

NEW INSTRUMENTS FOR HUMAN RIGHTS PROTECTION IN GLOBALIZATION

ANA M. OVEJERO PUENTE*

Abstract: The Ruggie principles have given new impulse to the process of developing and modernizing International Law through the influence of human rights. However, this process has been developed as “soft law” measures included in the corporate social responsibility activities of multinational companies, which academic opinion deems has lessened the capacity of human rights for transforming international law into more effective and truly binding instruments to avoid abuses against human dignity. This issue has prompted a debate concerning the role of multinationals as subjects of international law, and the advisability of returning to more traditional and conservative approaches to governance of globalization and to effective protection of human rights from risky business activities. However, thanks to Common Law traditions, this model may be transformed into binding rules, using the legal tools of private Law. This reveals the utility of such soft Law regulations in creating cultures of respect useful when rule of law is weak to rule relations between states, companies and people, that arise from the actions of private individuals rather than the activity of public law-making institutions.

Keywords: Human Rights protection, globalization, multinational companies, governance; International Business, social responsibility, soft law regulation, hard law regulation, Common Law tradition.

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1. INTRODUCTION

One of the consequences of the late capitalist system, developed at the end of the 20th century in globalized environments, is the states’ loss of economic control and, consequently, the loss of their executive powers to enforce national systems of human rights guarantees with regard to companies’ international economic transactions, whether financial or commercial, and which, in principle, fall under the state’s jurisdiction.

The Rule of law Principle is conditioned by the lack of international regulations that enable national systems to effectively overcome territorial boundaries, and to expand national human rights guarantees beyond national frontiers in cases of abuse of power or violations on the part of corporations and multinational companies when developing economic or commercial relationships within third countries. Therefore, many authors argue that globalization has crippled national states as effective guardians or custodians

* Universidad Carlos III de Madrid, Spain (aovejero@der-pu.uc3m.es)

of their citizens' essential human rights, while weakening the traditional legal instruments used to enforce human rights laws and regulations in these guarantee systems.¹

Non-governmental organizations (NGOs) defending human rights maintain that it is very difficult for states, acting within the limits of their jurisdiction, to control the international behavior of multinational companies and corporations, which although based in their territories, operate in different jurisdictions along their value chains. In many cases, and no matter their size, multinational companies take advantage regulatory differences among countries to avoid regulatory constraints that increase business costs. Protectionist rules mean higher costs for producing, distributing or selling products or services. Companies pursue the highest efficiency for their business and therefore seek to reduce the cost of social insurance of workers, production costs resulting from compliance with occupational health and safety regulations, or simply taxes on business profit.

These NGOs have also frequently criticized companies' use of economic and commercial globalization to ensure their impunity in actions brought for rights violations.

The political and legal debility of states faced with the phenomenon of economic globalization, especially in developing or underdeveloped areas in need of foreign investment for their own economic growth, and the worldwide weakening of generous implementation of the rule of law principle has resulted in lacunae in state legislation that are used by multinational companies to circumvent their legal responsibility to abide by compliance standards and respect the most basic human rights. In fact, many of the most significant human rights abuses of the last decade were committed by multinationals.

In response to this situation, the international regulatory framework, created first by the Global Compact initiative and later by the Ruggie Principles, provide models for behavior, habits and good business practices that respect fundamental rights, and that transcend the logic of "subjection to the norm" imposed by law and classical legal theory.²

This new internationalized reasoning mainly affects rules of the economic-business world and explains, from more flexible positions, the rights and duties that must govern the peaceful coexistence of society. Private commitment to respect rights is more effective than their being legally imposed by the state, especially the state's power of enforcement is weak. The new international, technological and globalized world has generated a de facto transfer of power from the realm of politics to the economy, creating a new conceptual framework and new human rights regulations, which particularly influences international economic and business relations. However, the set of norms that affects social relations between citizens and companies likewise indirectly affects the relation between multinational companies and states, and of course the relationship between citizens and the state. We cannot ignore that social models depend on economic development.

¹ MARTÍN, Olga. *Empresas multinacionales y derechos humanos en Derecho Internacional*. Bosch 2007

² See MACCORMICK, Neil. *Legal reasoning and legal theory*. Clarendon Press, 1994, and HILL, Jonathan. *Comparative law, law reform and legal theory*. Oxford J. Legal Stud., (1989), vol. 9, (p. 101)

Companies are assuming obligations to human rights in all of their headquarter operations, as well as in their value chains, wherever they are, by means of soft law tools, through internal policies, or through public commitments with clients, consumers and other stakeholders. Companies are able to overcome the limitations of traditional jurisdictions by respecting their own voluntarily accepted commitments.

In this sense, companies' soft law provides a new way of creating rules and norms that are useful in a globalized world, despite being far removed from international law and the traditional national law-making process. These new systems, which are already being applied with relative success and are transforming the definition of human relations and the design of operating rules in globalized markets, offer us a new theoretical approach to reconsider how to order complex globalized contexts. In any case, any new form of regulation of globalization must have the same objectives and limits as the traditional systems. These are, basically, respect for human rights and human dignity and access to effective remedies in the event of abuse or damages resulting from violations.

2. GLOBAL COMPACT, RUGGIE PRINCIPLES AND THE NEW FRAMEWORK FOR A MORE EFFECTIVE INTERNATIONAL SYSTEM OF HUMAN RIGHTS PROTECTION

Since the adoption of the United Nations Charter and the Universal Declaration of human rights (UDHR) by the UN General Assembly, human rights (HR) have provided an engine for the innovation and transformation of modern international law, being an “undeniable dimension of change and transformation in international law” as professor CARRILLO said.³

After World War II, human rights were unanimously accepted as universal values and essential instruments for managing relationships between states and individual citizens. Human rights are erected as limits to the exercise of the state powers, and as the ends that justify the actions of the state. Citizens, in whom these inalienable rights are vested and for which they may legally demand compliance, have been placed at the center of international relations, ceasing to be a mere object of international law to become the protagonist of the international order.

Respect for human rights has transformed the consideration and reputation of states in an international context. The countries most protective of human rights become the most respected within the international community of states: a “quality criterion” for modern international relations.

The criterion of “force” finds its ability to influence international relations among states diminished and ceases to have international coverage if used to threaten human rights.

³ In CARRILLO SALCEDO, “Derechos Humanos y Derecho internacional”, in *ISEGORIA Revista de Filosofía, moral y política*, No. 22 (2000) (pp. 69-81)

The ability of states to respect human rights transforms the concept of the utility of international relations and, of course, the interpretation of the application of International Law.

This conceptual revolution affected the basic organization of international relations in the second half of the 20th century. Citizens appeared on the scene as new actors, able to interact directly with states, thanks to rights recognized in international treaties and protected by international agents, tribunals or commissions, outside of the state itself, and beyond what the state's own legal system and often its constitution would recognize. States under international rights-protection organizations recognized persons under their jurisdiction and under the jurisdiction of other states as subjects of international rights. And they quickly introduced those guarantees into their own constitutions or constitutional systems. The recognition of rights on the part of other states protects citizens from the abuse and/or arbitrariness of their own national authorities, even beyond the extent of any positive legislation that their country may have.

Human rights law, which was created only to regulate relations between states, has also affected the legal structure of international law. The theoretical bases of international law have had to be adapted to individuals who are now active agents of international law, able to act in favor of their own individual interests, different from those of the state. International law, which until the second half of the 20th century maintained its elemental inter-state structure, had to generate new tools to include people as subjects of international relationships. This resulted in the creation of international means to enable direct relations between persons and international institutions,⁴ ending the former exclusively inter-state legal structure.

The human person is seen as a full subject of international law, including his or her globalized or internationalized human relations, which is a new individual perspective for international law, concerning specific people and far removed from the traditional international regulatory plan for national communities, which affected thousands of citizens at once, in the "mass" management of intra-state relations.

Sovereign states, which created international law for themselves to organize their relationships, ceased to be the only subject of human rights and, therefore, the rules of international law regulating the powers and obligations of human rights can no longer be imprecise, increasing their legal content and ensuring greater certainty and legal security for people, who are now aware of their rights and how they can be protected. Human rights law is one of the roots of the transformation from classical international law to contemporary international law, according to legal scholarship.⁵ This implies evolving

⁴ In CARRILLO SALCEDO, "El sistema internacional de los Derechos Humanos y la globalización", en *El Derecho internacional humanitario ante los retos de los conflictos armados actuales*. Marcial Pons, (2006).

