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Transterritoriality as a theory to hold corporations accountable for human rights violations: the application of its principles in vedanta and nevsun cases*

A transterritorialidade como teoria para responsabilizar corporações por violações de direitos humanos: a aplicação de seus princípios nos casos Vedanta e Nevsun

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Abstract

This paper examines the basis for transterritoriality as a theory to hold corporations accountable for human rights violations and attempts to its application in two Business and Human Rights leading decisions: *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors. [2019] UKSC 20* and *Nevsun Resources Ltd. v. Araya, 2020 SCC 5*. By the analysis of both judgements, issued by two Supreme Courts under the common law regime, the present work aims to prove that, in order to hold corporations accountable for human rights violations, national judges can apply private international law, public international law and international human rights law in an heterarchical and transversal manner to ensure a genuine dialogue between national jurisdictions and international courts under the application of the main principles and rules of international law. Qualitative and deductive methods used were based on interdisciplinary research and primary and secondary business and human rights sources were consulted to develop the proposed theory and case analysis.

Keywords: business and human rights; international law; remedies; transterritoriality; access to justice.

Resumo

Este artigo examina os fundamentos da transterritorialidade como uma teoria para responsabilizar as empresas por violações de direitos humanos e tenta aplicá-la em duas decisões importantes sobre empresas e direitos humanos: Vedanta Resources Plc e Konkola Copper Mines Plc v. Lungowe e Ors. [2019] UKSC 20 e Nevsun Resources Ltd. v. Araya, 2020 SCC 5. Pela análise de ambos os julgamentos, proferidos por duas Supremas Cortes sob o regime da common law, o presente trabalho visa provar que, para responsabilizar as empresas para violações de direitos humanos, os juízes nacionais podem aplicar o direito internacional privado, o direito internacional público e o direito internacional dos direitos humanos de forma heterárquica e

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transversal para garantir um diálogo genuíno entre as jurisdições nacionais e os tribunais internacionais sob a aplicação dos principais princípios e regras do direito internacional . Os métodos qualitativos e dedutivos utilizados foram baseados em pesquisa interdisciplinar e fontes primárias e secundárias de empresas e direitos humanos foram consultadas para desenvolver a teoria proposta e análise de caso.

Palavras-chave: Comércio e Direitos Humanos, Direito Internacional, remédios, transterritorialidade, acesso à justiça

1 Introduction

This research is situated in a scenario of grave offenses to human rights and to the environment practiced by corporations, especially in less developed States of the globe, or that belongs to the "Global South" – which until the present date count with the exploitation of "northern" States and with the silencing of their legal and political narratives. In front of the complicity of States to the corporate activity and of the structure of International Law -which still considers them as the main subjects of its discipline, this paper aims to study the best means to hold companies accountable for human rights violations.

Even with the efforts of the post-modern international society (considered from the second half of the twentieth century on) in creating domestic and international rules regarding Business and Human Rights (BHR) and the consequent accountability of companies for human rights violations, such as the UN Guiding Principles on Business and Human Rights (UNGPs) in its third pillar (2011), the works of the Open-ended Intergovernmental Working Group for the creation of a treaty on Business and Human Rights and the National Action Plans of several States to address the human rights protection by corporations, human rights abuses committed by those actors are still a reality, and its victims are mostly vulnerable groups from underdeveloped States.

In this sense, to better address the reparation pillar of BHR and considering the centrality of the victim's suffering, this paper intents to present a theory that might be an alternative mechanism of accountability of corporations for human rights violations under the judicial perspective: *transterritoriality*. Such theory shall be the result of the joint application, by States and domestic judges, of existing rules of Public International Law, Private International Law, and International Human Rights Law, by means of the consideration of the heterarchy of such norms, as well as of the transversal dialogue and interpretation of their predicates. Its methodology is constructed under the theories of fragmentation of international law, societal constitutionalism, transconstitutionalism, and the transversal governance of fundamental rights, designed, respectively, by Martti Koskenniemi, Gunther Teubner, Marcelo Neves and Marcelo Torelly.

Finally, once the bases of such theory are presented, the feasibility of its practical applicability shall be evaluated in two concrete cases, namely: *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors. [2019] UKSC 20* and *Nevsun Resources Ltd. v. Araya, 2020 SCC 5*. Qualitative and deductive methods used were based on interdisciplinary research and primary and secondary BHR sources were consulted in order to better develop the analysis proposed herein.

2 Methodological basis of transterritoriality as an alternative mechanism for holding corporations accountable for human rights violations

Before defining the concept of transterritoriality, certain premises are required for its in-depth scrutiny, all of which relate to the theoretical framework underpinning the present study's premises. *Fragmentation of international law* is the starting point for the theory outlined in this paper. This concept has been propagated internationally since the UN's International Law Commission published its 2006 report on Fragmentation of International Law: difficulties from the diversification and expansion of International Law[1] coordinated by Martti Koskenniemi.

For Koskenniemi, postmodern international law is fragmented by the existence of specialized legal regimes[2] shaped by autonomous international institutions,

[1] INTERNATIONAL LAW COMMISSION. *Fragmentation of international law*: difficulties arising from the diversification and expansion of International Law (A/CN.4/L.682). Geneva, 2006.

[2] YOUNG, Margaret A. Fragmentation, regime interaction and sovereignty. *In:* CHINKIN, Christine; BAETENS, Freya. *Sovereignty, statehood and state responsibility*: essays in honour of James Crawford. United Kingdom: Cambridge University Press, 2015. p. 71-89.

although their jurisdictions may be over-layered[3]. Due to the emergence and proliferation of these new regimes - reflecting increasing specialization across various sectors of society, international politics, and the immediate consequences of globalization, as well as the absence of a specific international legislature - statehood is declining and the distinction between international and domestic spheres is being blurred, thus challenging the very coherence of Law as discipline[4].

