational corporations as “firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combinations thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities. This definition is used in order to exclude criteria such as the legal form of the company, the provenance of the capital or the identity of the management.”<sup>53</sup>

We have to give more details about this first definition by saying that the transnational corporation represents an economic entity or a set of economic entities operating in two or more countries. As a consequence, they are subject to conflict of laws and jurisdictions.

A transnational company is generally comprised of a parent company that manages its subsidiaries. Transnational companies can also set up groups inside a same sector of activity, conglomerates or coalitions dealing with different activities.

So it is important to remember that transnational companies are legal persons governed by private law with a multiple territorial presence but a unique center of decision. As physical persons, they can be subject of international law. But they are not international legal entities, unlike States and inter-state organizations.

### D. Violations committed by transnational companies regarding human rights

Globalization, a complex phenomenon:

It seems important to precise that economic globalization should not be considered as a dynamic that would be by essence negative regarding respect and achievement of human rights. The reality of globalization is too complex, and should be considered with nuance. Thus, one of the characteristics of its complexity is in the major contributions that

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<sup>53</sup> Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Working document on the impact of the activities of transnational corporations on the realization of economic, social and cultural rights*, E/CN.4/Sub.2/1998/6, 10 June 1998, p. 2

globalization has done in some regions, notably regarding the right to development, the protection of human rights and the economic growth. A lot of developing countries welcome the actors of economic globalization, transnational companies, while thinking about the benefits that those companies bring directly to their population: new infrastructures (transports, communication, and buildings), better life conditions, and new jobs.

According to Sukanya Pillay, globalization has facilitated the implementation of liberal political reforms in Eastern Europe. “For example, globalization has enabled and catalyzed the free flow of information, ideas, and ideologies that can help people to mobilize and make informed choices in their daily lives regarding government”<sup>54</sup>.

Furthermore, globalization has enabled the advent of a civil society, consisting notably of non-governmental organizations (NGOs) that have transformed the human rights’ topic into an international issue.

The evasion of responsibility of transnational companies:

Again, the observation has to be nuanced: not all the transnational companies have bad results regarding human rights, some only commit serious violations.

More precisely, certain transnational companies choose to shirk their responsibilities from taking advantage of their particular system, and of the lack of international, social or environmental rules, common to all States.

The negative impacts of transnational companies regarding human rights differ according to how influential they are. Rory Sullivan identifies three level of influence:

“1. Where a company has direct control – that is, its own operations and activities - and can be held responsible for the realisation of human rights. This relates to issues such as labour standards; expectations that the company will not use, procure or offer goods that have been produced using forced or bonded labour or the worst forms of child labour; the treatment of indigenous peoples; and security arrangements.

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<sup>54</sup> Sukanya Pillay, *And Justice for All ? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections*, University of Detroit Mercy Law Review, vol. 81, 2004, p. 91

2. Where a company can exert influence over a situation and thus can contribute to the realisation of human rights by or in conjunction with others. This relates particularly to supply chains and relationships between the company and its suppliers, customers, subcontractors and business partners (for example, in joint ventures). In these situations companies can usually require these parties to meet certain standards - including human rights standards.

3. Where a company can contribute to the creation of an enabling environment for the realisation of human rights. While the main contribution of companies tends to be through the provision of economic benefits – that is, overcoming economic barriers to the realisation of human rights – the responsibility does not end there. Companies can also contribute to the protection and promotion of human rights through their public commitment to the UDHR, through making statements of concern regarding human rights violations, and through supporting rights-based development activities. <sup>55</sup>

Indirectly, the presence of transnational companies on the territory of developing countries sometimes diminishes the scope and the significance of social and environmental policies of those countries. The primary responsibility belongs to the States. However, the constant pursuit of new markets and new profits put transnational companies in a situation of high competitions that make them minimize their costs. In return, those States, in order to attract international investment flows, decrease drastically their methods of social and environmental regulations and diminish their capacity to guarantee the fulfilment of social, economic and cultural rights<sup>56</sup>.

Even if the negative impacts that transnational companies generate is hardly questionable and is globally denounced, especially regarding the most fundamental human rights, there is no consensus about the solutions to give to improve those bad behaviors.

In the actual debate pertaining to the responsibility of companies, three approaches defend different forms of regulation: the libertarian position that is pushing for economic laissez-faire, the actual approach that evokes the Corporate Social Responsibility, and the approach that defends a regulation based on legal jurisdiction.

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<sup>55</sup> Rory Sullivan, *NGO expectations of companies and human rights*, Non-State Actors and International Law, n°3, 2003, p. 313

<sup>56</sup> Debora Spar and David Yoffie, *Multinational Enterprises and the Prospects for Justice*, Journal of International Affairs, vol. 52, 1999, p. 561



### **III. Three approaches regarding the regulation of companies' behavior**

#### **A. Libertarianism and the non-regulation of economy**

This school of thought from the 20<sup>th</sup> century is complex and gather different theories from several authors (the most important of them are Friedrich A. Hayek, Robert Nozick and Milton Friedman). They differ on a certain number of topics, however we can find three key features<sup>57</sup>:

- individualism: the subject of the analysis is the individual rather than the community. The interest of the individual, its freedom and its property right must predominate over the rest (public interest or public good).
- market: it should be as free as possible. The intervention of the State should be limited to foster its prosperity and freedom
- minimal State : the role of the State must be limited to a coercive function in favor of the freedom of economic markets and individuals.

What are the consequences of those key characteristics about the social role that an enterprise should assume in the society? In other words, what does libertarianism say about rights and duties of business enterprises?

Among the neo-classical authors, Milton Friedman, in an article of the New York Times Magazine, claims that “the social responsibility of business is to increase its profits”<sup>58</sup>. In the article, he argues that “in a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom”.