⁵ CHEN, LUNG-CHU. *An introduction to contemporary international law: a policy-oriented perspective*. Oxford University Press, (2014).

from liberal international law, decentralized and based on the oligopolies and leading states, to institutionalized, social and democratic international law.⁶

This change is reflected in many international and regional human rights protection instruments, although it doesn't have the depth required to constitute a true theoretical category. Even today, states continue to be the prevailing subjects of current international instruments, and principles of mutual respect for national sovereignty or decentralization of the international legal system are maintained in the benefit of national economic interests. The international system of human rights does continue to recognize fundamental rights of the people against abusive or arbitrary action of the state. But it is the state that must generate the instruments and resources (at the national or the international level) to make those rights real and effective. Even the most current international treaties define obligations of the states as "obligations of outcome," regardless of their actions, applying general principles such as the sovereign equality of states, the notion of national sovereignty, or the principle of non-intervention in home affairs as valid sources of international law. The infringement of rights is essentially considered an internal matter falling under the jurisdiction of each state (paragraphs 1 and 7 of Article 2 of the United Nations Charter).⁷

The emergence of the regional treaties for human rights protection intensified this transformational trend. First, because the multilateral action of these institutions intensifies and complements the states' protective measures. And, secondly, because these new organizations are endowed with political powers capable of limiting the powers of the states, thus further preventing or avoiding human rights abuses.

The state has ceased to be the exclusive guarantor of fundamental rights. Citizens have international tribunals where they can seek remedies when the states fail. The European system of human rights protection, embodied in the European Convention on human rights is, certainly, the instrument that has had the most significant impact in this change.

The creation of the ECHR and the imposition on all signatory states of the obligation to "abide by the final judgments of the Court in disputes to which they are parties" (art. 46.1 ECHR) reflects the imperative nature of the European system as an international collective guarantee of the rights of those persons under the states' jurisdiction. And this includes not only their nationals, without imposing conditions of reciprocity, and regardless of the conduct of the other member states. The Rome Convention established "a new objective order" based on the respect for human right, in which the degree of compliance of other member states or bilateralism are irrelevant, extending beyond the principle of reciprocity. In addition, the Convention adds another new element which also has significant impact

⁶ GÓMEZ ISA, Felipe, et al. *International Human Rights Law in a global context*. Universidad de Deusto (2014). MARQUEZ CARRASCO, Carmen. "Las Relaciones entre el Derecho Internacional y la práctica Interna en el ámbito de los Derechos Humanos y la responsabilidad de las empresas". *Anuario Español de Derecho Internacional*, (2018), vol. 34, (p. 707).

⁷ LÓPEZ-JACOISTE, "Los principios rectores de las Naciones Unidas sobre las empresas y los derechos", at FERNÁNDEZ LIESA, Carlos R.; LÓPEZ-JACOISTE María Eugenia. *Empresas y derechos humanos*. Thomson Reuters Aranzadi, 2018

and disregards traditional conceptions of international law: the possibility for individuals to file individual claims. It is now possible to sue the states directly for non-compliance with international conventional obligations.⁸

In the beginning, when the Convention entered into force, the possibility of filing individual claims was lawsuits was limited by the fact that individuals did not have standing at the Strasbourg Court. Individual claims had to pass the filter of the European Commission of human rights which, together with the signatory states, had the power to decide which matters would be admitted. The right to file individual claims was firmly recognized in the reforms introduced in 1998 in Protocol 11, acknowledging the standing of those who considered themselves victims of human rights violations.⁹

This powerful system of individual protection initiated by the victim himself is the one that most decisively transformed international law at the beginning of this century. It operates with its own normative instruments, with courts and independent international institutions of protection, and with powerful instruments to guarantee enforcement (for example, tools for executing international judgments, or requiring compliance with these instruments as a requisite for access to organizations of regional integration, etc.),¹⁰ enabling individuals to be active subjects of international law. However, it is still understood that the state is the only “possible hypothetical violator” of human rights and therefore the entity only responsible for actions or omissions, capable of injuring the rights of individuals.

The same applies to the Inter-American system of human rights, whose signatories are members of the Organization of American states (OAS), and which has the Inter-American Court of human rights to determine the international responsibility of states, through the application and interpretation of the American Convention on human rights and other system instruments.¹¹

The system is culminated by the incorporation of international human rights law in national constitutional texts or national constitutional systems, and through the integration of national constitutional and international systems for the protection of fundamental rights. In both the European monist systems and the dualist English- Commonwealth systems, international human rights law is part of the states’ internal legal order, either being automatically incorporated, as provided in article 10.2 of the Spanish Constitution,

⁸ SAIZ ARNAIZ, Alejandro, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española*. Consejo General del Poder Judicial, Madrid (1999).

⁹ In QUERALT JIMÉNEZ, Argelia, *La interpretación de los derechos: del tribunal de Estrasburgo al Tribunal constitucional*, Centro de Estudios Políticos y constitucionales, Madrid (2008).

¹⁰ See in that sense, CARRILLO SALCEDO, “Soberanía de los Estados y Derechos Humanos” en *Derecho Internacional contemporáneo*, Tecnos (2nd ed.), Madrid, (2001). SAP, Jan Willem. “The Role of Human Rights in Setting the Boundaries of Sovereignty and the Autonomy of the EU Legal Order”. *Amsterdam Law Forum*, (2017), vol. 9, p. 48.

¹¹ A BURGORGUE-LARSEN, Laurence. *El sistema interamericano de protección de los derechos humanos: entre clasicismo y creatividad*. IREDIES, Paris, (2009), “La Corte Interamericana de Derechos Humanos como tribunal constitucional”, BOGDANDY, FIX-FIERRO, H. and MORALES ANTONIAZZI, M., coords. *Ius Constitutional Common In Latin America. Features, Potential and Challenges*. UNAM, Mexico (2014), (p. 421-458).

or through the national court's application of human rights case law, as essential principles of the "law of the Nations".¹²

In short, the protection provided human rights in these international instruments has transformed the foundations of classical international law, removing or surpassing the jurisdictional barriers and the principle of non-external intervention imposed by the traditional theory of classical public international law. However, the process is not over since, given the profound changes that have been introduced, including the constitutional integration of human rights law, these modern systems continue to entrust states with the preeminent role of protecting rights and exclusive responsibility in the event of infringement, despite the fact that, recently, the most significant human rights violations have not been committed against citizens solely by direct actions of the states, but also by the commercial activities of multinational companies seeking more favorable regulatory spaces for maximizing economic profit.

The international system of human rights protection does not react quickly in such cases, since it is very difficult to demonstrate the responsibility of the state in the injuries inflicted by companies, and because national legislation does not envisage international mechanisms of control and compliance for multinational companies. The same may be said from a constitutional perspective: constitutional systems mandate that national law and national resources have the obligation to monitor and control companies, with the difficulties that this entails when companies operate internationally.

However, global society demands tangible results in protecting, or at least in compensating, people or communities for abuses generated by the operations of corporate enterprises, whatever the theoretical legal responsibility of states may be in regulating or overseeing their activities. Human rights, that were conceived in the nineteenth and twentieth centuries as protection for personal dignity and the individual's autonomy when faced with arbitrary action of the part of the state, are left unprotected from the commercial activities of multinational companies that abuse economic positions of power when operating in weak states that are incapable of enforcing their own rights-protection regulations, or where local regulations apply different standards of defense, allowing for actions that violate rights or obstruct national or international controls.

It is this new reality, the emergence of multinational companies as subjects of international law, that is driving a new stage in the evolution of human rights protection, which will surely translate in a new stage in the development of international, having significant consequences for global governance and the creation of new legal instruments for managing global coexistence and human rights protection.

3. MULTINATIONAL COMPANIES AS SUBJECTS OF INTERNATIONAL LAW

In the configuration of national and international social reality created by economic globalization, states and individuals coexist with other relevant actors: multinational

¹² ROBERTSON, Geoffrey. *Crimes against humanity: The struggle for global justice*. The New Press, (2013).

companies that globally meet people, customers, workers, consumers, suppliers, etc. They can escape compliance with national protective legislation, taking advantage of the jurisdictional limits of national legal orders in international contexts, and can avoid applying international standards of rights protection, benefitting from their invisibility as subjects of international law.

