

# Reparação de vítimas à luz de um tratado sobre empresas e direitos humanos

## Reparation of victims in light of a treaty on business and human rights

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### RESUMO

Este estudo tem como objetivo analisar as tentativas em nível internacional de implementar regras capazes de garantir a responsabilização das corporações transnacionais por violações de direitos humanos. Ele verifica, entre os avanços e retrocessos das últimas décadas, a edição dos Planos Nacionais de Ação pelos Estados desde 2011 e as principais questões consideradas por um grupo intergovernamental discutindo a elaboração de um tratado sobre o tema em relação à indenização às vítimas. Será avaliado que, embora haja alguma informação sobre a compensação de vítimas nos Planos de Ação Nacionais já existentes, é necessário um maior desenvolvimento neste campo, especialmente no tratado que está sendo discutido. Essa essência também está em consonância com os Objetivos de Desenvolvimento Sustentável, que constitui a Agenda 2030 da ONU. O método é focado em (i) fontes primárias e (ii) fontes secundárias. O método de interpretação resulta principalmente de fontes secundárias que abordam (i) uma leitura crítica do Direito Internacional Contemporâneo, e (ii) a relação entre Direito Internacional, Direitos Humanos e Política Internacional. Seu valor surge da perspectiva sobre a compensação das vítimas - o reconhecimento de seu sofrimento - e a necessidade de uma norma vinculante que possa responsabilizar os Estados e as corporações pelas violações dos direitos humanos.

**Palavras-chave:** Direitos Humanos e Empresas. Direito Internacional. Princípios Ruggie. Planos Nacionais de Ação. Tratado sobre Empresas e Direitos Humanos. Objetivos do Desenvolvimento Sustentável.

### ABSTRACT

This study aims to analyze the attempts at an international level to implement rules capable of ensuring accountability of transnational corporations for human rights violations. It verifies, amongst the advances and setbacks of recent decades, the edition of National Action Plans by states since 2011, and the main issues considered by an intergovernmental group discussing the drafting of a treaty on the issue with regard to the victim compensation. It will be assessed that, although there is some information on the compensation of victims in the already existing National Action Plans, more development in this field is necessary, especially in the treaty that is being discussed. This essence is also in consonance with the Sustainable Develo-

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pment Goals, that constitutes UN 2030 Agenda. The method is focused on (i) primary sources and (ii) secondary sources. The method of interpretation results mainly from secondary sources that address (i) a critical reading of Contemporary International Law, and (ii) the relationship between International Law, Human Rights and International Policy. Its value arises from the perspective on the compensation of victims – the recognition of their suffer - and the necessity of a binding norm that can make States and corporations accountable for human rights violations.

**Keywords:** Human Rights and Business. International Law. Ruggie Principles. National Action Plans. Treaty on Business and Human Rights. Sustainable Development Objectives.

## 1. INTRODUCTION

The evolution of international society over the last fifty years has brought as a consequence, in addition to the emergence of new issues and actors responsible for control of the socio-economic and political dynamics of States, a myriad of new forms of human rights violations.

Despite the increase in the number of treaties intended to protect the rights of individuals globally, new entities subject to international law and actors have remained unnoticed in this new social setting in relation to their characterization as holders of obligations. Accordingly, it was found that in parallel to their establishment in the performance of transnational activities, serious human rights violations were committed by them.

The role of transnational corporations is particularly prominent in this new configuration. With an economic power greater than a large number of States their influence and lobbies are capable of modifying legislation or even initiating processes in the Executive and Judicial plans of States. Such interference in internal processes is also detrimental to the interests of individuals who are the main victims of the negative impacts of activities performed by those actors. Situations that place them in conditions analogous to slavery, the international trafficking of people, loss of livelihood and other forms of physical, moral and psychological degradation become commonplace in the absence of an imposing ruling capable of ending the culture of impunity and

establishing a true human rights protection culture to counter the development of business activity.

It is this spirit that has guided the international community since the 1970s establishing a discussion on the creation of international standards that regulate the activities of transnational corporations. 2011 saw the issue of the much-celebrated UN Guiding Principles on Business and Human Rights on a global level, a rule that would establish, among other equally important issues, a requirement that the States implement National Action Plans for proper protection of human rights by companies. Accordingly, the obligation to establish the basis of a much-needed protective culture was transferred to a state plan.