Given this premise and the progressive judicialization of international conflicts, fragmentation of international law leads to a proliferation of international courts that eventually decide claims independently without really coordinating different interests or cooperating to ensure uniform decision making.

Hence, Koskenniemi's arguing that the fragmentation of international law is "both normative and institutional".[5] But there are cases in which a certain issue cannot be narrowed down to a single regime, e.g., those involving human rights violations and corporations. In these cases, although there are numerous international initiatives attempting to regulate naturally private situations, most rules still come from the national or domestic levels.

Notwithstanding the legal-doctrinal views opposed to this theory[6] and its developments, the process of fragmentation, which has impacts pertaining to public international law, is now seen as a constant that is being extended to include private regimes. These regimes are also being individualized to reflect their functional differences, so their consideration is crucial to a putative basis for transterritoriality. Although the theory of fragmentation of international law is important for the present study, other authors' interpretations will be studied in support of the applicability of the proposed mechanism.

The second aspect of its theory is the *societal constitutionalism*. As a representative of the social theory of law, Gunther Teubner states that the process of proliferation of new private subjects and actors in international society- whose dynamics and issues differ from those found at state level - has led to the establishment of so-called autonomous global subsystems or constitutional global fragments (such as economics, science, culture, and mass media[7]) - whose centrifugal dynamics are extending beyond borders. Although these subsystems coexist with States, they are less and less dependent on them.

These subsystems have their own constitutionalizing aspects but are not fundamentally sovereign since they have not reached the level of complexity of national constitutions. The main difference between Teubner's theory and Koskenniemi's is that the former sees fragmentation as affecting not only public international law but society as a whole[8].

Teubner therefore argues that transnational constitutionalism will have to conform to this dual fragmentation and poses a societal constitutionalism which, unlike constitutional models that are purely economic or entirely domestic welfare states, conceives the State's role as coordinating cooperation between public and private actors within and beyond its classical jurisdictional boundaries while aligning their relations and reflexive processes despite differing interests and higher levels of transnationalization[9]. Hence his definition of societal constitutions as "structural couplings between the reflexive mechanisms of the law [...] and the reflexive

[3] BENVENISTI, Eyal; DOWNS, George W. *Between fragmentation and democracy*: the role of national and international courts. Cambridge: Cambridge University Press, 2017. p. 18.

[4] KOSKENNIEMI, Martti; LEINO, Päivi. Fragmentation of international law? Postmodern Anxieties. *Leiden Journal of International Law*, v. 15, 2002. p. 557; INTERNATIONAL LAW COMMISSION. *Fragmentation of international law*: difficulties arising from the diversification and expansion of International Law (A/CN.4/L.682). Geneva, 2006. itens 05 e 491, p. 10; 248.

[5] NASSER, Salem Hikmat. Direito global em pedaços: fragmentação, regimes e pluralismo. *Revista de Direito Internacional,* v. 12, n. 2, 2015. p. 105.

[6] "International law at large, in all its diversity and proliferation, seems to be doing the same". (CRAWFORD, James. *International law as an open system*. London: Cameron May, 2002. p. 18; SLAUGHTER, Anne-Marie. *A new world order*. New Jersey: Princeton University Press, 2004.; DUPUY, Pierre-Marie. L'unité de l'ordre juridique international: cours general de droit international public (2000). *RCADI*, t. 297, p. 9-490, 2002.; RAMOS, André de Carvalho. *Direitos humanos na integração econômica*: análise comparativa da proteção de direitos humanos e conflitos jurisdicionais na União Europeia e Mercosul. Rio de Janeiro: Renovar, 2008. p. 374; MENEZES, Wagner. *Tribunais internacionais*: jurisdição e competência. São Paulo: Saraiva, 2013.

[7] TEUBNER, Gunther. Global bukowina: legal pluralism in the world society. *In:* TEUBNER, Gunther (ed.). *Global law without a state*. Aldershot: Dartmouth, 1997. p. 6.

[8] NASSER, Salem Hikmat. Direito global em pedaços: fragmentação, regimes e pluralismo. *Revista de Direito Internacional,* v. 12, n. 2, 2015. p. 104-108.

[9] TEUBNER, Gunther. *Constitutional fragments*: societal constitutionalism and globalization. New York: Oxford University Press, 2012. p. 40.

mechanisms of the social sector concerned"[10] rather than just the political system alone.

This model must also have institutional rules capable of coercing autonomous subsystems into a certain level of cooperation with State entities, based on the premise that there is yet no global model that could fully solve this issue, nor is there a universal solution. Therefore, an alternative to the modern model and meaning of the Constitution is required that also considers the impacts of highly transnationalized autonomous constitutional fragments, including rules applicable to transnational corporations in relation to fundamental rights[11] and human rights.

On this last aspect in relation to corporations, Teubner argues those actors should show more concern for environmental sensitivity in relation to nature, society, and human beings, thus redirecting them towards corporate social responsibility with sustainability finally being the core of his theory. Nor does Teubner believe that legal sanctions play a decisive role as pressures to induce learning and his views differ from those posed here to some extent[12].

Particularly in relation to transnational corporations, the present paper argues that such a claim cannot be made with absolute certainty, since these sanctions have not been fully applied by domestic courts with full recognition of the suffering of victims; some have even used codes of conduct to determine a company's obligations[13], as it will be argued below in positing the theory of transterritoriality.

The third premise lies in *transconstitutionalism*, concept formulated by Marcelo Neves. Based on a society whose complexity is increasing in the same proportion as its evolution - especially in a globalizing context, resulting from the intensification of society that is seen and identified as global - the above concept determines that transconstitutional problems are those that intrinsically arise in more than one legal order, particularly in their courts.

Their solution on the judicial level will require an intertwined relationship between "state, international, supranational and transnational (arbitral) courts, as well as native local legal institutions"[14]. Multiple legal orders are involved and acting together and concomitantly they can develop better solutions to the problems posed. Cooperation across different systems enables mutual learning mechanisms to develop in the normative domain, which will be salutary in terms of proper solutions for concrete cases.