Multinational companies have not recognized their status as legal international subjects in an autonomous manner, nor they have been directly registered as subjects of international obligations and rights. This status is recognized for natural persons, but not for legal persons. Therefore, the mandates of human rights instruments must be imposed on them through the state's intermediary intervention. It is this intermediation that limits preventive capacity and the control of accountability of multinational enterprises operating and developing their business simultaneously in different countries, when committing abuses or violating human rights. Explanations of this phenomenon have been proposed by several authors, who see it as a consequence of the commonly-held conception of the effectiveness of human rights, applied since the mid-20th century. The idea is that human right protection is only effective in vertical relationships between citizens (the rightsholders) and the state. Human rights protection is deployed vertically.

In other words, human rights define how the state should act in relation to its people, preventing the acts of public authorities from negatively affecting their dignity. Dignity is defined from the perspective of rights recognized to individual persons.

As a result, states are the only institutions bound by obligations arising from human rights precepts, and therefore they are the only ones that must take measures to prevent the violation of human rights on the behalf of third parties, or to ensure that those rights effective in relationships between individuals (what we call “horizontal relationships”).

International law does not recognize the direct horizontal effect of fundamental rights—known as the *Drittwirkung* theory—¹³ or the direct effect of human rights in private relations. In international law terms, rights in private relationships between individuals is mediated by law. Using its legal or judicial instruments, the state has to determine how people should act among themselves and prevent violations of human rights in private relations. The legal order controls the actions of companies, corporations, institutions, etc., in businesses that may offend individual dignity. But what happens if this protective legislation doesn't exist? Or if existing regulations are not effective or powerful enough to be enforced against global economic or commercial global entities?¹⁴ In the absence of legislation, companies may impose their business criteria or interests, even when they may violate fundamental rights.

¹³ Theory suggested by the German judge Hans Carl NIPPERDEY in *Grundrechte und Privatrecht*, Sharp, (1961).

¹⁴ The debate on the vertical and horizontal conception of fundamental rights is described masterfully in BILBAO, JM, *La eficacia horizontal de los derechos frente a los particulares. Análisis de la jurisprudencia del TC*, CEPC, Madrid (1997).

Academic opinion generally maintains that the submission of private law subjects to human rights law can only be achieved in the national legal orders. The state (understood as the legislative, judicial and executive powers working for the general interest) can transform general human rights obligations into specific rules, norm or precepts to address specific private situations and can establish effective mechanisms of reparation in case of injury. Indeed, law is the mechanism that orders private relationships, developed through private contracts.¹⁵

If either party breaches its duty to perform the obligations set forth in a contract, contract law provides damages to the injured party. If either party abuses its superior position, contract law establishes equity mechanism. Contract law sets limits on the autonomy of the parties to a contract in order to protect the elemental principles of public policy, national security, democracy, etc., and human rights.¹⁵ Therefore, there is an indirect link between companies, corporate international organizations, etc. to human rights law, and consequently, it is the law of state and the judges applying the law that determines how companies should act in respect of human rights obligations, what they can and cannot do, and what liability is incurred in the event of infringement or violation of human rights, as well as which are the reparation mechanisms imposed in the event of violations. The normative structure underlying the concept of contract or private relationships is basically and essentially a liberal conception of private autonomy. Contract law sets limits on unequal power relations between contracting parties, ruling in favor of the notion of equal respect *inter-partes*. In that regard, the principle of non-exploitation may include the protection of human rights as on contractual autonomy, and the idea of fairness inherent in contracts. Problems arise when contract law fails to include limits on the autonomy of contracting parties, enabling abuse of an unfair or unequal position and, thus violating the human rights of one of the parties.¹⁶

At any rate, and according to this conception, companies would not have the obligation to respect human rights imposed directly by any international treaty. And in the absence of any protective contract law, there is no limit to their autonomy to enter into agreements with third parties, based on human rights protection or respect.

It is the state that is obligated to protect the people from damages caused by the activities of private entities and, therefore, it is the state that assumes indirect liability for injuries committed by companies. The state must impose obligations on enterprises or

¹⁵ Contract law imposes duties on parties who enter into an agreement (contractual relationship) as the essential tool for organizing private relationships. Within this agreement, both parties are expected to act reasonably toward one another. If either party breaches their duty to perform the terms of the contract, contract law provides damages to the injured party. Typically, damages are awarded with the intent to restore the injured party to their positions before the breach occurred, or as if the contract had been performed.

¹⁶ Under tort law, members of a community are expected to act reasonably toward everyone else within the community. Tort law is based on the premise that people are liable for their actions. If someone's careless actions injure another person, they may face consequences—whether their actions were intentional or accidental. Tort law aims to compensate victims for any injuries or damages suffered by the unreasonable acts of others. See in detail the explanation of this theory in GUTMANN, Thomas. "Theories of Contract and the Concept of Autonomy". *Münster: Zvi Meitar Center for Advanced Legal Studies*, (2013).

limit their autonomy through the exercise of the legislative power; the state must ensure compliance with such legislation through administrative mechanisms; and the state must investigate and provide resources for the administration of justice in order to determine responsibilities and demand proper reparation in the event of a violation.

Companies only acquire indirect obligations that are materialized through the action of the state. As noted by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case (IACHR judgment of 29/7/1988), the responsibility of states is not for the violations committed by a private agent, but for their own failure to take the necessary measures to prevent the violation or to require the effective repair of that violation. The control and protection provided by international instruments is activated against the state in which the affected collective or the victims are located. International liability is not imposed to the companies. It is a reaction against public authorities, who are incapable of guaranteeing respect for human rights; who are unable to remedy the damage caused by the intervention of national courts; or that have increased the harmful consequences of the injury, for example, by preventing or hindering the victims' access to a fair trial. The doctrine of the "indirect responsibility of the state" is also widely endorsed in the case law of the European Court of human rights (ECHR) in cases such as *X and Y v. The Netherlands* (1985), or *Osman v. UK* (1998), and is directly reflected in recent international texts, such as Article 3 (4) of the Optional Protocol to the Convention on the Rights of Children, on the Sale of Children, Child Prostitution and Child Pornography,¹⁷ or the United Nations Convention against Transnational Organized Crime.¹⁸

However, the application of this doctrine causes the international system of human rights protection to fail when there is no applicable law, when a judge does not sufficient means for enforcing the law, or when law enforcement is made impossible by the application the principles of sovereignty and jurisdiction. Situations, all them very common in underdeveloped countries, with low levels of respect for the rule of law.¹⁹

From an international perspective, indirect responsibility theories have been transformed into the generally accepted "principle of subsidiarity". Accordingly, international protection systems, including the most advanced as the European or American system, apply this principle in the protection of rights at the international level (art. 35.1. ECHR and 2 of the ACHR).²⁰ This means that, in the event of a human rights violation on the part of a company, neither the ECHR nor the Court of San José can act on their own to halt or repair injuries committed by private entities. International courts may only intervene once the individuals concerned have requested the protection of their national

¹⁷ Resolution A/RES/54/263 of May 25, 2000. Entry into force on January 18, 2002

¹⁸ General Assembly resolution 55/25 of 15 November 2000 and General Assembly resolution 55/255 of 31 May 2001.

¹⁹ The World Justice Project (WJP) is an independent, multi-disciplinary, non-profit organization that works to promote the rule of law around the world and Quand annually elaborates a rule of law index (WJP rule of law Index). It is an initiative of the American Bar Association (ABA), and it has the initial support of 21 strategic partners.

²⁰ See, VARGAS VERA, "La aplicación del Principio de Subsidiariedad en la jurisprudencia de la Corte Interamericana de Derechos Humanos: avances y retos", en *Revista Iuris Dictio* N° 21 (2018), (p. 99- 109).

public authorities, including national courts, and when this protection has been denied, has proved to be insufficient or has failed to comply with the obligation to effectively protect the rights guaranteed in international treaties. In the case of violations of rights arising from business activities, protection must be sought from the state, through the fair judicial process. The principle of subsidiarity requires exhausting internal remedies as the primary and priority source of protection, prevention or remedy of alleged violations of international Conventions.