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<sup>57</sup> Christian Arnsperger, Philippe van Parijs, *Ethique économique et sociale*, La Découverte, Paris, 2003

<sup>58</sup> Milton Friedman, *The Social Responsibility of Business is to increase its profits*, New York Times Magazine, 13 September 1970.

Thus, any businessman that doesn't lead its actions toward this fundamental goal would be misconducting, in the sense that, making politician maneuvers, it will waste the money of its employers: the stockholders.<sup>59</sup>

Milton Friedman adds that the business enterprises that are engaged in other activities than maximizing their financial profits would be "subversive", since they don't respect "the rules of the game, which is to say, engages in open and free competition without deception or fraud".

We remark here the reference to the respect of "the rules of the game". We note that Friedman defends the compliance with laws by business enterprises, especially when the laws are more favorable to their interests. Here, the law is more seen under its instrumental dimension than its moral or ethical dimension: it must serve the market.

According to what precedes, and with the same neo-classical vision of economy, we can infer that any legal norm in favor of the respect of human rights would be seen as a restrictive political decision and damaging for the functioning of market. Following this theory, we could even state, for example<sup>60</sup>, that the conditions in which a product has been manufactured has no influence on its commercialization stage. No matter if those conditions are mediocre, as long as they allow and ease the maximization of profit.

This vision of the specific roles of the State and the business enterprise is now considered as obsolete and doesn't enjoy the same popularity than during the eighties, in particular in the United States and in the United Kingdom with the advent of neoconservative governments.

The incompatibility of libertarianism with the respect of human rights:

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<sup>59</sup> Denis G. Arnold, *Libertarian Theories of the Corporation and Global Capitalism*, Journal of Business Ethics, n°48, 2003

<sup>60</sup> Wesley Cragg, *Human Rights, Globalisation and the Modern Shareholder Owned Corporation*, Kluwer Academic Publishers, Netherlands, 2004, p. 109

In this paragraph, we will here deconstruct the foundations of this ideology, in order to demonstrate that it is incompatible with the idea of respecting the human rights by a private actor.

The neo-classical approach is resolutely economically centered: the values it defends (first and foremost the notion freedom) pertain to the market or the individual, but uniquely in its role of economical agent. The weakness of this approach is that it doesn't consider the individual in a more global social context. Starting from the point that the State has inherently a negative influence over the economic interests of the individual, libertarianism evacuates the State from its analysis. According to the neo-classical theory, the same applies to all collectivity or community, since they restrain the individual in its pursue of economical happiness.

The ambition of libertarianism is to give to individuals the best means to reach individual satisfaction. Although noble, its weakness is to reduce individual happiness to financial satisfaction. In other terms, libertarianism places at the heart of its analysis the homo oeconomicus, while forgetting that a human being can have more complex and various aspirations. Human rights, in their actual form, consider the human being in its entirety: they overlap all the set of realities experiences by a human being.

Thus Arnold states “The foundational question of ethics is «How should we live as rational persons? » It is not, «How should we as profit makers? »”<sup>61</sup>

Libertarianism, as explained by Milton Friedman, fails to perceive the potentially negative influence of the business enterprise (as well of the transnational company), since in its analysis, the firm operates in democratic societies.

Last, libertarianism is based on a hypothesis that is less relevant today: the prevalence of strict division between the public and private spheres. This dissociation has never been an evidence and is even less today with the transfer of some public services to private actors.

This libertarian vision has very few to share with the human rights ideology. We can give a precise example. Although the human rights assign different meanings to the notion of freedom, the approach that Milton Friedman defended gave only to the human rights a “negative” definition. Indeed, in this meaning, the non-interference of States is considered has

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<sup>61</sup> Denis G. Arnold, op. cit., p. 159

an absolute guarantee of the liberty of people. Today, while recognizing the universality of human rights (and the interdependency of the civil and political rights and the economic, social and cultural rights), the human rights define the liberty both in a positive and a negative way. In other terms, it is acknowledged that the State has a positive role to play in the protection, implementation and promotion of human rights.

Resolutely egoist, the libertarian approach could be related to the famous adage “the end justifies the means” (even the less legal and the more immoral). In the contrary, the ideology of human rights has found inspiration in the Kantian humanism that considers the other human beings, not as means but as an end in itself<sup>62</sup>.

## B. The Corporate Social Responsibility (CSR) and the idea of autoregulation of economy

Presentation of the approach:

At the foundation of the notion of Corporate Social Responsibility is the idea that the society and the economy are not two different entities but that they are interconnected. In this systemic vision (opposed to the neo-classical approach), the bigger the business enterprises (transnational companies) in terms of economic and social weights, the more they have to show liability towards the society, their first responsibility is to produce goods and services useful for the society while making profits.

According to Lord Sieff, former CEO of Marks & Spencer, “Business only contributes fully to a society if it is efficient, profitable and socially responsible”<sup>63</sup>.

Most of the definitions of Corporate Social Responsibility describe this concept as the voluntary integration of social and environmental concerns of the business enterprises to their commercial activities. The Shell Report made in 1998 illustrates those new extra-commercial concerns : “The Royal Dutch/Shell group is commercial in nature and its primary responsibility has to be economic – wealth generation, meeting customer needs, providing an

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<sup>62</sup> Thomas Donaldson, Patricia H. Werhane, *Ethical Issues in Business, A Philosophical Approach*, Prentice-Hall, Upper Saddle River, 1996

<sup>63</sup> Lance Moir, *What do we mean by corporate social responsibility ?*, Corporate Governance, 2001, p. 16

acceptable return to investors, and contributing to overall economic development. But there is also an inseparable responsibility to ensure that our businesses are run in a way that is ethically acceptable to the rest of the world and in line with our own values”<sup>64</sup>.