Also denoted is the heterarchical position between legal orders advocated by Neves, which reinforces the nature of an effective dialogue between different kinds of legal subsystems[15]. Therefore, it is not a matter of dialogue held solely for the purpose of influencing judgments emanating from one court or another, but dialogue that may eventually operate as the constructive element of a certain court's *ratio decidendi,* agreeing or disagreeing as to the persuasive authority of principles and values upheld by other States, preferably democracies. Nor is it a theory devised to ensure negation of identity "according to an inoffensive model of pure convergence, but rather readiness for both cognitive and normative openness to other legal system(s) intertwined in concrete cases"[16].

Although this theoretical model applies to a wide range of different contexts, protection for human rights emerges as its core aspect, since despite the rise of human rights on the level of States, their interpenetration on all sorts of levels is recognized fact hence their pertaining to state, international, supranational, transnational, and local legal orders[17]. Transconstitutionalism

[10] TEUBNER, Gunther. *Constitutional fragments*: societal constitutionalism and globalization. New York: Oxford University Press, 2012. p. 104.

[11] TEUBNER, Gunther. The anonymous matrix: human rights violations by 'private' transnational actors. *Modern law review*, v. 69, 2006. p. 327-346.

[12] TEUBNER, Gunther. *Constitutional fragments*: societal constitutionalism and globalization. New York: Oxford University Press, 2012. p. 54, 92-93, 95, 129.

[13] BECKERS, Anna. *Enforcing corporate social responsibility codes*: on global self-regulation and national private law. Oxford: Hart Publishing, 2015. p. 32-35; MARRELLA, Fabrizio. Protection internationale des droits de l'homme et activités des societés transnationales. *RCADI*, t. 385, 2017. p. 280-287.

[14] NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009. p. XXII, 2-3, 27, 270, 295.

[15] NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009. p. 117-118, 126. Para uma análise mais completa sobre a "internacionalização dos juízes nacionais", ver: DELMAS-MARTY, Mireille. *De la grande accéleration à la grande métamorphose*: vers un ordre juridique planétaire? Lormont: Le bord de l'eau, 2017. p. 41-69.

[16] NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009. p. 272, 279.

[17] FORNASIER, Mateus de Oliveira; FERREIRA, Luciano Vaz. A regulação das empresas transnacionais entre as ordens jurídicas estatais e não estatais. *Revista de Direito Internacional,* v. 2, n. 1, 2015. p. 401.

is therefore also a means of analyzing and solving conflicts arising between different legal orders that involve some aspect of human rights protection in an attempt to promote inclusion for individuals and to mitigate any attempted exclusion.

In the case of transnational companies, Marcelo Neves points to the influence of these organizations in different legal systems and therefore situates them in the context analyzed here. In this respect, he emphasizes the argument that forms of law devised to uphold contractual and property rules are expansively asserted in relation to environmental protection and inclusion for individuals[18].

Neves also foresees the existence of a transconstitutionalism between State and transnational legal systems, in which corporate entities would be included. In his view, it is no longer possible to deny corporations and other transnational entities have the nature of legal systems pursuing autonomy. Also in this regard, he refers to the new *lex mercatoria*, *lex sportiva*, *lex digitalis* and other transnational (sub)systems to note the possibility of reciprocal learning, beneficial effects, and constructive conversations between public/state and private/transnational legal (sub)systems[19]. Associating this issue with corporate violation of human rights, a possible conclusion would be that overlap between legal orders should be resolved through transconstitutionalism, so that critical use obviates both economic losses and more importantly any harming of human lives[20].

However, Neves does not believe in the possibility of revolutionary changes in the institutional architecture of international society and public international law, since the latter were erected on the cornerstone of the nation State, and they will continue to reflect their past for a long time. Since this reality cannot be avoided in the initial stages, transconstitutionalism would continue to leverage these subjects' roles to solve existing conflicts arising from multiple legal orders, it but would pose a new angle more suited to the current scenario of a globalized international society, which would be based on a methodology that also considered the notion of alterity in its centrality[21].

Nor could the concept of transconstitutionalism be used for the sole purpose of harmoniously unifying existing rules emanating from a wide range of legal orders. As he explains, not all legal orders - particularly States' systems- show interest in transconstitutionalism. In this latter case, their postponing effective implementation of a transconstitutional ideal would be obvious. However, transconstitutionalism would undeniably be an effective means of addressing the problems of a fragmented international society.

Therefore, the concept of transconstitutionalism poses the challenge of integrating postmodern society by finding joint solutions for its legal problems, while it is also aligned with the subject matter of this paper.

The last concept that supports the foundation of transterritoriality is presented by Marcelo Torelly: the *transversal governance of fundamental rights,* a theory formulated essentially based on a hierarchical unity of global law[22], strengthening the role of the courts and establishing reflective or normative transverse governance through stages of developing global norms. The domain used by Torelly to develop his doctrine is the same used by the present study, which Torelly calls the third stage of global governance for the historical period of the post-Cold War era, when self-regulation for certain sectors of society became a constant practice that extended beyond the boundaries of States.

Assuming an evolution of the role of international law in the context of global governance[23] in which Law is one of its parts[24], Torelly argues the need for a "judicialization of legal governance, strengthening the role of the courts and other spaces for inter-individual conflict resolution" and the consequent relevance of judges and experts. For Torelly, the fact that the courts and similar bodies function as "spaces capable of con-

[18] NEVES, Marcelo. *Transconstitucionalismo.* São Paulo: Martins Fontes, 2009. p. 284-286.

[19] TEUBNER, Gunther. *Constitutional fragments*: societal constitutionalism and globalization. New York: Oxford University Press, 2012. p. 77, 128.