The principle of subsidiarity is key in all conventional systems and presupposes healthy internal legal systems, with effective means of recourse and reparation against the violations of rights by private persons or companies. The existence of such resources must have “a sufficient degree of certainty, not only in theory but also in practice, because otherwise they would lack the desired efficiency and accessibility” (*ECHR in McFarlane v. Ireland* (2010)).

But what happens when national remedy systems are not effective vis-a-vis private companies operating in different countries, covered by different standards of human rights protection? What happens when it is difficult for victims to determine the applicable law and to determine which state is truly responsible where a claim should be filed?

The international structure created “by” and “tor” guarantee human rights runs the risk of becoming merely theoretical, since it is actually only effective when it is applied in states where there is an acquired status and an acceptable level of application of rule of law standards. For the rest, internal systems and international protection systems are de facto inapplicable to enterprises. In the first case, due to a lack of resources. In the second case, because companies are not considered to be subjects of international law.

The general acceptance of the theory of “vertical efficiency of Human rights”, the doctrine of “indirect accountability” and the principle of subsidiarity explain the inability of traditional international systems to enforce human rights against breaches produced by companies, or private individuals.

The human rights and business movement, stemming from the UN’s recognition of the conceptual framework “UN Protect, Respect and Remedy: A framework for business and human rights” (A Doc A/HRC/8/5 (7/4/2008) and the “Ruggie Principles”(2011) seek fill this void, offering new means of improving human rights protection in the face the new globalized economic powers,²¹ regardless of the level of protection that national states can guarantee and regardless of the levels of internal application of international law.

²¹ The “Guiding Principles on Business and Human Rights: Implementation of the United Nations Framework for Protecting, Respecting and Remediating” were drawn up by the Special Representative of the Secretary-General for the question of human rights and transnational corporations and other enterprises. The Special Representative attached the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), including an introduction to these principles and a summary of the process that led to its preparation. The Human Rights Council endorsed the Guiding Principles in resolution 17/4 of 16 June 2011. See in that regard, OVEJERO PUENTE “Los principios Ruggie y el nuevo marco de referencia de Naciones

This a regulatory but non-normative acquis which introduces, through recommendations and self-regulation guidelines for enterprises, new good governance “duties”, or due diligence responsibilities, which contribute to the sustainability of the business. These references and good practices are not legal human rights protection obligations in the horizontal relations of the company with the third parties (whether customers, consumers, workers, suppliers, etc.), but rather impact the quality of multinational companies’ business. They don’t affect the vertical relationship between companies and states, nor the legislative capacity or intermediary function of the latter.

As specified in paragraph II of the Spanish National Plan for Human Rights and Business (2017),²² these guiding principles are characterized by the following: a) they are applicable to all states and all companies, both transnational and national, regardless of their size, sector, location, ownership or structure; b) they do not create new obligations under international law, or limit or weaken existing obligations under constitutional or international law; c) they should be applied in a non-discriminatory manner, paying particular attention to the rights and needs of individual members of highly vulnerable or marginalized groups, and risks involving gender discrimination.

The Ruggie framework considers multinational companies as the main objective of these international instruments, together the with states, although, it is not itself a legal instrument.

Nevertheless, this regulatory framework notes that international law, as previously understood, and the traditional international legal instruments that we have been using to organize international coexistence are insufficient. Personal, commercial and labor relationships that arise as a result of globalization and through the application of information and communication technologies have surpassed the ideas on which traditional international law was based. For that reason, other mechanisms are needed to effectively achieve the same objectives.

At the theoretical level, the definition of the human rights to which multinational companies must respond is clear: those contained in the Universal Declaration of Human Rights; in the International Convention of Civil and Political Rights; in the International Convention of Economic, Social and Cultural Rights (resolution 2200 A

(XXI) of 16 December 1976); and the ILO Conventions (Freedom of Association and Protection of the Right to Organise Convention, 1948; Right to Organize and Collective Bargaining Convention, 1949; Forced Labour Convention, 1930; Abolition of Forced Labour Convention, 1957; Minimum Age Convention, 1973; The Worst Forms of Child Labour Convention, 1999; Equality of Remuneration Convention (Employment

Unidas”, en *El papel del abogado en la implantación de los principios Ruggie*, (C. I) Tirant Lo Blanch, Valencia (2016) (p. 15-52)

²² National Action Plan for Companies and Human Rights, approved by agreement of the Council of Ministers on 28 July 2017, and published by resolution of 1 September 2017, of the Secretary of State for Foreign affairs.

and Occupation), 1958; and the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up. It is clear what they are and what powers are guaranteed for individuals.

The common interpretation of the case law of international human rights courts and national constitutional courts is clear, thanks to the interpretative unification known as “dialogue among courts”.²³ We also know the limits the companies may respect, and the limits of the companies’ contractual autonomy in their private relations.

It is at the practical level where change must occur. We have to reconsider the effectiveness of the mechanisms by states with regard to the objective of achieving real and effective respect for rights when they are applied to multinational companies’ global activities, and to suggest other international instruments adapted to cross-border environments, capable of verifying and ensuring companies action within their powers, respecting human rights when negotiating or contracting with third parties.

Whether these mechanisms be a new treaty or a new international court, with international jurisdiction to control that actions of companies as direct subjects of international obligations, is also one of the most active debates. However, is clear that in both cases the prior protective instruments have been recognized as unsatisfactory and insufficient. It has also been acknowledged that multinational companies must be considered full subjects of international law, with their corresponding international liabilities. The Ruggie Principles and the whole regulatory framework that they implement, are precisely based on the assumption that human rights law is directly inapplicable to corporations and that national governments face limitations when implementing national instruments to effectively protect the human rights of the persons under their jurisdiction.

4. THE ROLE OF GOVERNMENTS AND COMPANIES IN THE DEVELOPMENT OF NEW PROTECTION INSTRUMENTS

4.1. On the side of the states

The development of new instruments on the behalf of the state has accelerated in the first decade of our current 21st century, as a result of the international economic crisis of 2009. Civic and social movements in defense of the fair governance of globalization, such as the World Social Forum (Porto Alegre 2012 and 2013), and the global movement of business ethics born during the World Economic Forum (Davos Forum) of 2011, placed the debate about the governance of globalization on the public agenda. Human rights law was reconsidered as key configurating instrument of international peace and social progress. Consequently, the need to redesign the role of multinational companies and governments and their responsibility towards the global society has raised, as well as their

²³ BURGORGUE-LARSEN, Laurence; MONTOYA Céspedes, Nicholas. “El Diálogo Judicial entre la Corte Interamericana de Derechos Humanos y la Corte Europea de Derechos Humanos” en. BANDEIRA, URUEÑA, TORRES PÉREZ, (coordinadores). *Protección multinivel de derechos humanos. Manual*. Red de Derechos Humanos y Educación Superior, Barcelona (2013).

leadership position in the current economic environment, for the protection of human rights.

The states reacted for the confluence of three movements that were already making changes in that regard: the movements in defense of human rights promoted by the NGOs that led public complaints against abusive actions of multinationals; the movements promoting business ethics and theories of corporate social responsibility; and the United Nations initiative, developed from the Global Compact, to search for more effective instruments of human rights protection.

Governments reacted because they were aware of their limitations to implementing national instruments to effectively protect the human rights of the people under their jurisdiction against multinational companies that extended their economic and commercial power in different countries. They were aware of the burden of responsibility that they would assume in all dimensions: economic, social and reputational, for the damage to fundamental rights on the part of multinationals, when applying the traditional principles of international law.

Many governments directly adopted the Ruggie principles through national plans and strategies to provide better mechanisms to ensure that companies in their territories respect human rights, even when acting abroad. However national plans were not legal rules. They were programs that establish public policies aimed at respecting, promoting and protecting human rights, which were adopted from a transversal perspective and for a predetermined period of time. They identified objectives and goals to be achieved, responsibilities and available financial resources, as well as mechanisms for monitoring and evaluation.²⁴

These national plans reflected the commitment of public authorities to protect human rights from negative impact that business might have, providing possible victims with effective remedies. However, national plans have very few resources to use in achieving their projected goals because, as it has been observed, the commitments arising from the implementation of the measures envisaged “are conditional on the existing budgetary availability in each financial year and on the objectives of budgetary stability” and may not provide a net increase in the costs of personnel at the service of the administration. National plans choose awareness-raising measures and incentives for companies that comply internally with the Ruggie framework, rather than any other measure that entail costs for the state’s budget.