Concretely, the CSR approach covers a large range of problematics that all share an important link with the activities of the business enterprise and their positive or negative impacts. The issues are related to the following fields: the supply chain, the workplace, the market, the environment, the community, the business ethics, the governance and the human rights.<sup>65</sup>

We remark notably in the societal reports of transnational societies, that the human rights are regarded as one of the component of CSR. For most of them, they simply underline that they recognized the international conventions and declarations and they adopted their principles and guidelines. A few of those transnational companies implemented codes of conduct that plan genuine answers to the problems caused by their activities. In any case, transnational companies cannot elude easily the question of human rights.

“Corporations have come to acknowledge the relevance of human rights largely as a consequence of reports and accusations of reprehensible practices by some of the largest and most reputable corporations, often in the overseas undertaking”<sup>66</sup>.

Those who advocate CSR underline that the responsible and ethical behavior of the business enterprise allows important economic benefits. They include the good reputation of the enterprise and a bigger productivity and loyalty from the employees.<sup>67</sup>

It is interesting to notice that, in the debate evolving around CSR, a certain form of tension prevails about the motivations that push business enterprises to adopt this approach. Can we speak about ethical and moral motivations or should we see utilitarian motives from the business enterprise?

In reality, a business enterprise follow rarely purely moral arguments to develop its economic, social or environmental strategy. The enterprise will take advantage from CSR and pick out

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<sup>64</sup> Shell Report, *Profits and Principles – Does there have to be a choice ?*, 1998, p.3

<sup>65</sup> Lance Moir, op. cit., p. 17

<sup>66</sup> Michael K. Addo, *Human Rights Perspectives of Corporate Groups*, Connecticut Law Review, Vol. 37, 2005, p. 672

<sup>67</sup> Report of WBCSD, World Business Council for Sustainable Development on Corporate Social Responsibility, *Corporate Social Responsibility*, 1999

the elements that fit the best its strategic interest. The popularity of CSR among the biggest companies in the world is due to its voluntary nature. Of course, other external factors pushed the business enterprises toward a more responsible and ethical approach. The societal pressures made by an expanding civil society in the beginning of the nineties played a crucial role in the implementation of the CSR.

The concept of CSR (along with the concept of sustainable development) appeared in 1992 during the Earth Summit in Rio de Janeiro. While the recommendations of the United Nations in favor of a legal regulation of sustainable development were rejected by a coalition of western states and transnational societies<sup>68</sup>, the idea of autoregulation was progressively imposed.

“Within a decade a whole new corporate language, championed by multinational corporations, has evolved around the notion of more ethical business practice. A new industry has grown up to help companies present, implement and monitor what they are doing in the name of Corporate Social Responsibility”<sup>69</sup>.

Criticisms of voluntarism in the human rights field:

The voluntarist approach, that is the core of the CSR definition, should not be neglected in terms of practical efficiency and theoretical relevance. It is especially true when the enterprise, in developed countries, in the name of CSR or sustainable development, will take commendable steps in fields that are firmly regulated (in the labor rights field for example).

This approach could suffer from major shortfalls when applied to the question of human rights.

Even if this remark seems obvious, a voluntary initiative only applies to those who accept it.

“People sometimes argue that, if it makes good commercial sense to respect human rights, then market forces will ensure compliance. It is not self-evident, however, that human rights norms are always good for business”<sup>70</sup>. In the extractive industry, there are numerous

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<sup>68</sup> They were represented by the World Business Council for Sustainable Development, the CSR Europe association or Business for Social Responsibility.

<sup>69</sup> Christian Aid, *Behind the Mask, the real face of corporate social responsibility*, 2004, p. 4

<sup>70</sup> International Council on Human Rights, *Beyond Voluntarism, Human Rights and the developing international legal obligations of companies*, Versoix, 2002, p. 8

transnational companies that prosper in territories under the jurisdiction of authoritarian regimes.

Advocates of the voluntarist approach don't call into question the relevance of human rights, but defend a perspective that puts forward the principles of the market economy. This position is based over the belief that any external intervention (or any binding external norm) will, by essence, harm the functioning of the market (market distortions). In this sense, the voluntarism of CSR has a tendency to consider human rights under a particular and narrowed angle.

“As rules of law promulgated for public governance and not specifically for economic refinement, human rights may be of interest to economic affairs only as a matter of business ethics and less as binding rules of law”<sup>71</sup>.

As long as the specific question of human rights depend of the large field of Business Ethics or CSR, their respect and their implementation will remain a matter of choice for the business company.

The Corporate Human Rights Responsibility, or the reappropriation of the human rights question by companies, is based on the fact that a power transfer has been made from the State to the company. One of the reasons given is that the voluntarist approach is that the traditional public model is not sufficiently efficient.<sup>72</sup> This assumption justifies that expanding private entities inherit functions previously in the hands of the State. At the same time, always in this identical approach of CSR, those companies, broadening their sphere of influence, have to feel liable towards society and prevent their negative impacts according to the three dimensions of the sustainable development (social, economic and environmental).

Codes of conduct, ethical charts, all those voluntary initiatives linked with CSR are important and should not be neglected. Indeed, they can make the difference when they are correctly implemented. For example, codes of conduct are a significant step towards the respect of human rights. Those can be even more concrete and flexible than some international norms, since they fit better to specific sectors of the economy. Moreover, some codes of conduct go beyond the minimal standards in the human rights field.

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<sup>71</sup> Michael K. Addo, op. cit., p. 675

<sup>72</sup> Michael K. Addo, op. cit., p. 678

In this context, the example of the Levi Strauss Company shows how CSR can be veritably efficient (regarding the human rights question)<sup>73</sup>. The values that the company defend were adopted to ensure the respect of the rights of all the employees. In order to prevent unfair and undignified work conditions for the employees engaged by subcontractors, guidelines have been developed to evaluate the environmental and social impacts of their activities and to select regions and countries in which the products will be manufactured. Following that, Levi Strauss stopped its activities in China for systematic violations of the human rights, despite the major cost savings that the company could have done. “Levi Strauss (...) serves as an excellent example of how good companies respect both the law and the ethics of fundamental human rights by successfully institutionalizing and operationalizing fundamental ethical norms in resolving international business decisions”<sup>74</sup>.