[20] NEVES, Marcelo. *Transconstitucionalismo.* São Paulo: Martins Fontes, 2009. p. 268, 282-283.

[21] DOUZINAS, Costas. *O fim dos direitos humanos*. São Leopoldo: Unisinos, 2009. p. 357.

[22] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 229.

[23] RUGGIE, John Gerard. American exceptionalism, exceptionalism, and global governance. *In:* IGNATIEFF, Michael (ed.). *American exceptionalism and human rights*. New Jersey: Princeton University Press, 2005. p. 307.

[24] NASSER, Salem Hikmat. Direito global em pedaços: fragmentação, regimes e pluralismo. *Revista de Direito Internacional,* v. 12, n. 2, 2015. p. 109.

taining rationalities and producing binding decisions in any of the legal regimes or systems involved in the legal problem in question" entails a possibility of communication between these regimes, thus creating new processes and converting law to a more technocratic, more specialized, and less participatory aspect.

Torelly therefore follows the logic of visualizing the importance of national and international judicial systems to apprehend the role of law in the postmodern scenario of interaction between public and private actors with no distinction in practice between domestic and international levels in many different regimes - so they are subject to fragmentation too. The focus of governance, in his words, should shift from investigating applicable law to specifically focusing on the "shared legal problem"[25].

Moreover, assuming this non-distinction between internal and international in the context of an ideal of relevance of the role of judicial systems, one may note Torelly's comprehension for a heterarchy of global norms, in either international or transnational litigation (the latter, in Torelly's opinion, under the influence of Anne-Marie Slaughter, materialized in domestic courts), will not be governed solely by implementing express rules. Although Torelly draws inspiration from the idea of a global community of courts[26] he goes these ideals when the issue is internalizing global norms.

At this historical, political, and legal conjuncture, international society is focusing on solving conflicts through its courts. While previously there was intense social mobilization calling for codified rights, the third stage of global governance will be marked by this sphere of action transferring to the courts, whose domestic and international role will be solving any problems shared between public and private actors.

In this period, national judiciaries and international courts of public and private international law strongly influence the construction of new forms of interpretation of then existing rules, as well as political activism - with a strong focus on strategic litigation[27] - in cases where there are clearly overlapping norms, a situation constantly arising in cases involving corporate violations of human rights.

Problems in the third phase of global governance then become characterized as transconstitutional problems, since they occur simultaneously in different legal regimes. Therefore, legal solutions should not only reflect the aspirations and rules of one single order or subsystem but should rather pursue new resources to open a space in which all sorts of institutional actors and subjects proffer their decisions without one normative system being superimposed by another.

Given this dynamic, the so-called global norms are formed, thus defined as having "effectiveness in a number of multiple social spaces around the globe"[28], regardless of whether the latter are nation states or specific regimes. Simultaneity in their application also assures their aspiration to universality.

In Torelly's view, therefore, the theory of transverse governance of fundamental rights would be crystallized in the manner established by Martha Finnemore and Kathryn Sikkink, with so-called "stages in the development of global norms": (i) the first stage, referred to as the "stage of the norm's emergence", in which "multiple actors on different action platforms seek to persuade other actors located on decision platforms of the existence of a given norm", this being a norm "derived from the legal scope of the platform occupied by general law or some specific regime"; (ii) the "normative cascade" stage, named for the point in time at which international society's subjects and actors are persuaded of the existence of the norm and uphold it to then "demonstrate its existence from examples of concretization seen in the previous stage, socializing and institutionalizing its content", so that it gains volume and starts to radiate "to other actors of institutional processes"; and (iii) the last stage, known as the "stage of internalizing the norm", in which the norm finally comes to be applied "on an everyday basis by legal operators"[29] within States, without any challenges, thus altering general perception as to its adequacy.

[25] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 14, 21-44.

[26] SLAUGHTER, Anne-Marie. A global community of courts. *Harvard International Law Journal*, v. 44, n. 1, 2003.

[27] CARDOSO, Evorah Lusci Costa. *Litígio estratégico e sistema interamericano de direitos humanos*. Belo Horizonte: Fórum, 2012.

[28] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 112-116, 142.

[29] FINNEMORE, Martha; SIKKINK, Kathryn. International norm dynamics and political change. *International Organization*, v. 4, n. 52, autumn 1988. p. 897-898; TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 116-215.

Based on this reasoning, Torelly alludes to global norms of individual responsibility for grave human rights violations and traces back its application historically in relation to Finnemore and Sikkink's theory highlighting their distinction between rules and principles and showing its application in the context of domestic law in Brazil, Argentina, Chile, and Uruguay with the methodological focus on analyzing transitional justice processes in these States. The situation is very similar to human rights and corporate issues in terms of their form of internalization at the domestic level of States and establishing victims' rights to reparations.

For Torelly, reflective transverse governance relates to a dialogue in which a "legal order or regime leverages the rationality of another to construct the solution to a problem" while the latter is established when the constitution of a domestic regime affords "differentiated normative status" to a norm under international law or international human rights law[30].

Therefore, transversal governance of fundamental rights may refer to a process of re-formulating norms through the heterarchical observance of domestic and international judicial processes feeding back into each other and involving subjects and actors from the whole range of legal orders comprising international society, which, in addition to the stages of development of global norms in terms of fundamental rights, enables national and domestic courts to pursue judicial interpretations that are more appropriate for effective protection of human rights, thus ensuring the elaboration and consolidation of new rights. Its practical applicability has been demonstrated by Torelly's focus on transitional justice in South American States. However, as shown above, some of the key features of those contexts may be transposed to the reality of human rights and business.

The abovementioned theory would consequently be yet another alternative to the use of strategic litigation in domestic and international courts - or for periods prior to international litigation (such as cases submitted to the Inter-American Commission on Human Rights), following Torelly's dictum that "transnational mobilization, even if not accompanied by litigation, enables effects on fundamental rights"[31] - serving transversal governance of fundamental rights as a means of providing adequate legal answers to a whole number of social problems affecting protection for individuals.