To-date the following have approved national plans: United Kingdom (September, 2013, updated in May, 2016), Netherlands (presented in December, 2013), Denmark (presented in April, 2014), Finland (presented in October, 2014), Lithuania (presented in February, 2015), Sweden (presented in August, 2015), Norway (presented in October,

²⁴ 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*, (2017), vol. 17, p. 113-144

2015), Colombia (presented in December, 2015); Switzerland (presented in December, 2016), Italy (presented in December, 2016), United states of America (presented in December, 2016), Germany (presented in December, 2016), France (presented in April, 2017), Poland (presented in May, 2017), Spain (July, 2017), Belgium (July, 2017), Chile (July, 2017), Czech Republic (presented in October, 2017), Ireland (presented in November, 2017), Netherlands (2017) and Luxembourg (2017).²⁵

In the case of Europe, EU member countries have also adopted a general framework, the EU's "Strategy on Corporate Social Responsibility 2011-2014", which is applicable throughout the EU and which seeks to achieve the objectives of the Union on specific human rights issues and basic labour standards, such as child labour, forced labour in prisons, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining. More recent is the "EU Human Rights and Democracy Action Plan 2015-2019", which includes among its objectives progress on human rights protection through different activities to be developed by the member states, the European External Action Service and the European Commission, and initiatives aimed at implementing the Guiding Principles (paragraph II. 18). The actions envisaged include the development and implementation of National Action Plans and other measures affecting the EU's development cooperation policy in which multinational companies should play a more active role.²⁶

In addition to these instruments, and related to the implementation of public policies, some states have also tried taking a purely traditional normative route, integrating the Ruggie principles and its underlying philosophy directly in commercial regulations applicable to multinational companies having headquarters or offices in their territories. In some cases, commercial obligations have been imposed on companies via public audit controls. This is the case of section 1502 of the US Dodd-Frank Act. This Act requires US companies to apply obligations arising from the principle of "due diligence" to their supply chains, even when those supply changes are located outside of US territory. This mandate is particularly focused on those US mining companies operating in developing African countries (such as the Democratic Republic of the Congo, Angola and Sierra Leone),²⁷ but the objective of this regulation is to extend the legal obligations of US companies working abroad beyond the territorial principle.²⁸

²⁵ Updated listing available on the official website <https://www.ohchr.org/SP/Issues/Business/Pages/NationalActionPlans.aspx> January 29th, 2019

²⁶ MARQUEZ CARRASCO & VIVAS TESON *La implementación de los Principios Rectores de las Naciones Unidas sobre Empresas y Derechos Humanos por la Unión Europea y sus Estados Miembros*. (2019).

²⁷ 7% percent of companies reported strong efforts to determine whether they bought minerals that benefited armed groups.

²⁸ See LYNN, David M. *The Dodd-Frank Act's Specialized Corporate Disclosure: Using Securities Laws to Address Public Policy Issues*. J. Bus. & Tech. L., (2011), vol. 6, p. 327. In the opposite position, see SEAY, Laura. "What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy". Center for Global Development Working Paper, (2012), no 284.

In other cases, the regulation of company disclosure obligations or due diligence processes are used to introduce certain elements of the Ruggie principles. The California Supply Chain Transparency Act (2010) is an example that applies this scheme by imposing on California companies and external companies operating in California (wholesalers and retailers) the obligation to disclose their efforts to eradicate slavery and human trafficking from their supply chains, and to reveal the measures they adopt to prevent worker exploitation throughout their supply chains.²⁹

A similar UK law, the Modern Slavery Act, came into force in 2015.

Both USA and UK legislation require multinational companies to publicly report internal actions to protect elementary human rights (fighting against slavery and human trafficking) by activating consumer pressure, with the assumption that the fear of being “named and shamed” will compel companies to do their human rights due diligence. The US Congress is presently considering the Business Supply Chain Transparency on Trafficking and Slavery Act initiative, which would mandate that public companies disclose measures taken to address forced labor conditions to the Securities and Exchange Commission

Spanish law 31/2014, amending the Corporate Enterprises Act for the Improvement of Corporate Governance.³⁰ also establishes new rules of good governance inspired by the Ruggie principles. These are obligations that will help to improve the corporate governance of Spanish corporations, based on transparency and information to third parties, which range from the relations between traded companies and interest groups to corporate responsibility actions, the financial participation of workers, or internal plans and compliance policies. These are measures that apply to all Spanish companies, wherever they are located, and also to foreign companies operating in Spain.

Other countries, such as Brazil, have adopted a more aggressive public complaint policies against companies that do not fulfill their obligations to respect human rights. Brazil publishes a so-called called “dirty list” of firms found to employ (directly or indirectly) forced workers. Blacklisted companies cannot receive loans from state-backed banks, face restrictions on the sale of their products, or any other public promotional measure. The government will remove companies from the list after two years if they have paid all required fines and reformed their labor practices.

The Brazilian Congress subsequently approved on June 5, 2014 an amendment to the constitution providing for the expropriation of property where the work practices akin to slavery had been verified. The law establishes that rural or urban properties of companies where government inspectors discover slave workers will be expropriated without compensation and will be used for land reform or social housing programs, depending on their location. The amendment addresses forced labor, exhaustive working

²⁹ California Transparency in Supply Chains Act (TISCA) 2010.

³⁰ Law 31/2014, of 3 December, amending the Corporate Enterprises Act for the Improvement of Corporate Governance. BOE No. 293, December 4, 2014. Effective December 24, 2014

hours, degrading work conditions or on movement “due to debts owed to the employer”. This 2014 constitutional amendment of 2014 seeks to have a financial—and not just reputational— impact, in order to create strong incentives for companies to better monitor their working conditions.

When held legally accountable for their suppliers’ labor violations, corporations more readily identify, prevent, and mitigate human rights abuses. In 2008 Brazil prohibited children under eighteen from farming tobacco, and subsequently enacted strict penalties for domestic and international tobacco corporations, including foreign companies, whose suppliers used child labor.

Human Rights Watch found that as a result of this, most tobacco companies now require farmers to sign contracts that contain an explicit ban on child labor and mandate financial penalties for noncompliance. Company representatives conduct routine site visits to suppliers to reinforce their zero tolerance policies on child labor. Various European countries, including Finland, Germany, Italy, Spain, and the Netherlands, also punish companies in their construction sectors whose subcontractors fail to meet certain labor standards.

The judiciary has also helped to create new instruments inspired by the Ruggie principles through case law interpretation. For example, applying the prior Alien Tort Act, in February 2012 the Supreme Court of the United States examined under what circumstances foreign employees of American companies can sue their companies in American courts for serious human rights abuses outside of US territory. In such cases, the Ruggie principles become principles of international law, valid for the creation of norms.

Examples in which Ruggie principles provide a source of law are quite scarce. In most states, the public authorities promote internal assessment procedures in companies, or disclosure obligations. In any case, the ability of states to control international economic power and business operations in third countries is very limited, and even more so in developing or economically stressed states. Their capacity to enforce national human rights guarantees in international economic transactions is likewise limited. All of these transparency laws alone will not advance the fight for labor or human rights. Five years after the original California act, fewer than a third of corporations bound by that law actually published all the information they were required to report. Major companies regularly flout supply chain transparency laws. Caterpillar, Hyundai Motor America, and Krispy Kreme Doughnuts have been reported by NGOs as making no effort to evaluate and address human trafficking and slavery risks. And the same applies to compliance with other national regulations.

It has been demonstrated that consumers don’t care about these reputational impacts for multinational companies. A 2014 poll from IPSOS UK³¹ found that British consumers were largely apathetic to labor abuses in companies’ product supply chains. Other corporate practices are more pressing, such as tax evasion, exorbitant executive

³¹ Ipsos MORI’s latest Sustainable Business Monitor at <https://www.ipsos.com/ipsos-mori/en-uk/consumers-vote-their-feet-corporate-tax-avoidance> (visit on Feb, 27th, 2019)

pay and corruption. Consumers value corporate transparency, but they don't use this information to demand changes.³²

It is clear that corporate transparency alone will not change how firms do business vis- a-vis human rights principles. Governments must hold companies legally accountable when they fail to investigate rights violations in their supply chains or address these abuses when they find them. But governments alone cannot clean up global human rights violations committed through global business activities. We need firms not just to disclose, but to act proactively against slavery and human trafficking risks.