However, an evaluation of the entities subject to international law and actors in the international community, especially civil society, revealed that this responsibility, given the events that marked the course of last decades, would not be developed without a binding instrument capable of effectively ensuring that the States are responsible if they remained inactive in the implementation of this ideal. Guided by this spirit, in 2014, a group of States adopted resolution A/HRC/26/L.22/Rev.1 in the Human Rights Council (HRC) of the United Nations (UN), which laid the foundation for the elaboration of a treaty on human rights and business.

At present, therefore, the international community is making advances in those thematic discussions, and this is where the problem of this work arises: what are the obstacles to the full compensation of victims discussed in intergovernmental meetings for the elaboration of a binding instrument for States and companies on the theme of human rights violations committed by corporations? Accordingly, would it be possible to achieve compensation for all violations committed by companies? Would these principles be in line with the UN 2030 Agenda?

This paper intends to answer these questions by historical and critical analysis on development of the issue and results of qualitative research based on documentary analysis of primary and secondary sources. It will be assessed that, although there is some information on the compensation of victims in the already existing National Action Plans, more development in this field is necessary, especially in the treaty that is being discussed. This essence is also in consonance with the Sustainable Development Goals, that constitutes UN 2030 Agenda.

The method is focused on (i) primary sources (documents and UN reports and resolutions of the HRC/UN, National Plans on Human Rights and Business, and reports of the Intergovernmental Group for the preparation of a treaty on business and human rights) and (ii) secondary sources (national and international legal literature). The method of interpretation results mainly from secondary sources that address (i) a critical reading of Contemporary International Law, and (ii) the relationship between International Law, Human Rights and International Policy.

## **2. COMPANIES AND HUMAN RIGHTS IN THE UN PLAN: THE TRIAD “PROTECT, RESPECT AND REMEDY” AND THE COMPENSATION COMPONENT OF NATIONAL ACTION PLANS**

Concern for the protection of human rights arising from business activity at the UN plan dates back to the 1970s. Since then, a series of measures intended to regulate participation of those actors before the international community which, until then, was so only regulated by States themselves and relied on the participation of other entities subject to international law hitherto recently recognized in the framework of International Law, namely International Organizations.

That was one of the reasons up to the early twenty-first century little had been done in relation to the establishment of binding rules for companies with regard to accountability for the performance of activities detrimental to human rights. The difficulty in recognizing them as being subject to International Law, in addition to the economic power that is the hallmark of their activity in the world, prevented that the originally proposed initiatives would result in effective rules and policies.

In 2005, the UN Secretary-General appointed John Ruggie to conduct research on the normative possibilities on the issue of business and human rights. As a result of this work, in 2011 the Human Rights Council approved Resolution A/HRC/RES/17/4, which established Guiding Principles on Business and Human Rights, also called the “Ruggie Principles”. In general terms, the rule is based on the triad of “Protect”, “Respect” and “Remedy”. The States have a duty to protect human rights, actively intervening in violations made by third parties. Companies, in turn, would have a duty to

respect those rules, i.e. to refrain from performing acts contrary to human rights. Finally, both entities should ensure judicial or extrajudicial compensation to those who suffer such abuses.

As regards soft law, the Ruggie Principles are characterized as a potential initiative to stimulate the regulation of human rights violations by corporations, to the extent that States and companies begin to endorse its content and put its precepts into operation. That Resolution also determined that the States that adhere to such a standard should implement National Action Plans seeking to put the recommendations made by that instrument into practice.

Accordingly, to date the following States have enacted National Action Plans in line with the UN Guiding Principles on Business and Human Rights: UK, Netherlands, Italy, Denmark, Finland, Lithuania, Sweden, Norway, Colombia, Switzerland, the USA, Germany, France, Poland, Spain, Belgium, Chile, the Czech Republic and Ireland.

For the purposes of this study, only items of National Action Plans concerning remedy mechanisms for compensation of victims of human rights violations by corporations under the third axis of the Ruggie Principles shall be considered.