3 Definition and application of transterritoriality by the States

While human rights justice is preferably formulated in its negative aspect - meaning that situations considered unfair are removed and materialized as a "counter-principle of communicative violations of body and soul"[32] - building a theory that covers this aspect is satisfactory but also remote from the same responses historically presented, given the sophisticated nature of the problem posed today[33].

Transterritoriality, therefore, will leverage the positive aspect of extraterritoriality - which is disconnecting protection of human rights as mere rhetoric for social and economically developed States and developing States[34] - with the expansion of its scope through rules of jurisdiction, thus obliging states to apply their internal rules for protection and obey sources of international law, transversally and through international legal cooperation - as well as transnational or global law - without these rules being interpreted transcivilizationally[35] by the competent judges.

In addition, interpreters of the norm should be able to consider codes of conduct drafted by corporations involved in human rights violations[36] as well as other non-state norms arising from specific regimes[37], thus

[30] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 100.

[31] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 162.

[32] TEUBNER, Gunther. *Constitutional fragments*: societal constitutionalism and globalization. New York: Oxford University Press, 2012. p. 148-149.

[33] TEUBNER, Gunther. The anonymous matrix: human rights violations by 'private' transnational actors. *Modern law review*, v. 69, 2006. p. 341-343.

[34] BENVENISTI, Eyal; DOWNS, George W. *Between fragmentation and democracy*: the role of national and international courts. Cambridge: Cambridge University Press, 2017. p. 176.

[35] YASUAKI, Onuma. *Direito Internacional em perspectiva transcivilizacional*: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI. Belo Horizonte: Arraes, 2016. p. 51-53, 95, 105, 250.

[36] BECKERS, Anna. *Enforcing corporate social responsibility codes*: on global self-regulation and national private law. Oxford: Hart Publishing, 2015. p. 176-185, 393. Ver também: TEUBNER, Gunther. Transnational economic constitutionalism in the varieties of capitalism. *The Italian Law Journal*, 2015. p. 219-248.

[37] FISCHER-LESCANO, Andreas; TEUBNER, G. Regime-colli-

confirming Koskenniemi's dictum: "conflict-resolution and interpretation cannot be distinguished from each other"[38].

The normative power of human rights gains clout to the detriment of those of a merely manipulative character often practiced by States[39] which, as shown in the above items, let go of much of their decision-making power and influence in a society consisting of multiple entities.

Added to this aspect is the primacy of transconstitutionalism and transversal governance of fundamental rights, which advocate hierarchical dialogue between legal orders as a means of collaborative leverage to find solutions to concretely posed judicial problems and effective human rights protection[40]. This conversation, although marked by a subconscious ideal of establishing universal justice[41] will not be put into practice in this way, being rationally used and correctly contextualized[42].

In the case of transterritoriality, if the concept of the centrality of victims' suffering is added to the presumed concern of multiple legal orders, this conversation would be fruitful while eschewing arguments based on potential legal uncertainty and ensuring jurisprudential and normative constructive use of situations positively resolved in analogous cases by both domestic and international courts eschewing the main negative aspects of international law's fragmentation.

The above behavior would be crystallized in international society through Finnemore and Sikkink's theory of stages of development of global norms. Despite some initial reluctance - mainly due to the lack of awareness on the part of interpreters and other enforcers of postmodern international law and to fragmentation of international law, with the current existence of different regimes, but including shared legal problems - it is possible to detect a horizon of application and internalization of protective rules that dialogue with each other purely for the purpose, in the abovementioned scenario, of holding corporations accountable for human rights violations, thus reducing to some extent the distances that separate and characterize different regimes comprising international society. Therefore, normative hierarchy may be self-deconstructed by legal practices themselves[43].

Since human rights treaties are living instruments - whose interpretation must not only consider its content and intent but also their scope in international society's evolution[44] - these norms may be interpreted to guarantee the need for the State's role of controlling national and transnational corporates, their subsidiaries, and subcontractors, while also requiring positive obligations for these entities[45].

Transterritoriality is therefore conceptualized as the possibility of a transnational corporation being held accountable in a territory other than the one in which its negative performance occurred under the permission of express jurisdictional rules in this respect (extraterritoriality), added to the perspectives of applicability of the norm arising from societal constitutionalism, transconstitutionalism and transversal governance of fundamental rights, also considering that its judicial interpretation should be transcivilizational.

The abovementioned theory confirms an ideal of transcivilizational co-responsibility[46] to hold companies accountable for human rights violations and to reach the UN's Sustainable Development Goals set for the

sions? The vain search for legal unity in the fragmentation of global law. *Michigan Journal of International Law,* v. 25, 2004. p. 1013.

38 INTERNATIONAL LAW COMMISSION. *Fragmentation of international law*: difficulties arising from the diversification and expansion of International Law (A/CN.4/L.682). Geneva, 2006. iten 412, p. 207.

39 NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: Martins Fontes, 2009. p. 95-96.

40 HABERLE, Peter. *Estado constitucional cooperativo*. Rio de Janeiro: Renovar, 2007. p. 4.

41 FRYDMAN, Benoît. Diálogo internacional dos juízes e a perspectiva ideal de justiça universal. *In:* PIOVESAN, Flávia; SALDANHA, Jânia Maria Lopes (coord.). *Diálogos jurisdicionais e direitos humanos*. Brasília: Gazeta Jurídica, 2016. p. 28.

42 DIAS, Roberto; MOHALLEM, Michael Freitas. O diálogo jurisdicional sobre direitos humanos e a ascensão da rede global de cortes constitucionais. *In:* PIOVESAN, Flávia; SALDANHA, Jânia Maria Lopes (coord.). *Diálogos jurisdicionais e direitos humanos*. Brasília: Gazeta Jurídica, 2016. p. 349-350.