We will now analyze the idea of complementarity between voluntary codes of conduct and legal norms. As Stephen Timms, former British minister of CSR, said “It is paramount that all organizations comply with the law. Recent events have highlighted the importance of exercising responsibility abroad as well as at home. Corporate Social Responsibility goes beyond legal minimum requirements, it is certainly not a substitute for legal minima”<sup>75</sup>.

### C. Beyond voluntarism: the regulation of transnational societies by international law

Arguments against a regulation with legal norms related to human rights:

Andrew Clapham<sup>76</sup>, specialist of the human rights question presents his arguments. The first, called “the trivialization argument”<sup>77</sup>, states that imposing direct obligations related to human rights to private actors is a dangerous way to weaken their importance, to make them trivial. In this historical vision, influenced by the Second World War, the initial goal of human rights was to erect strong barriers against the possibility of abuses by a totalitarian State. It is feared

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<sup>73</sup> Edward J. Schoen, Joseph S. Falchek, Margaret M. Hogan, *The Alien Tort Claims Act of 1789: Globalization of Business Requires Globalization of Law and Ethics*, *Journal of Business Ethics*, n°62, 2005, p. 50

<sup>74</sup> Edward J. Schoen, Joseph S. Falchek, Margaret M. Hogan, *op. cit.*, p.51

<sup>75</sup> Christian Aid, *Behind the Mask, the real face of corporate social responsibility*, 2004, p.19

<sup>76</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006

<sup>77</sup> Andrew Clapham, *op. cit.*, p. 33



that the extension of the respect of human rights to the private sphere would harm the initial project of the Universal Declaration of Human Rights. The main limit of this approach is its exclusion of some actors from being potentially beneficiary of human rights, for example the victims of domestic abuse. Women and children are also more concerned about moral and physical harassment, aggressions and discrimination to any entity of the private sphere: the local community, the factory, the home.<sup>78</sup>

Another argument evokes the legal impossibility to extend to private actors the obligation to respect human rights<sup>79</sup>. The supporters of this approach put forward the fact that treaties are negotiated by States for States and as a consequence, they cannot apply to actors that are not contracting parties.

The third point of view that is interesting to mention here is “the policy tactical argument”<sup>80</sup>. Some human rights observers are afraid that the extension of international obligations to private actors (transnational societies) would draw attention away from the bad behaviors of States. “There is a perception that the raising of responsibility of transnational corporations at human rights is a ploy by developing countries to escape monitoring of their domestic human rights record”<sup>81</sup>.

Arguments in favor of regulating by legal norms in the field of human rights:

Knowing if a private company was subject or not to international law is at the core of the argumentation in favor of the extent of international obligations in the field of human rights concerning transnational societies.

In international law, some jurists speak about a “classical model”<sup>82</sup> in which only States have a legal personality. Today it seems that this modele can no more describe international law in a relevant way. “This seemingly originalist position regarding human rights emphasizes that international law should distinguish between, on the one hand, ordinary crimes or torts

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<sup>78</sup> International Council on Human Rights, *Beyond Voluntarism, Human Rights and the developing international legal obligations of companies*, Versoix, 2002, p. 53

<sup>79</sup> Andrew Clapham, op. cit., p. 33

<sup>80</sup> Andrew Clapham, op. cit., p. 44

<sup>81</sup> Koen de Feyter, *Corporate Governance and Human Rights*, Bruxelles, 2001, p. 106

<sup>82</sup> Carlos M. Vasquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, *Columbia Journal of Transnational Law*, n°43, 2005, pp. 932-933

between private actors – which are outside its province and belong to domestic law – and, on the other hand, governmental action, which is the true subject of international law”<sup>83</sup>.

The international law address to non-state actors. First they have individuals are subject to international law thanks to the different regional and international mechanisms in the field of human rights. Since the Nuremberg trials in 1946, it appears that non-state actors have duties since they have a criminal liability. A transcription of a Nuremberg court judgment in 1946 states that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”<sup>84</sup>.

Private actors, with or without link with a State are held responsible for their acts in international law: slavery, war crimes, genocides, crimes against humanity, torture. Thus, several international human rights conventions address directly to private actors.

For example, the first article of the Convention on Prevention and Punishment of the Crime of Genocide states that “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. The fourth article indicates that people who committed the crime of genocide will be punished, “whether they are constitutionally responsible rulers, public officials or private individuals”. So to be internationally sued, such crimes should not especially committed as part of a State policy.

It is also interesting to come back to the human rights founding text, the Universal Declaration on Human Rights (UDHR) made in 1948. The reference to private entities is clear in the preamble. “Therefore the general assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.

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<sup>83</sup> Steven Ratner, *Corporations and Human Rights : A Theory of Legal Responsibility*, The Yale Law Journal, vol. 111, 2001, p. 466

<sup>84</sup> Andrew Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993, p. 96

Here “organ of society” includes naturally private companies, in the sense that they play a role in the society. Even if the Universal Declaration on Human Rights is not legally binding for States, it stays as a fundamental source of international law for human rights. For example, the prohibition of torture that is mentioned in the UDHR is seen as a customary rule of international law. On a theoretical point of view, nothing can assess that non-state actors are not obliged to comply with the rights mentioned in the UDHR.

Likewise, the two International Covenants of 1966, related to economic, social and cultural rights for the first and related to civil and political rights for the second, can be interpreted in the same manner. Thus, the fifth paragraph of the common preamble states: “realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”.

Human rights, in fifty years, have largely evolved and accepted the idea that a distinction between the public and the private sphere is no more relevant. We can perceive this evolution while observing the issue of discrimination, and especially how it is treated in the different international treaties: the 1960 UNESCO Convention against Discrimination in Education, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and others. In those texts, the author Andrew Clapham<sup>85</sup> analyzes that it is constantly recalled that it is essential for States to forbid all forms of “private” discrimination.