The United Kingdom was the first State to launch its National Plan in September 2013 and conducted a review of its basis in a paper published in 2016. The British plan considered the possibility of compensation to victims in a judicial and extrajudicial framework. A highlight of the measures implemented by the United Kingdom to compensate victims was the entry into force of the Modern Slavery Act in 2015. However, in 2017, the Joint Committee on Human Rights published a report criticizing the United Kingdom in relation to its National Action Plan and the practice of protection for human rights victims committed by corporations, particularly in terms of access to justice and the bureaucratic procedure for formalization of accusations against companies and the possibility of presenting proof of alleged violations.

The Netherlands launched its National Action Plan in December 2013. The final draft of the document mentions that there was no consensus among interested parties on judicial liability of Dutch companies within or outside Dutch territory or on reparations to victims. As regards the latter issue it is known that the Dutch

National Action Plan suffered criticism from civil society of that State, particularly for not envisioning protection of human rights from the perspective of the victims.

Denmark launched its official document in April 2014, and Finland in October of that year. Neither example contained express considerations on the forms of reparation for victims.

Lithuania, Sweden, Norway and Colombia launched their plans in 2015. The Lithuanian National Action Plan brought procedural measures to promote access to justice. However, it is important to emphasize that these measures do not necessarily ensure compliance by companies for any convictions in cases of human rights violations. The Swedish National Action Plan describes the internal rules intended for reparation of victims in cases of violations of their rights. However, said National Action Plan has been subject to criticism<sup>1</sup> as it does little to consider their voices in the final draft presented to society. The Norwegian National Action Plan also offered little detail on the issue.

In the Colombian plan, the first to be developed by a Latin American country<sup>2</sup>, despite an intervention request from the Working Group on UN Business and Human Rights to carry out analysis of existing remedies and an indication of more effective mechanisms in the reparation and protection of victims of grievous, business activities, nothing has been implemented so far in that regard.

In 2016, Switzerland, Italy, the United States and Germany launched their plans, increasing the number of States that have joined this initiative. None of them, however, established robust accountability on companies for human rights violations or compensation measures for victims.

The other National Action Plans, launched in 2017

and 2018<sup>3</sup>, in turn, did not present any advance in developing innovative forms of reparation for victims of violations of human rights committed by companies.

From analysis of the National Action Plans established so far it can be concluded that in their less formal aspects, the initiatives resemble the recommendations set out in the Ruggie Principles. Highlights are those that during their drafting and review process included participation from entities subject to international law and actors belonging to the States, albeit in an imperfect manner. However, despite the fact that such provisions may describe improvements in the plan for protection and promotion of human rights plan for companies, advances with respect to establishing binding rules relating to compensation for victims of human rights violations committed by companies are also required.

So as not to dismiss the efforts by the States that have adopted National Action Plans it is also imperative to constantly monitor compliance with their provisions to ensure that such initiatives do not become merely a mechanism for those States to strengthen their protectionist rhetoric before the international community and continue drawing out negotiations on the treaty or hide under a cloak of impunity.

In this regard, the International Corporate Accountability Roundtable statement is valid, in that a binding instrument could potentially eliminate the lack of complaint mechanisms at an international level or even support the implementation of internal accountability mechanisms for corporations for human rights violations<sup>4</sup>.

Finally, although the aforementioned States have implemented National Action Plans, cases of human rights violations committed by companies based in their respective territories are still reported, which is why one can argue for the need to establish a treaty on the subject, which will be seen below.

1 EUROPEAN COALITION FOR CORPORATE JUSTICE. *Sweden: more action required for business and human rights*. Available at:

<<http://corporatejustice.org/news/169-sweden-more-action-required-for-business-and-human-rights>>. Accessed: May 28, 2018.

2 On the proactivity of European States in developing National Action Plans on business and human rights, possibly attempting to justify the lack of necessity in establishing a treaty on the same matter, see CANTÚ RIVERA, Humberto. Planes de acción nacional sobre empresas y derechos humanos: sobre la instrumentalización del derecho internacional en el ámbito interno. *Anuario Mexicano de Derecho Internacional*, v. 7, p. 113-144, 2017.