43 TEUBNER, Gunther. The king's many bodies: the self-deconstruction of law's hierarchy. *Law and Society Review*, v. 31, 1997. p. 772.

44 OC MRIA, William A. Schabas. *The Universal Declaration of Human Rights*: the travaux préparatoires: October 1946 to November 1947. Cambridge: Cambridge University Press, 2013. v. 1.

45 GASPAR, Renata Alvares; BUSTILLO, Luísa Nascimento. Imposição de obrigações positivas a empresas e violações de direitos humanos: efeitos horizontais. *Revista Jurídica Direito & Paz*, n. 33, p. 63-99, 2015.

46 DELMAS-MARTY, Mireille. *De la grande accéleration à la grande métamorphose*: vers un ordre juridique planétaire? Lormont: Le bord de l'eau, 2017.

year 2030 (2030 Agenda) in terms of States effectively guaranteeing access to justice.

The theory could be applied in practice by altering internationally recognized and classically established mechanisms in private and public international law contexts[47] respectively through changes in norms defining international jurisdictions of States and international legal cooperation, as well as the heterarchical application of sources elaborated in the different legal orders. The latter would then be subject to an effective stance of dialogue and constructive cooperation in a truly "transnational governance space"[48]; the ideal of permeable frontiers for business conducted by transnational corporations would be transposed to the normative and judicial sphere when human rights violations were committed by these entities[49].

On the international scenario, the abovementioned model cannot but recognize the subjectivity of major social actors, such as civil society organizations, thus enabling them to go to court to ensure protection for individuals. Once applied at the domestic level, the mechanism of transterritoriality would also favor NGOs claiming reparations for rights of individuals, or even appearing as *amicus curiae* in related cases[50]. No less important is the fact that public entities for the protection of human rights - such as state public defenders and federal entities - would also be favored[51].

As one of its positive aspects, transterritoriality would in general allow transnational corporations to be punished for human rights and environmental violations; it would also facilitate accountability for corporations that usually outsource work in precarious conditions, particularly in jurisdictions that are most indifferent in relation to protective rules for workers.

Another point favoring the theory hereby argued is the need for enhanced corporate responsibility culture, which would not only remedy any damage caused but also involve preventive measures[52]. A legal entity's domicile would matter little in cases of human rights violations since the issue to be considered in a case of transterritorial accountability would be the most appropriate jurisdiction to effectively end victims' afflictions and afford them a greater sense of safety and trust in the legitimacy of international law[53].

Although not expressly written in any binding domestic or international, transnational, or supranational legal order, these restrictions would be sufficient to reinforce corporations' concern to conduct their business properly. Once they have been held accountable by courts in democratic states and in different legal systems - common law and civil law - they would have to reexamine their own internal processes and establish - or help conceptualize and crystallize - a protective culture that would get past marketing and business dictated barriers[54] to ensure well-being for people working or operating in their surroundings or purchasing their products. This would confirm Teubner's idea that the mere "existence of a body of law is not decisive" since what matters "is a self-organized process of mutual constitution of legal acts and legal structures"[55].

Specifically in relation to the argument posed herein, the second component of transterritoriality does not necessarily have to be expressly mentioned in do-

[47] TEUBNER, Gunther. *Constitutional fragments*: societal constitutionalism and globalization. New York: Oxford University Press, 2012. p. 42.

[48] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 142.

[49] GIANNATTASIO, Arthur Roberto Capella; NOGUEIRA, Clara Soares; BISCAIA, Bruno Simões. Limites na responsabilização internacional de empresas nos sistemas regionais de direitos humanos: o aprendizado institucional como alternativa. *In:* PIOVESAN, Flávia; SOARES, Inês Virgínia Prado; TORELLY, Marcelo (coord.). *Empresas e direitos humanos*. Salvador: JusPodivm, 2018. p. 76; ZERK, Jennifer A. *Multinationals and corporate social responsibility*: limitations and opportunities in international law. Cambridge: Cambridge University Press, 2006. p. 239.

[50] TEUBNER, Gunther. Global bukowina: legal pluralism in the world society. *In:* TEUBNER, Gunther (ed.). *Global law without a state*. Aldershot: Dartmouth, 1997. p. 5.

[51] MARRELLA, Fabrizio. Protection internationale des droits de l'homme et activités des societés transnationales. *RCADI*, t. 385, 2017; CARDIA, Ana Cláudia Ruy. Direitos Humanos e empresas no Brasil: como as empresas mineradoras têm afetado a proteção dos direitos humanos no território brasileiro. *Homa Publica:* Revista Internacional de Direitos Humanos e Empresas, v. 2, n. 1, p. 109-137, 2018.

[52] MCBARNET, Doreen. Human rights, corporate responsibility and the new accountability. *In:* CAMPBELL, Tom; MILLER, Seumas (ed.). *Human rights and the responsibilities of corporate and public sector organisations*. Dordrecht: Kluwer Academic Publishers, 2004. p. 73.

[53] YASUAKI, Onuma. *Direito Internacional em perspectiva transcivilizacional*: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI. Belo Horizonte: Arraes, 2016. p. 116-117.

[54] HACKETT, Ciara. The grass is always greener: reflecting on global disparity in CSR. *Commercial law practitioner*, v. 18, 2011. p. 151-157.

[55] TEUBNER, Gunther. Global bukowina: legal pluralism in the world society. *In:* TEUBNER, Gunther (ed.). *Global law without a state*. Aldershot: Dartmouth, 1997. p. 10.

mestic constitutional or infralegal mandates. Following Torelly's reasoning, "although the constitutional architecture in some States may favor the use of international law, this single point could not be described as decisive in itself". It is a changed legal and political culture that must prevails if social transformation is to prevail[56].