4.2. On the Side of Multinational Companies

In globalization multinational companies have mainly sought more favorable economic and regulatory areas for cost reduction, and to benefit from more permissive labor or environmental legislation, in order to maximize their business profits. In traditional business models, it was understood (CARROLL, 1979)³³ that the responsibility of organizations was toward their owners or shareholders, which implies, exclusively, the obligation to create profit and the legal responsibility to abide by local legislation. Organizations, using legal and bilateral investment treaties (BIT) or complex but legal contractual business frameworks recognized under international trade regulations, evade can evade their responsibility for damages resulting from their business activities in third countries.³⁴

Under such behavior lies the theory of the vertical effect of human rights and the theory of the inapplicability of international treaties to corporations, as a fundamental argument for the immunity of multinationals.

³² It has been reported the Nudie Jeans Scandal as a reference of this conclusions. They revealed hazardous denim treatment practices, at Nudie Jeans, a Swedish clothing brand, began disclosing its supplier lists and factory audit reports. However, the company found that consumers were subsequently more willing to purchase its products, despite the fact that reports revealed some workers treat the jeans with dangerous chemicals that cause potentially life-threatening respiratory disease. The same situation happens to Patagonia, the American outdoor clothing company, who has declared that is

³³ This basic theory was exposed by Carroll In well known article CARROLL, "A Three-Dimensional Conceptual Model of Corporate Performance", *Academy of management review*, (1979), (vol. 4, No. 4), (Page. 497-505), MOHAMMED, Abdulalem; RASHID, Basri. "A conceptual model of corporate social responsibility dimensions, brand image, and customer satisfaction in Malaysian hotel industry". *Kasetsart Journal of social sciences*, (2018), vol. 39, no 2, (p. 358-364). RUIZ ACOSTA, Liliana Elizabeth; CAMARGO MAYORGA, David Andrés; BECERRA FERNÁNDEZ, Mauricio. *Proposal of a Social Responsibility Indicator Model Based on Systems Dynamics SSRN* (2019).

³⁴ To illustrate this idea, significant international cases of human rights violations on the part of multinational companies include: Philip Morris vs Uruguay, commenced on 19 February 2010 and not yet completed (ICSID case Process No. ARB/10/7; FTR Holdings S.A. (Switzerland) and others vs. Eastern Republic of Uruguay); Pacific Rim Cayman ILC vs Republic of El Salvador (2012); Pac Rim Cayman LLC vs. the Republic of El Salvador, ICSIDRB/09/12); and Chevron vs. Ecuador, initiated in 2003 and not completed, which was brought in a collective claim by over 30,000 Ecuadorian Indians before an Ecuadorian trial court against the oil company for poisoning the waters of Lago Agrio in the Ecuadorian Amazon. The contamination is claimed to have caused a thousand deaths from diseases prompted by completely open that human trafficking persists, despite its longstanding social responsibility efforts, and its customers keep buying Texaco's dumping during extraction in the region from 1964-1992, under the protection of the BIT between Texaco and the government of Ecuador, signed in the 1990s.

But the philosophy of profit was overcome by the theory of corporate social responsibility, although there are still many corporations that do not accept it in practice. Thus, there may be a dissociation between the internal policies of a company, applied according to the principles of social responsibility, and its way it actually conducts business, aimed at maximizing of profits, and which result in aggressive business practices with an impact on human rights.

The reaction of multinationals to violations arising from their business practices often follow similar patterns: First, in most cases the cause of the rights violation is not an illegal action on the part of the multinational, so there are no legal grounds on which to base a claim. Companies turn to legal advisors, who determine limits set forth in local legislation, limits to judicial remedies, or whether prior bilateral investment treaties (BIT's) apply, which take disputes out of the hands of the national judiciary to be determined by international arbitration courts. Secondly, companies know that in many cases the victims, for one reason or another, have limited access to the courts and do not have the instruments to bring claims against the company for liability, or against the state for indirect liability, which is of particular concern when this affects victims of vulnerable groups such as indigenous peoples or women and children.

But when pressure is exercised by global society, demanding more effective instruments for human rights protection, companies react positively, defending ethical businesses to achieve socially sustainable globalization, and assuming their role and their responsibility in the defense of human rights. Although this reaction is often more cosmetic than real, if we consider the actions taken by companies to avoid infringing rights when they do business.

The object of the Ruggie Principles is precisely to assist companies in this area. In that regard, the "Protect, respect and remedy framework" is an ideal tool for two reasons:

a) it is not a disruptive innovation in international law, but rather is based on the essential international consensus on actions of protection that can be taken by states and companies in the present circumstances, and b) it is a practical and enabling standard, which seeks to achieve greater effectiveness through acceptable and voluntarily-assumed conduct on the part of companies, which does not take into account the legal obligations or the levels of integration of human rights law into the national regulations applicable to them, and which goes beyond the enforcement capacity of states. Companies accept these because they enable them to create more sustainable businesses and safer investments. States accept them because they do not have to generate new public resources and they complement traditional constitutional and international protective legal instruments.

Like other initiatives promoted by United Nations in the 1990s and during the first decade of 21st century, such as the 2000 Global Compact,³⁵ companies have adopted the Ruggie Principles as part of the activities and commitments undertaken in their corporate social responsibility (RSC) policies. The Ruggie Principles are the distinctive symbol

³⁵ For details on the Global Compact SAGAFI-NEJAD, Kind; DUNNING, John H. *The UN and Transnational Corporations: from Code of Conduct to Global Compact*. Edit. Indiana University Press, (2008).

of “ethical companies” that operate according to the “Code of Good Governance of the Sustainable Enterprise”.³⁶ Socially responsible companies seek to create “economic, environmental and social value in the short and long term, contributing to the well-being of present and future generations, both in their immediate environment and on the planet in general”. These companies have their reputation conditioned by being able to demonstrate (Knowing and Showing theories)³⁷ that they observe socially responsible behavior, that they design strategies and establish internal management procedures bearing in mind not only the economic dimension of their business actions but also their social and environmental impact and, above all, their impact on human rights. Corporate Social Responsibility (CSR) includes all business decisions that are adopted beyond strictly economic and/or technical interests of the firm and has to be transparent and accessible for company stakeholders. Is in the company’s better interest to demonstrate its ethical and sustainable ability to do business.³⁸

The consequence is that, step by step, companies develop internal policies, internal codes of conduct for employees or corporate good governance guidelines. They consolidate behavior, habits and business practices that become obligations toward third parties and their stakeholders that reach beyond the logic of “submission to the legal precept” imposed by the rule of law and the national courts. In assuming the Ruggie recommendations, companies assume obligations vis-à-vis third parties, similar to the obligations they assume with regard to the product quality, pricing or advertising. Depending on how these commitments are expressed or projected externally and how they apply to the day-to-day running of the business, they may become contractual obligations or incur contractual liability: “Lex Inter-partes”. Their fulfilment will then be no longer voluntary, but rather may become legal obligations subject to claims in national courts for extra-contractual liability. Commitments to respect human rights become contract clauses that benefit third parties maintaining relationships with the company (whether they be investors, suppliers, insurers, etc.), then voluntarily-assumed commitments will have been transformed into compulsory contractual undertakings, into clauses in private agreements, which are enforceable, as are all contract clauses, in national or international civil and commercial courts, depending on the type of instrument. However, even if such commitments are not included in specific contract clauses they may also generate expectations of certain behavior, and may be capable of generating an extra-contractual liability for which companies will have to answer when they “violate the duties of monitoring people and things that are under their purview and fail to use due diligence when hiring workers and

³⁶ The “Code of Good Governance of Sustainable Enterprises” was commissioned by the driving entities of the Sustainable Development Forum: IESE, PricewaterhouseCoopers and Fundación Environment (2002). See, in that regard, RICART, J. E.; RODRÍGUEZ, M. A. *Código de buen gobierno para la Empresa Sostenible*. Foro Empresa y Desarrollo Sostenible, Barcelona, (2002), y DE LA CUESTA GONZÁLEZ, Marta; MARTÍNEZ, Carmen Valor. “Responsabilidad social de la empresa. Concepto, medición y desarrollo en España”, *Boletín económico de ICE*, 2003, (nº 2755), *ICE Economic Bulletin*, 2003, (No. 2755).