3 Between 2017 and 2018 National Action Plans were published for Spain, France, Poland, Belgium, Chile, Ireland, the Czech Republic and Georgia. In this regard, see NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS. *Countries*. Available at: <<https://globalnaps.org/country/>>. Accessed: 29 May 2018.

4 INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE. *Key recommendations: Pillar III*. Available at: <<https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5865e19ebe6594411018015a/1483071903727/Pillar-3-Recommendations-FINAL.pdf>>. Accessed: 28 May 2018.

### **3. DISCUSSIONS ON THE PREPARATION OF A TREATY ON BUSINESS AND HUMAN RIGHTS AND THE NEED FOR EFFECTIVE REMEDIES**

The Ruggie Principles, established in 2011, made provisions in the UN system for corporate accountability of human rights violations, despite the non-binding nature of its provisions.

Due to the dissatisfaction of states and civil society organizations regarding the legal hierarchy of the Ruggie Principles and the urgent need for effective association with, and accountability of, non-state actors for human rights violations given the continued occurrence of human rights violations by companies, Resolution A/HRC/26/L.22/Rev.1 was adopted by a majority vote at the 26th Session of UN Human Rights Council in 2014. It provided for discussions under sessions of an Intergovernmental Working Group for the drafting of a treaty on the issue.

Accordingly, in July 2015 the First Session of the Intergovernmental Working Group to discuss the basis of that document was convened. At that first meeting the establishment of effective remedies for victims of human rights violations by transnational companies were discussed, among other issues, as well as other equally important points such as the possibility of extra-territorial application of the treaty, necessary dialogue with other international organizations dealing with the protection of human rights and similar initiatives (ILO, OECD, etc.) in the event of violations of human rights by companies. This also included contributions on the establishment of judicial and extrajudicial mechanisms to compensate damages caused to individuals stemming from activities conducted by transnational corporations and possibly accepted by States. There was also the existence of positions contrary to the immediate adoption of a treaty given the short timeframe between the issue of Ruggie Principles and their effective implementation by States. There was also disagreement between European Union representatives on the expansion of the scope of this standard to companies of any nature, and not only transnational corporations. Finally, among the Member States of the United Nations participating in the discussions a number of countries that today headquarter a large number of transnational companies, particularly involved in paradigmatic cases of human rights violations, were absent.

The second session, held in October 2016, also saw participation from States, as well as civil society organizations and other interested parties in the construction of the main basis of the international treaty. It is important to highlight a paradigm shift in the discussions: when before this focused on the creation of a binding instrument solely for transnational companies, it was decided at the second session to expand the scope of the standard to all corporate entities. The extension of the scope of the treaty, as seen, was the result of pressure from the European Union made in the previous year and that, in some way, became a condition for its participation in that forum. Moreover, there was intense lobbying by non-governmental organizations on the need to strengthen guarantees for access to justice for victims of human rights violations by companies in the internal plan but left the establishment of a special international tribunal for this purpose pending. Similarly, no agreement was reached on the expansion of the jurisdiction of existing international tribunals to hold companies accountable for human rights violations. Among the proposals, the most important were discussions on the inclusion of specific clauses on the protection of human rights in bilateral and multilateral investment agreements involving companies, which would take place in parallel with the treaty under discussion; questioning the sovereignty of States in the event of the use of extraterritoriality for holding companies accountable; cooperation between States in cases of violations committed in countries where companies have subsidiaries; strengthening the remedies provided for in the Ruggie Principles in parallel with greater assurance for access to justice for vulnerable groups affected by business activity. These also included the establishment of an actual dialogue between states, businesses, civil society and the potential and actual victims of the activities carried out by companies.

The third session, dated October 2017, was significant for the progress in discussions on access to justice for protection of victims of human rights violations by companies, as well as prospects for international legal cooperation and discussions on the extraterritorial aspect of the jurisdiction rules. In relation to compensation of victims, there was controversy about the possibilities of redress in civil and criminal spheres, especially as the latter is not accepted in a number of States in cases involving corporate entities. However, these points are still the subject of much controversy

among the interested parties so it is currently expected that there will be new sessions to continue the discussions presented herein.