There would also be no argument over the need to adapt transterritoriality across different productive sectors - an issue to be discussed when drafting a treaty on the matter[57] - since the States' judicial powers would use pre-existing specific domestic and international norms in each branch to solve all sorts of issues posed in consonance with protection of human rights.

From a competitive perspective, the practical application of this theory could initially lead to higher expenses for legal entities involved and eventually have economic and financial impacts for States, but it would eventually boost profits (from the consumer-market and economic development perspective of States that would attract incoming investments) and would avoid any loss of capital or prestige (from the angle of judicial and reputational risks) in the medium and long term.

In relation to States, new international jurisdiction rules, strengthened international legal cooperation and more flexible material requisites for approval of foreign judgments in cases of corporations violating human rights, in addition to training for interpreters of the law to ensure correct interconnection between domestic, international, transnational and supranational law - combined with the vision of the abovementioned authors - would result (despite any short-term negative financial consequences) in effective protection of constitutionally recognized fundamental rights and conventional or principled international human rights law, and consequently more safety and security for individuals.

If a substantial contingent of States adopted measures of this nature, corporations would not be reluctant to invest in one territory or another. Investments would no longer be defined based on which jurisdiction had the most incipient application of rules, favoring the State that effectively offered better conditions for their development. A corporation's profitability would therefore depend on a new metric, namely the protection of individuals, and no longer on the absolute exploitation of others' adversity and vulnerability.

4 Potential Transterritoriality elements in Vedanta and Nevsun Cases

From the bases of the transterritoriality theory, it is necessary to study its applicability in two practical cases recently decided by the British and Canadian courts, respectively: the cases *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors. [2019] UKSC 20* and *Nevsun Resources Ltd. v. Araya, 2020 SCC 5*[58].

Both cases were decided in the last years and involve the participation of companies headquartered at the States of the abovementioned jurisdictions in extraterritorial activities. In the first case, the judicial procedure refers to the activity of the company Vedanta Resources Plc ("Vedanta") in the performance of its mining activities in partnership with another company name Konkola Copper Mines Plc ("KCM") in Zambia, whilst the second case references the participation of the company named Nevsun Resources Ltd. ("Nevsun") in human rights violations practiced at Eritrea.

Considering that the national courts involved belong to States that adopt the legal regime of common law, the analysis of the decisions is fundamental to the comprehension of the possible elements of transterritoriality present in their texts.

In a first moment, it is important to highlight that both decisions only recognized the British and Canadian jurisdictions as relevant for the judgment of the requests presented, and as of now there is no decision related to their merits. Although the transterritoriality theory involves in greater measure the aspect related to the analysis of the content of the judicial disputes with connection to the jurisdiction rules, the analysis of both decisions is fundamental regarding the observance of

[56] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 213.

[57] NOLAN, Justine. Mapping the movement: the business and human rights regulatory framework. *In:* BAUMANN-PAULY, Dorothée; NOLAN, Justine (ed.). *Business and human rights*: from principles to practice. Abingdon: Routledge, 2016. p. 70-73. p. 71.

[58] THE SUPREME COURT OF THE UNITED KINGDOM. *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors.* [2019] UKSC 20; SUPREME COURT OF CANADA. *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

the arguments of the judges involved for future exercises connected to the law applicable to these cases.

Accordingly, in the Vedanta case it was possible to extract the comprehension that the rules defining the jurisdiction in the internal context as well as in the context of the European Community Law prevent judicial authorities from receiving lawsuits only when it is proven that there is no abuse by the foreign litigators. Its opening, therefore, may be considered positive under the prerequisites of the transterritoriality theory, which does not perceive the jurisdictional search only with the purpose of allowing the occurrence of any lawsuits, but that the judicial analysis of jurisdiction rules are extensive enough in order to avoid misapplications and allow the assurance of access to justice to the victims of abuses committed by companies in their extraterritorial operations whenever their participation and their negligence in acting in conformity with the protection of human rights and the environment is proven[59]. One can realize, when analyzing the decision, that this was the perspective of the judges from the British Supreme Court in the Vedanta case[60].

Despite no express mention to the centrality of the suffering of victims in the decision parting from the terminology described by judge Cançado Trindade in his decisions at the Inter-American Court of Human Rights[61], it is possible to see the concern of the magistrate with regard to the success of the lawsuit proposed by the Zambia victims, along with the difficulty of access to justice concerning the reparation procedures by them envisaged, which allows us to observe such judgment even under a transcivilizational perspective[62].

In *Nevsun Resources Ltd. v. Araya, 2020 SCC 5* case, conversely, the copper and zinc mine where Eritrean workers were submitted to forced labor was the property of the Canadian company Nevsun (which detained 60% shareholding participation). Hence, differently from the case presented before, the need to prove the existing correlation in the extraterritorial participation was not as pressing.

In this case, too, the complaint by the victims occurred beyond the violation of internal rules of the Canadian State and of its State of origin, but mostly with connection to the violation of the customary law of prohibition of torture and of inhumane and degrading treatment. In this respect, the decision also brings forth the importance of the imperative of human rights' protection, reaffirming the need for analyzing the case also considering the international customs:

> Modern international human rights law is the Phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed[63].

Furthermore, it is significant to call attention to the recognition, by the Canadian judicial authorities, of the role of corporations in the international society and especially concerning the protection of human rights and the *jus cogens* status of crimes such as forced labor, slavery, cruel, inhumane and degrading treatment, on top of crimes against humanity – notwithstanding the same Court affirming that the recognition of connection of such crimes to the *jus cogens* category should not happen at first with regard to facts which occurred extraterritorially.

Even if this is a decision aimed only at the analysis of the possibility of the merits of the lawsuit being as-

[59] THE SUPREME COURT OF THE UNITED KINGDOM. *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors*. [2019] UKSC 20. Paragraphs 49 to 55.

[60] THE SUPREME COURT OF THE UNITED KINGDOM. *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors*. [2019] UKSC 20. Paragraph 29.