Thus, paragraph d of second article of the International Convention on the Elimination of All Forms of Racial Discrimination is explicit: “Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”

The 1989 Convention on the Rights of the Child shows the will to involve the private sector and to abandon the sole reference to the public sphere. First paragraph of article three states that : “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

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<sup>85</sup> Andrew Clapham, *op. cit.* p.100

The answer to the question of whether a transnational company has a legal personality under the international law is still open to debate. Most of the jurists give a negative answer<sup>86</sup>. This position could be justified by the fact that otherwise, transnational companies could get easily involved in the political activities of a State, thanks to their status of subject of international law.

However, the actual tendency in the international law of human rights is no more a state-centric vision: “Since International human rights law has been drafted by states, for states, it has been debated to what extent the boundaries of its legal subjectivity extend to natural and legal persons to impose direct legal obligations on businesses, their officers and the persons working for them. With the advent of globalization and the proliferation of various new non-state actors, such as intergovernmental organizations, NGOs, individuals and transnational corporations, the state-centric view of international human rights law has started to change. Today, non-state actors have become an important factor in international relations and play a vital role in almost every field of international law”<sup>87</sup>.

We have seen that the important international conventions, while recognizing that the State is primarily responsible of the respect of human rights, don't ignore the increasing weight of some private actors that became competitors of the State in their capacity to exert influence on social, economic and environmental conditions in a global scale. Andrew Clapham observed : “The emergence of new fragmented centers of power, such as associations, pressure groups, political parties, trade unions, multinational corporations and quasi-official bodies has meant that the individual now perceives authority, repression and alienation in a variety of new bodies. This social development has meant that the definition of the public sphere has had to be adopted to include these new bodies and activities”<sup>88</sup>.

Indirectly, the international community, with the help of international law, recognized the indirect responsibility of transnational companies when they violate human rights.

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<sup>86</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 76-77

<sup>87</sup> Franck Amalric, Peter Buomberger, Alexander Seidler, *Transnational Corporations and Human Rights : The Business Implications*, Center for Corporate Responsibility and Sustainability, CCRS Working Paper Series, n°3, march 2005, pp. 6-7

<sup>88</sup> Andrew Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993, p. 137

#### **IV. The different methods of regulation and legal sanctions of transnational companies**

International law can regulate transnational companies by using two different methods: the indirect regulation by the liability of States for the conduct of transnational companies and the direct regulation for transnational companies.<sup>89</sup>

##### **A. Indirect obligations on transnational companies: the primary responsibility of the State**

Traditionally, States had the duty to control private actors and their behavior. According to the liberal and democratic approach, the State's duty is to protect its citizens and to regulate against the negative impacts that can be done by a company towards its employees, environment, and consumers. Since the advent of globalization, the belief in the capacity of the State to solve and regulate those issues has been weakened.

This has allowed international law, in its actual form, to include some norms that evoke explicitly the behavior of private companies, and hence transnational companies. Unless rare exceptions, those norms oblige the States to regulate the behavior of private actors. It is current to find international treaties with provisions that explicitly condemn behaviors from private companies: this is the case for example, of the Convention on the fight against Corruption involving officials of the Communities or officials of Member States of the European Union adopted by members of OECD in 1997. Indeed, article 6 of the Convention states that: "Each member state shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of corruption [...] by a person under their authority acting on behalf of the business."

It is interesting to notice that, instead of criminalizing corruption, the Convention asks the State to legislate when corruption is occurring in its territory.

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<sup>89</sup> Philip Alston, *L'Union Européenne et les Droits de l'Homme*, Bruxelles, 2001, pp. 573-590

Thus, the concept of making the State liable for the application of international treaties' provisions is rife<sup>90</sup>. For example, the European Convention on Human Rights uses the concept of "third-party effects" whereby some of the provisions have to be respected in the private sphere. In other terms, the member States have the obligation to ensure that the individuals will behave in a certain way toward other individuals. The European Court of Human Rights has incorporated the concept in its jurisprudence.

For example, in 1998, the European Court of Human Rights has condemned the Italian state because it has not prevented a fertilizer company from releasing toxic gases in the atmosphere<sup>91</sup>. In its judgement details, the Court affirmed that "severe environmental pollution could interfere with the right to respect for home, private life, and family. It considered that the authorities had not taken the necessary measures to ensure the effective protection of this right. The Applicants had not been provided essential information about the risks of the factory."<sup>92</sup>

In this regard, it could be dangerous to take this logic to an extreme since it could be risky for human rights (that is the concept of trivialization of human rights): we cannot hold States liable for every wrongdoings made by a private actor. So some criteria have progressively appeared to determine in which cases the State is answerable for actions taken by private actors.

For this purpose, the "due diligence test" is relevant to assess state accountability<sup>93</sup>. This test claims that States should take serious and reasonable measures, including investigations and compensations, to prevent any abuse perpetrated by a private actor. It measures efforts and goodwill of States to act in this field. This test was put into effect for the first time by the Inter-American Court of Human Rights in 1988 with the Velasquez Rodriguez case<sup>94</sup>. In 1981, Velasquez Rodriguez is victim of enforced disappearance. His case is presented to the Court which states that, even if the abductors are private persons, the State of Honduras is found to have committed a violation for not having conducted research or planned compensations for the family. Over time, different norms of international law, as well as organs in charge of

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<sup>90</sup> Carlos Vasquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, *Columbia Journal of Transnational Law*, n°43, 2005, p. 937

<sup>91</sup> Case Guerra and Ors. V. Italy, judgement by the Court of Human Rights, Strasbourg, 19 February 1998

<sup>92</sup> The judgement details of this case is available at : <http://www.globalhealthrights.org/health-topics/environmental-health/guerra-and-ors-v-italy/>