³⁷ See SCHEPER, Christian. ‘From Naming and Shaming to Knowing and Showing’: Human Rights and the Power of Corporate Practice. *The International Journal of Human Rights*, (2015), vol. 19, no. 6, p. 737- 756.

³⁸ GONZÁLEZ, O. J., et al. *El libro blanco de la RSE en España: la gestión de empresas desde la Responsabilidad Social*. En International Conference on Industrial Engineering and Industrial Management–CIO. 2007

overseeing their actions” (opinion of the Supreme Court, STS 6/6/1997, Resource No. 165/1993). And this applies both to committing acts infringing human rights and failing to adopt measures to control or prevent human rights violations, or for having failed in attempts to do so (STS 606/2000 of 19/6/2000, resource No. 3651/1996).

In short, in the private sphere, the Ruggie principles and the obligations assumed by companies become current law, achieving normative status when they are reflected in contract clauses or when they generate legitimate expectations of behavior capable of extra-contractually affecting third-party relationships. Therefore, the transformation takes place through the application of typical instruments of Private law: By contracts and tort law and by endowing, with real effectiveness, the initially voluntary commitments of respect of the human rights Public law for private entities. Thanks to Private International Law, the legitimacy and efficacy of these private legal obligations transcend borders because they are able to solve the conflicts applying its own instruments of claim, even transnationally. This is a step ahead of the Ruggie framework and is the key to innovation in the creation of Law in globalized environments and in the development of new really effective instruments of international human rights protection.

Another example of this transformation is reflected in commitments of investors themselves, especially those produced by Social investment Funds and institutional investors present in all asset shareholdings in the world. They may comply with their own ethical and RSC commitments by formalizing extra financial-requirements in risk operations. As an example of this, the commitment that insurance companies should focus their investment portfolios in equity securities that expressly pledge respect for human rights (such as the Norwegian Oil Fund), so that the funds do not invest in business activities that do not offer guarantees in that regard. This type of commitment is publicly communicated to minority shareholders and affects the sustainability indices of which companies are or may be interested in becoming a member (such as the FTSE4GOOD and Dow Jones Sustainability Index). In this way, commitments to respect human rights are transformed into investment conditions that can lead to the strengthening of practices in this area.

And the same applies to insurance companies, which are a determining factor in the transformation of the recommendations into fully-enforceable rules of law. First, because they are themselves subject to compliance with Ruggie Principles in their business activities. Secondly, because when evaluating the risk of an international commercial or financial operation with a multinational client, the insurer must also calculate the risk that the commercial or productive activity of the insured company can generate with regard to the human rights of third parties, and the economic consequences that this may have on both the company itself and the insurer, when the client’s activities result in a claim for compensation for damages arising out of a human rights violation. For this reason, they may begin to adopt additional measures to protect themselves from human rights violations committed by their client’s companies.

This type of measures likewise obliges multinationals to adopt internal practices that minimize risks in their commercial activities, in order to avoid insurance-related problems. In addition to internal RSC practices, adopting the recommendations and

assuming them as real obligations to be undertaken in their business activities become a *sine qua non* requirement to obtain insurance cover. This type of measure also extends to insurance agencies or investment guarantee institutions that require due diligence from their clients in matters of human rights.

Finally, voluntary commitments to respect the Ruggie framework are also transformed into a mandatory legal rule through corporate governance standards. In fact, in the late 1990s, good governance standards offered guarantees and guidelines that facilitated the efficient management of business organizations and guidance for managers for the social good or the general interest of the company, represented in its shareholders. Thus, the standards of good governance have generated the necessary indicators to determine the due diligence of managers and the fulfilment of their obligations as such. In that regard, an example may be found in the Spanish *Olivencia* Report,³⁹ which contains specific recommendations on good governance practices capable of redirecting managers toward the interests of shareholders.

Codes of good corporate governance achieved normative status in the EU in 2004, but were not as effective as expected in preventing systemic crises in international financial market, such as they did not give all the fruits that were expected to prevent systemic crisis of international financial markets, such as the one in 2009. Under the codes, even while formally complying with recommendations, certain unscrupulous activities continued, such as abuse of privileged information, in full view of authorities, regulators and rating agencies. Consequently, corporate governance due diligence began to include ethics commitments for managers, in order to create value in their decisions and increase confidence in their business activities and investments. These ethical criteria are directly related to respect for human rights and to the incorporation of Ruggie principles.

Thus, a correct interpretation of “acting with due diligence in business” implies that managers and business leaders assume their own commitments, while ensuring compliance with the obligations undertaken by the corporation. What was initially applied voluntarily has become essential to accredit good governance and the creation of value for the company. And it is precisely respect for due diligence undertakings that may eventually exempt the company’s executives from direct individual legal liability in case of damages to third parties, which in some countries, as is the case in Spain, may even incur of criminal responsibility.

The introduction of Ruggie recommendations into the governance of multinationals at all levels, from management activities to supply contracts with other companies, dismantled the current validity of the efficient market theory (developed during the 1960s at the University of Chicago and in vogue until the 1990s), because the creation of value is not definitively determined by share price, but rather is linked to the long- term life of the

³⁹ See, for more details, SISON, “The Cultural Dimension of Codes of Corporate Governance: A Focus on the Olivencia Report”. *Journal of Business Ethics*, 2000, vol. 27, (no. 1-2), (p. 181-192)

corporation, which not only depends on quantitative benefits, but also on the achievement of a wide range of intangibles that guarantee the sustainability of business and investment.

The set of “soft law” regulations that companies have formed to structure and order business behavior and its relations with third parties, have been proven more effective than traditional international law for the organization of fair horizontal relations that globalization today.

This new paradigm of management or international governance is what leads us to consider this private form of organization, founded and limited by the respect for human rights, as an effective way of ordering coexistence in globalized environments, and which may be extrapolated to other areas of law. This has been created progressively, but now more and more international companies are demanding compliance with these standards and commitment to socially-responsible and sustainable behavior, and more companies apply them beyond the strict fulfillment of the local Law.

Therefore, two types of obligations are generated for companies with regard to respect for human rights: some imposed directly in the positive legislation of the states (on both sides, the states to which they belong and the states where they operate), which depends on the levels of integration of International Human Rights Law in national internal systems or the constitutional development of international instruments for the recognition and protection of human rights. Other obligations, which they must assume voluntarily, including those in contract clauses or in commercial or business undertakings with third parties, which imply adopting ethical management criteria beyond commercial and public expectations that society may have (Business for Social Responsibility). These soft law obligations combine social and environmental aspects in companies’ operations and in their interaction with other stakeholders on a voluntary basis (European Commission); and incorporate respect for ethical values, people, communities and the environment (Acción RSE, Chile).

In both cases Ruggie Principles have provided a source of law and, thanks to them, human rights law acts as imposed (self-imposed or legally-imposed) limits in private relations, acquiring horizontal efficiency.

At the present conjuncture multinational companies are the ones assuming a more prominent role in the development of these new instruments of human rights protection, due to their international expansion, size, complex structure and capacity to operate in more than one jurisdiction (either directly or through subsidiary companies), having multiplied their capacity to influence in economic, commercial or financial relations throughout the world.⁴⁰ Many of them were already dealing with human rights as part of their internal RSC actions and plans, even before the publication of the Ruggie Principles: gender equality plans, actions against racism, environmental campaigns, integration strategies for people with disabilities, etc.

⁴⁰ In ANGUITA OYARZÚN, “El rol del Derecho en la responsabilidad social de la empresa”, en *Ars boni et aequi*, (2017), (vol. 8, nº 1), (pp. 215-233)).

And then companies applied their own criteria and commitments that, with regard to their stakeholders, the consider more advisable or profitable for their business, on a case by case basis. Multinationals' adoption of Ruggie Principles and their implementation of this regulatory framework provides a more homogeneous perspective and understanding of human rights limits and content worldwide world. And this is what helps to generate a common and valid conception internationally concerning new instruments of human rights protection and their usefulness and effectiveness.

5. SOFT LAW AND HARD LAW: ADVANTAGES AND DISADVANTAGES

Despite the fact that the Ruggie Principles were well-received in multinational enterprises, cases of rights violations by multinationals in developing countries have continued in recent years. The ethic of profits continues to justify companies' strict submission to current legislation. And in any case, the incorporation of the obligation to respect human rights in private regulatory instruments, such as contracts, only provides for obligations of action, not of result, and are binding only on the parties to the contract, and not on third parties who may be injured by the rights violation, although the business' risky or harmful behavior may involve workers, users, or others affected by the negative impact of its business practices, and who are not party to the commercial transaction and cannot bring a claim for compliance.