[61] INTER-AMERICAN CORT OF HUMAN RIGHTS. *Case of Blake v. Guatemala*. Série C, n. 36. Decision of 24 january 1998. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_36_ing.pdf. Access on: 17 oct. 2018; INTER-AMERICAN CORT OF HUMAN RIGHTS. *Case of Villagran-Morales et al. v. Guatemala***.** Série C, n. 63. Decision of 19 november 1999. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf. Access on: 17 oct. 2018; INTER-AMERICAN CORT OF HUMAN RIGHTS. *Case of Bámaca Velásquez v. Guatemala*. Série C, n. 70. Decision of 25 november 2000. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf. Access on: 17 oct. 2018; INTER-AMERICAN CORT OF HUMAN RIGHTS. *Case of Ximenes Lopes v. Brazil*. Série C, n. 149. Decision of 4 july 2006. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf. Access on: 17 oct. 2018.

[62] THE SUPREME COURT OF THE UNITED KINGDOM. *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors*. [2019] UKSC 20. Paragraphs 87 to 95. In this sense, see YASUAKI, Onuma. *Direito Internacional em perspectiva transcivilizacional*: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI. Belo Horizonte: Arraes, 2016.

[63] SUPREME COURT OF CANADA. *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

sessed by Canadian courts, such excerpts by themselves demonstrate a milestone in the discussion about business and human rights regarding violations committed outside the national territory.

In the same way as in the previous decision, the risk of a trial in Eritrea not being carried out -and hence violating the victims' access to justice - was also considered in the Nevsun case, proving that, at least regarding the discussion about the possibility of States that follow the common law legal regime recognize the broad aspect of their jurisdictional rules, the theory of transterritoriality has been applied. However, it remains to monitor the developments of such cases regarding the analysis of their respective merits so that it is possible to verify whether the other assumptions presented in the transterritoriality theory (i) are present; and (ii) whether they will be a differential in holding companies accountable for human rights violations.

5 Conclusion

There are a great number of well-known empirical obstacles to the development of transterritoriality, chief among them the notion that international society is hardly likely to reach a consensus on the issues posed herein, nor will the concrete impulses required to drive change of this nature exist in the short term[64] - as well as the fact that a theory of this nature would still have the State as its starting point[65].

One of the most obvious obstacles is that legal operators would push back on the political and legal fronts. As Torelly states, the so-called dual positivity of fundamental rights also depends on the "judiciary's inclination to enforce international human rights law and emerging global norms"[66]. Laurence R. Helfer also notes that even if these matters are eventually tried by international courts, much of their jurisprudence consists of cases concerning shortcomings in the judiciary powers of these states, such as long delayed judgments lacking cogent grounds[67].

Finally, regardless of the origin of rules, whether domestic or international, they will have their strength and reach measured precisely by the extent of their enforcement[68]. Therefore, awareness of the norm by those interpreting and enforcing it and the organization of spheres of activity with sufficient recruitment and training of agents is key to success for the theory of transterritoriality.

This mechanism will certainly require enhancements in the future, particularly in relation to: (i) individuals acting on behalf of States accepting the fact that the participation of these subjects in international society is no longer restricted to exclusive observance of rules formulated in their own territory; (ii) recognizing that globalization is also a reality for cases submitted to analysis by domestic and international judiciary powers (for truly shared problems) and that personal, political and judicial interconnections will no longer be like those of modern times - thus foregoing the territorialism present on those occasions; (iii) the comprehension of the centrality of a victim's suffering is necessary presupposition for both fundamental rights and international human rights law; there is no longer any sense in developing a jurisprudential framework (international and domestic) that disregards this reality in cases of human rights violations committed by companies, thus confirming the urgent need for theories that further analyze this interrelationship; (iv) the comprehension of the hierarchical unity of global norms while rejecting projections that attempt to homogenize beliefs and interpretations typical of hierarchical processes of shaping international law; (v) the analysis of the bases of transterritoriality and their applicability to the particularities of each of the domestic judicial systems that comprise international society; and last but not least, (vi) basic education for lawyers, judges, academics and legal operators to enforce the above theory properly wi-

[64] KRASNER, Stephen D. The persistence of state sovereignty. *In:* FIORETOS, Orfeo (ed.). *International politics and institutions in time*. United Kingdom: Oxford University Press, 2017. p. 54; DOUZINAS, Costas. *O fim dos direitos humanos*. São Leopoldo: Unisinos, 2009. p. 140.

[65] TEUBNER, Gunther. Global bukowina: legal pluralism in the world society. *In:* TEUBNER, Gunther (ed.). *Global law without a state*. Aldershot: Dartmouth, 1997. p. 9.

[66] TORELLY, Marcelo. *Governança transversal dos direitos fundamentais*. Rio de Janeiro: Lumen Juris, 2016. p. 12.

[67] HELFER, Laurence R. Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the european human rights regime. *The European Journal of International Law*, v. 19, n. 1, 2008. p. 158.

[68] NOLAN, Justine. Mapping the movement: the business and human rights regulatory framework. *In:* BAUMANN-PAULY, Dorothée; NOLAN, Justine (ed.). *Business and human rights*: from principles to practice. Abingdon: Routledge, 2016. p. 38.

thout distorting its premises to the detriment of victims in particular.

However, as the studied cases demonstrate, it is possible to investigate such assumptions from the presented theory, regardless of the existence of a treaty on the subject. Even if the abovementioned decisions came from States under the common law legal regime and did not effectively deal with the merits of the respective demands, the premises of the transterritoriality theory can be evaluated in cases decided in jurisdictions under the civil law legal regime - which will be the object of future works. What matters at this first moment is the understanding of the strength of the theory of transterritoriality for the discussions on the accountability of companies for human rights and environmental violations, guaranteeing the imperative of planetary sustainability beyond the rules of international law related to the binding (or non-binding) character of its rules.

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