<sup>93</sup> International Council on Human Rights, *Beyond Voluntarism, Human Rights and the developing international legal obligations of companies*, Versoix, 2002, pp. 51-52

<sup>94</sup> Case Velasquez Rodriguez, judgment by the Inter-American Court of Human Rights, 29 July 1988. The case is available at : [http://hrlibrary.umn.edu/iachr/b\\_11\\_12d.htm](http://hrlibrary.umn.edu/iachr/b_11_12d.htm)

supervising them, have now started using the due diligence test. This the case of the Declaration on the Elimination of Violence against Women. It states in article 4 that: “States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and to this end, should [...] exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”

Imposing indirect obligations on transnational companies, by the intermediary of the concept of primary responsibility of the State, is an important step forward. It is not question here to give up any will to regulate the behavior of private companies. On the contrary, the goal is to make States responsible for this monitoring.

#### B. Direct obligations on transnational companies

The first way to regulate the behavior of private actors with respect to human rights shows some weaknesses. Indeed, what can be done when States cannot or don't want take steps towards companies that don't respect human rights, and that are more and more independent from state power? It is not rare to see private companies violating human rights inside States that are themselves complicit in such human rights abuses. In order to face with this challenge, there has been approaches according to whom international law can apply to other actors than the State.

For a long time, international law acknowledged international obligations of entities that were not only States. For example, article 1 of the additional protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977, calls for rebel groups to respect people's basic freedoms and rights and their human dignity: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the

principles of international law derived from established custom from the principles of humanity and from the dictates of public conscience”<sup>95</sup>.

International criminal law, has pointed out before, recognizes the individual as a duty-holder. During the Nuremberg trials’ era, after the Second World War, industry managers that participated in Nazi atrocities have been judged by courts from the allied forces. However, the enterprises themselves were not prosecuted, since the court judged only individuals<sup>96</sup>.

According to Brent Fisse and John Braithwaite<sup>97</sup>, it is important that the company itself, considered as a social organization and not as a sum of individuals, answer for its actions. According to the authors, the collective cost, carried by the firm, is more efficient than an individual condemnation to change the behavior of a company and prevent future abuses. Moreover, in most of the cases, the violation committed by the transnational company is not an isolated act but the consequence of a process decided by a strategy implying the all company.

We can also note that in the environmental field, international law tends to impose obligations to transnational companies. Building on the “polluter pays” principle, some States, influenced by environmentalists, have stated their support in favor of an international regime that hold polluting companies accountable. This “polluter pays” principle has been implemented in some international conventions pertaining to environmental issues, one of which is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, from 1989.

About international labor law, when we analyze the formulation of some conventions of the International Labor Organization (ILO), we can see that States are not the only entities to have duties. For example, regarding their employees, companies have fundamental obligations to respect. For example, article 1 of the ninety-eighth Convention of ILO concerning the Principles of the Rights to Organize and to Bargain Collectively mentions that: “Workers shall

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<sup>95</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977, available at : <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C86520D7EFAD527C12563CD0051D63C>

<sup>96</sup> Carlos Vasquez, op. cit., p. 939

<sup>97</sup> Brent Fisse and John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, Sydney Law Review, n°11, 1988, pp. 483-488



enjoy adequate protection against acts of anti-union discrimination in respect of their employment”.

This article can be read as a clear injunction for governments to legislate against some companies’ behavior.

### C. Obligations specifically addressed to transnational societies

We will here discuss about three instruments of international law whose common concern is the behavior of transnational companies relating to human rights. Those instruments have another specificity which is that they belong to the “soft law” category, not to be confused with “hard law”. Generally, we can find hard law rules in a text of international law (convention, treaty) whose goal is to create binding obligations for the parties that ratify the text. In contrast, soft law rules appear in common declarations, general guidelines, guiding principles, or other texts developed at international level, whose content is less binding in the legal sense. On the political or symbolic aspect, the respect or the implementation of soft law rules may be of particular relevance. Thus, a resolution of the General Assembly of the United Nations, by definition not binding, can imply in reality binding obligations for its addressees.

The OECD Guidelines for multinational companies:

The Organization for Economic Cooperation and Development (OECD) adopted in 1976 this text directed specifically at multinational companies. Since this text was at the beginning only a chapter from a declaration on international investment<sup>98</sup>, conceived for the benefit of transnational companies and investors, those Guidelines have been welcomed with skepticism.

Some critics saw in this gesture of OECD an anticipation of an eventual more binding regulatory framework and serving less the interests of companies<sup>99</sup>. After reading one of the paragraphs of the text, reviewed in 2000, it appears that those guidelines are voluntary: “The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommendations

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<sup>98</sup> OECD Declaration on International Investment and Multinational Enterprises, adopted in 1976

<sup>99</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, p. 201

addressed by governments to multinational enterprises. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. [...] The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards.<sup>100</sup>»

One of the biggest changes brought by the review made in 2000 was the inclusion of a paragraph specifically dedicated to the human rights topic: “[Enterprises should] respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”<sup>101</sup>.

The use of the terms “those affected by their activities” is broad enough to include other persons than the employees. Furthermore, this text invites companies to respect the international obligations of the government, which constitutes a guarantee from some States’ national law that insufficiently protects human rights.

#### D. Towards a binding treaty?

Among the international actors, the NGOs are not the only one convinced by the inefficiency of voluntary initiatives by transnational companies in the human rights field. If some states, especially from the West, stay prudent in reporting the abuses from “their” transnational companies, the United Nations called to increase the liability level of transnational companies.

For example the Global Compact launched in 2000 allowed to create local partnerships between companies, mass unions and other civil society groups. Nevertheless, its adoption by transnational companies looks more like a communication exercise: “The objection raised by NGOs – that the compact is toothless and allows multinationals to bluewash themselves (that is, to gain favorable publicity by association themselves with the United Nations without actually improving their behavior) – has merit too”<sup>102</sup>.