It is clear, therefore, that the focus of discussions at the moment lies on the need to establish mechanisms to ensure effective redress for victims of violations committed by corporations. Therefore, and in view of the discussions on the establishment of the means of full compensation, the following item shall consider aspects of international law doctrine of human rights issues, particularly in relation to international procurement agencies (Regional courts and DH) to provide suggestions on possible forms of reparation to be included in the text of the new treaty.

In addition, observance of internationally assumed standards regarding protection of human rights confirms the importance of a focused analysis on the actual demands of the victims, so that a well-oriented institution with similar mechanisms would be in accordance with the objectives of Sustainable Development, part of the UN 2030 agenda, in particular Objective 16, to promote peaceful and inclusive societies with sustainable rights, with progress on access to justice for all and building effective, accountable and inclusive institutions at all levels, particularly item 16.3 and 16.6.

#### 4. CONCLUSION

Recent discussions on the drafting of a treaty binding States and companies to the necessary protection of human rights are the result of intense international negotiations dating back to the 1970s under the United Nations. Since then, the need to establish a culture of protection of human rights arising from business activity has been recognized by the post-modern international society. However, despite the intense international dialogue, it was only in 2011 that a resolution establishing a mechanism to serve the interests of individuals and non-state actors responsible for compliance with this standard was approved at the UN.

There was no great delay to begin discussions on the need for a treaty on the issue, especially if we consider the concern that the National Action Plans failed to establish effective arrangements for the accountability of States or companies for violations of human rights, which became manifest in the years following the publi-

cation of Ruggie Principles.

Thus, the issue of a UN Human Rights Council resolution that demands the creation of a binding instrument was celebrated by States and civil society organizations, but the outcome of the dialogue of the first three sessions of the Intergovernmental Working Group focused on the development of the standard on the issue is, as we have seen, far from a consensus, particularly with regard to the establishment of compensation for victims in case of violations committed by corporations.

Accordingly, the present study sought to analyze the main points discussed in the first three intergovernmental sessions to establish a treaty on human rights and business, focusing on reparation rules for victims for acts that violate human rights. It was therefore possible to verify the evolution of the basis of the discussion on that the issue, which has gained greater visibility in the last two years.

However, regarding compensation to victims for human rights violations by companies, it is clear that often such measures are virtually impossible, particularly when there are situations where business activity is responsible for devastating entire areas where certain communities once thrived. In this sense, the total redemption of the identity of the individuals affected by the negative impacts of corporate activity becomes difficult.

It is certain that the treaty would bring elements of existing international law and those expressed in other treaties for the protection of human rights. In the case of reparations little has been debated, particularly because of the will of each state to develop its internal remedies. The question, however, is still controversial with States, since there are jurisdictions that manifest interpretation contrary to the establishment of criminal law for corporations, for example.

The treaty, therefore, would be a tool to reinforce the commitment of States to protect human rights in the context of business activities, since its provisions would inevitably have to combine with other treaties already established in specific areas such as the protection of women, children, indigenous peoples, the prohibition of discrimination of race, corrupt practices, among others. Accordingly, the treaty under discussion would be aligned with the most current discussions related to the protection of human rights at the international level

as well as the UN 2030 Agenda.

Regarding the application of the treaty provisions by States, it is certain that the wording must be used sparingly so as not to detract from the main purpose of that international standard. Regarding the states which accede to the treaty, it is certain that its provisions would eventually have to be changed in order to comply with international guidelines regarding corporate accountability procedures for violations of human rights and fair compensation to victims, an issue already widely used and recognized under international law.

Moreover, the provisions of the treaty must be expressed and arranged in relation to full compensation of victims, in order to clarify to the States and companies the possible penalties and their contexts.

Accordingly, despite the many controversies that surround the drafting of a treaty intended to protect human rights by companies, it is certain that training will be important not only in reinforcing the commitment of States and those entities in relation to the protection of victims, but also to strengthen the historical ideal of assistance for human rights that has been widely debated in the global system of human rights protection.

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