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<sup>100</sup> OECD, Guidelines for multinational enterprises, Concepts and Principles paragraph 1, 2000, p. 14

<sup>101</sup> OECD, Guidelines for multinational enterprises, General policies, paragraph 2, 2000, p. 16

<sup>102</sup> Daniel Litvin, *Human Rights are your business*, Foreign Policy, november – december 2003

The decision of the United Nations on 2 October 2017 to elaborate a draft treaty, precisely a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, could be a crucial step towards human rights. This draft treaty is particularly remarkable since it insists on prevention (both in terms of the state duty to prevent and obligations placed on corporate actors to prevent), and the need to make corporate human rights due diligence legally binding as a means of achieving this goal. It is always noteworthy the explicit reference to the need to ensure the legal accountability of corporate actors implicated in human rights abuses, access to justice and remedy for victims, and international cooperation, as well as the need to ensure the primacy of human rights law over trade and investment agreements. Eventually the state duties, according to the draft treaty should be extended beyond territorial borders.

According to Doug Cassel<sup>103</sup> the task of negotiating a treaty on business and human rights “is made more difficult by tensions among the goals: the stricter the obligations and the more realistic their implementation, the fewer states will readily join the treaty”.

According to the professor “the draft elements of a treaty prepared by Ecuador are an excellent point of departure for negotiations”, since it “addresses nearly all the points a treaty should cover”, but “is deliberately imprecise”. Indeed “they cover the general framework of a treaty; its scope of application; the general obligations of states, business, and international organizations; preventive measures including due diligence, consultation and public reporting; legal liability; access to justice and effective remedies; transnational jurisdiction: international cooperation to ensure access to justice and effective remedies; mechanisms for promotion, implementation and monitoring: and general provisions including dispute settlement and the ‘primacy of this instrument over other obligations from trade investment legal regimes’ “.

Doug Cassel states that “the diplomatic objective should be to attract a combination of states from the global South and Europe” and adds to “forget the United States, Russia and the United Kingdom [...] - as they cannot be attracted by any reasonable treaty. The same is almost certainly true of China as well”.

However Doug Cassel points out an issue in the European-South coalition in support of the treaty: “The EU has understandably insisted that the treaty should cover, not only transnational

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<sup>103</sup> Doug Cassel, *Ecuador’s Proposed Elements of a treaty on Business and Human Rights : Off to a Good Start*, retrieved from <https://www.business-humanrights.org/en/ecuador%E2%80%99s-proposed-elements-of-a-treaty-on-business-and-human-rights-off-to-a-good-start> [last consulted on 25 August 2018]

corporations (TNCs), but all companies”, while some allies from the South “including its chief partner South Africa, have insisted on the opposite: the treaty should cover only TNCs”.

In his conclusion, the author raises the main challenge: “Can a balance be achieved between a treaty that affords meaningful protection to victims of business-related human rights violations, while also attracting a meaningful number and mix of states to join the treaty?”

For the business community, represented by the International Chamber of Commerce (ICC), the International Organization of Employers (OIE), the Business and industry advisory committee (BIAC) and the Foreign Trade Association (FTA), the draft treaty is “a big step backwards”<sup>104</sup>.

Indeed, although stating that “respecting and advancing human rights is a priority for the international business community”, the document stipulates that “in this statement, we make it clear that the international business community does not support the “elements” because they represent a big step backwards and they jeopardize the crucial consensus achieved by the UN Guiding Principles on Business and Human Rights.

More precisely, they are opposing “the proposal to impose direct international human rights obligations on transnational corporations and other business enterprises.” According to the international business community, “seeking to introduce supply chain legal liability on transnational corporations [...] risks dampening investments flows to industrialized, emerging and least developed economies”.

Using arguments that we previously analyzed, the business community argues that “international human rights law binds States, not private entities.” Therefore, “non-state actors, including business do not have the democratic mandate or the authority to assume the same responsibilities and functions of Governments.”

Also the international business community fears that “establishing international human rights obligations directly on business when these duties often do not exist at the national level also suggests that States may be seeking to pass the buck onto private entities for their own failure or unwillingness to protect their people’s rights.”

The international business community proposes its point of view: “The problem is not the absence of a binding international instrument on business and human rights, but States’ failure

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<sup>104</sup> The article can be found here : <https://cdn.iccwbo.org/content/uploads/sites/3/2017/10/business-response-to-igwg-draft-binding-treaty-on-human-rights.pdf>

or lack of capacity to implement and enforce their own domestic laws and existing international human rights treaties that they have ratified”.

In its conclusion, the international business community, while disagreeing, fears that the “process runs the risk of taking the business and human rights agenda back into a period of political stalemate”.

That’s exactly this “political stalemate” that John Ruggie wants to avoid, but not for the same reason as the business community. John Ruggie is the person who developed a set of principles in 2005 when he was the UN Secretary-General’s Special Representative for Business and Human Rights: the UN Guiding Principles on Business and Human Rights, which are based on a voluntary approach. In his statement<sup>105</sup>, John Ruggie questions the attractiveness of the topic while commenting the first session of the Intergovernmental Working Group: “Attendance by states overall was poor, and fewer than ten delegations [...] accounted for most of the interventions”

Thus, he deplors that “if present dynamics continue, the process is likely to yield one of two outcomes : no treaty at all, or one that squeaks through to adoption but is ratified by few if any major home countries and thus would be of no help for the victims in whose name the negotiations were launched”.

John Ruggie calls on the civil society that “remains central”, “to moving the business and human rights agenda forward”. According to him, “when states are this divided and ambivalent, NGO leadership is badly needed. [...] They need to jump into the fray”.

Reaching his conclusion, John Ruggie makes two recommendations.

First, since the treaty negotiations will be slow and contested, he claims that “it is imperative that progress continue to be made on implementing the UN Guiding Principles on Business and Human Rights, [...] and that civil society continues to invest time and energy to pressure governments and enterprises to do so.”

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<sup>105</sup> John Ruggie, *Get real or we'll get nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty*, retrieved from : <https://www.business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>

Second, “civil society needs to help by advancing workable proposals that states cannot ignore or dismiss out of hand— and which, therefore, have a chance of making a difference where it matters most: in the daily lives of people.”

Role of NGOs to ensure the effectiveness of the treaty:

In its report on the issue of human rights and transnational corporations and other business enterprises<sup>106</sup>, the Human Rights Council gives recommendations to the civil society organizations. The Working Group notably states that “NGOs can play a particularly helpful role in helping to establish facts concerning business-related human rights impacts in concrete situations and supporting trust-building and stakeholder dialogue to prevent and address negative impacts”. As we analyzed with John Ruggie’s statement, the report also wishes that NGOs keep their fights and adds that “where companies are not willing to engage with civil society and affected stakeholders in addressing concerns, the traditional approaches of campaigning, “naming and shaming” and litigation will still be valid and may also provide additional incentives for companies’ action”.

More concretely, Irene Pietropaoli, consultant on business and human rights, insists on the crucial role of NGOs to sway the decision in favor of human rights. She develops “6 successful strategies for NGO engagement business and human rights treaty advocates can learn from”<sup>107</sup>.

- “Coordination of the NGO coalition and national NGOs”.

According to Irene Pietropaoli, the Treaty Alliance includes “a number of NGOs that are working independently in different regions on business and human rights issues.”

She praises collective work since “working through a coalition enables NGOs to exert greater influence on norms setting than through individual efforts alone.”

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<sup>106</sup> Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on multi-stakeholder engagement across “Protect, Respect and Remedy”*, A/HRC/32/45/Add.3, 27 May 2016

<sup>107</sup> Irene Pietropaoli, *Binding treaty: What we can learn from NGO strategies in other treaty-drafting processes*, retrieved from : <https://www.business-humanrights.org/en/binding-treaty-what-we-can-learn-from-ngo-strategies-in-other-treaty-drafting-processes>

- “Formal and informal engagement”.

According to the author “while formal attendance and involvement in the IGWG sessions is important, the Treaty Alliance and individual NGOs should exercise their influence informally in side events, such as meetings, receptions, and workshops”. Indeed, while approaching and lobbying key government representatives “may prove critical for the adoption of the instrument”.

- “Building a common NGO-State frame”.

The author gives the example the International Criminal Court which was created after “an alliance developed between the NGO coalition and the “like-minded group” of countries.

Thus, “treaty Alliance NGOs could develop a similar common frame between different NGOs and ‘friendly’ states supporting the business and human rights treaty”

- “Lobbying western states”

According to the author, “it is essential for NGOs to continue lobbying EU and other Western states as the support of both host and home countries would make the treaty process much more likely to succeed”.

- “Balance between need to compromise and to achieve highest standards”

The author advises NGOs on the necessity to compromise “on issues of enforcement, for example extraterritorial application of law and binding obligations on companies, instead opting for a traditional approach of reporting, individual complaints and general comments.”

The ideal would be, according to the author, to find a balance being “struck between drafting a text that enough states would ratify and maintaining the highest standard of human rights protection.”

- “Lobbying companies”

The author advises NGOs to lobby companies and business organizations that may be willing to support the treaty.

She justifies her assertion: “some responsible companies are increasingly calling for regulation and incentives to create a level playing field and competitive neutrality by establishing binding international standards that apply to all businesses.”

## Conclusion

If we consider all the work that has been done until now in terms of regulatory instruments for the behavior of transnational societies, the draft treaty that has been proposed builds up the first binding set of international standards. It is especially noteworthy since, if adopted, this treaty could become a referral authority. With this draft treaty (that still needs to be debated), a step forward has been taken towards the establishment of clear legal obligations in the field of human rights.

More concretely, it seems that this draft treaty could bring real benefits to all the international actors concerned by the human rights question. First of all, the victims of human rights abuses, but also the companies, that will have at their disposition an effective instrument to be genuinely socially responsible, and the States, the international organizations or courts, that will have a strong base to answer to the issues brought before them.

Whatever the changes that will be done to it, the draft treaty has the advantage to formalize a serious answer to face the challenges posed by the behavior of some transnational companies. It has contributed to increase awareness of the international community about the violations made by some companies. Eventually, the draft treaty allowed a common reflection and a debate among specialists (legal professionals, political scientists and economists) and the concerned actors: business companies, NGOs, politicians and the large public.

To finish with a positive note, we can recall Marilyn Croser's article "Achieving a binding instrument on business & human rights: 3 lessons from the Arms Trade Treaty campaign"<sup>108</sup>.

The author develops her observation : "When Amnesty International, Oxfam and IANSA (the International Action Network on Small Arms) launched Control Arms in 2003, the treaty proposal was supported by three States: Mali, Cambodia and Costa Rica. Three years later 153 countries voted at the UN in favour of beginning work on a treaty. How did this come about and what can BHR (business and human rights) treaty advocates learn from this success?"

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<sup>108</sup> The article is available at : <https://www.business-humanrights.org/en/achieving-a-binding-instrument-on-business-human-rights-3-lessons-from-the-arms-trade-treaty-campaign>



According to her, the first step towards the success of this campaign was that it memorably communicated the problem and the solution. The author advises to better communicate: “Putting numbers on corporate abuse is difficult but not impossible, as demonstrated by this recent Global Witness report which gives a figure for murders of environmental defenders in 2014.”

The author then recalls the role of NGOs to set out existing obligations and global norms in respect to arm transfers. She advises “to produce an equivalent set of principles for the proposed BHR treaty” since “this will help to crystalize the essential components of the treaty.”

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