This failure has led non-governmental organizations and international institutions to consider whether these are indeed effective measures, or if it would be better and more effective to apply positive legal standards through traditional instruments, given the importance of the rights to be preserved.

As we have seen, the transformation of the Ruggie Principles into legal obligations has been achieved through different mechanisms: in some cases, the national states include the principles directly in national regulations (hard law); in others, companies assume them as "self-obligations" in soft law instruments, which acquire normative force when included in contracts, or in legal commercial relationships.

The concepts of "hard law" and "soft law" are widely used in academia to describe the different scope of rules and regulations in international law that shape the relationships between states or between states and individuals.

The concept of "hard law" applies to the treaties and laws adopted by states. They are norms, rules, acts and other legal provisions enforced by the state, which can be imposed by the binding force the law and the power of the state.⁴¹ The concept of "soft law" is usually applied to a set of mechanisms, such as declarations, resolutions, plans, action programs, recommendations, etc. that reflect compliance with the rules established under international law, without generating new obligations having the force of law and directly actionable in court. Soft law may provoke indirect legal effects when

⁴¹ About The Definition de Hard law See STEFAN, O.A. "European Competition Soft law in European Courts: A Matter of Hard Principles?", *European law Journal*, 2008, (vol. 14, No. 6), (Page. 753-772).

it affects relationships with other subjects, and it is understood that the adoption of these mechanisms constitute a first step toward their becoming “hard law”.

Currently the division between “hard” and “soft law” is more diffuse. First, because states adopt both instruments in a strategic way to ensure a relevant position within the international community or to better achieve their international goals. Secondly, because, commencing with the Grimaldi judgment of the European Court of Justice,⁴² the differentiating elements (the existence of “binding force” or “binding effect”) was determined to be difficult concepts to distinguish in practice, making it impossible to judge infringements on the basis of that criteria. According to the judgment, it is clear that instruments of “hard law” have binding force and effect, while those of “soft law” they only have binding effect, but in practice what is the difference? Thirdly, because given the current complexity of legislative process -both in national parliaments and international fora for the creation of international law- governments prefer to resort to simpler regulations, with less complex drafting procedures, such as recommendations, or guidelines, which have the same effect on general public opinion.

Professors SHAFFER and POLLACK have established three ways for states to use soft and hard law standards, depending on their power and positioning in international contexts.⁴³ The first one is used by states that are considered “powerful” among them when they agree on developing a common policy or joint action to resolve a common issue. In this case they use the tools of “hard law” in the form of a treaty or by-passing national legislation. When the issue affects less powerful states, then “hard law” law is supplemented with “soft law”, in order to implement international legal provisions in the most efficient way possible. In such cases, the use of “hard law” or “soft law” it is insignificant because there is a prior agreement on the measures to be taken and both have binding force and effect. For less powerful countries “soft law” becomes hard law in the medium term.

The way is also used when powerful states disagree. In this situation, states begin to align themselves to share common positions and to form blocks of states that may impose their positions to adopt the legal provisions they require. For this initial stage to commence negotiations and form blocks, the first use “soft law” measures that hesitant states will more easily agree with, allowing them to gain advantage over states that are totally at odds.

The third way is used by “less” powerful states when they disagree. They prefer measures of “soft law” because they allow much more flexibility as to how to achieve the objectives imposed by the powerful states, without aggravating them or publicly contradicting their proposals, allowing the less powerful states to move forward affecting the force of their own internal practices.

⁴² Case C-322/88, *Grimaldi vs. Fond des maladies*, (STSJ 13/12/1989) E.C. R0 I-4407

⁴³ In SHAFFER, & POLLACK, “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance”, *Minnesota Law Review* (2009), (Vol. 94), (p. 706 and ff).

According to this theory, it is clear why the Ruggie Principles and the new United Nations regulatory framework adopted the form of recommendations and soft law. The most powerful countries had not reached an agreement on the measures applicable to multinational enterprises in order to impose obligatory transnational treaties guaranteeing respect for human rights. However, the application of the logic and the influence of common law on the new model for responsible corporate action transform the soft law measures into internal obligations and rules, capable of uniting companies and being enforced in court using the legal mechanisms of private law.

The advantages of soft law instruments are many. In fact, the United Nations uses this type of voluntary action on many occasions, considering them more effective than traditional forms of protection such as treaties or conventions, or purely conventional rules of international law. Initiatives such as the 1990 “Code of Conduct for Transnational Corporations” or the 2003 “Corporate Liability Rules” are good examples. They provide friendly ways of generating change.

From a strictly legal point of view or “hard law”, there hasn’t been in Spain nor at the European level, any in-depth reflection on the role that these new instruments of extraterritorial human rights protection may play in countries where constitutional rights enjoy little protection. No conclusion has been reached on the transnational nature of their binding force, which allows them to be applied or enforced beyond the territorial boundaries of national legal orders, or under the jurisdiction of national courts. Moreover, in weak states, with deficient guarantees with regard to the rule of law principle, the problem resides not in the absence of guaranteed legislation, but in the lack of mechanisms of enforcement.

The force or binding effect of one formula or the other (soft or hard) depends on the existence of institutions unassociated with the parties in conflict, capable of determining liability and resolving problems arising from legal or self-imposed obligations. In short, the problem lies not much in the nature of the rules that establish the required conduct, but in the existence of international courts capable of determining companies’ legal responsibility and executing measures put in place to remedy damages they may have caused. Using Ruggie language, the success of the system is not much depending on the right application of the principles of respect or protection, but in the existence of effective remedies for the reparation of damages caused to human rights.

The international order and national systems, even those in the weakest states, clearly establish the legal responsibilities which the private subjects may incur when infringing human rights. But their laws are lax, and their labor and tax control institutions weak, with insufficient means to ensure enforcement. On the other hand, and particularly after the 2009 world crisis, the states have no economic resources to provide incentives to influence corporate behavior. There are high levels of corruption, public officials without specialized training, prosecutorial systems devoid of guarantees, and an inability to demand that the great economic and commercial powers assume their responsibilities. Thus, traditional legislation doesn’t produce the desired effect, and soft law can play a role

in filling the gaps of governance or in weak points institutions of control or enforcement, without altering the sovereignty of the states while preventing areas of impunity.

The disadvantages of hard law, the institutional crises that many European countries are experiencing in relation to the EU, the delay in developing timely legal responses (which is exacerbated when it comes to reaching international consensus) and the powerful movement to strengthen private regulations have all increased companies' preference for soft law regulations, which they consider more advantageous.⁴⁴

As a result, there is much debate as to what is the best regulatory model to apply to human rights protection in globalized personal relationships. And the two predominant cultures or legal traditions have different perspectives. However, the purpose of debate is the same now it was in 1789, when the first Declaration of the Rights of Man called for the effective protection of human rights and the dignity of the person as the only limit to the exercise of power, whether it be political or economic, de facto or de jure, national or international.

The two positions may be summarized as: those who express a preference for hard law, that is, the signing of an international multilateral treaty that recognizes multinational companies as subjects of international law and that imposes upon them legal obligations to respect for human rights; and those who defend soft law regulations or create a "culture of compliance", through good practices and internal plans and policies, which are equally binding as legal rules when undertaken in private agreements.

In both cases, (a) companies would be considered directly or indirectly subject to international law, which constitutes a tacit and universally-accepted recognition of their capacity to be the subject of international obligations and is the first step in the creation of a truly international trade law common to all states, aimed at regulating the exchange of goods and services, the relations between private parties, or the cross-border provision of services in an open international, commercial or financial environment; (b) human rights would be fully constituted as limits to the action of economic and business powers (in the same way that they were considered as limits to political power), as well as limits to the exercise of private autonomy, thus becoming the foundational instruments of a new (public and private) regulatory system of globalization.

Defining of multinationals as subjects of international obligations would undoubtedly require a profound transformation of all positive regulations currently underpinning international trade and economic relations, with unpredictable results. But most important is the role that human rights would play in that transformation.

To-date there is no declared nor case-law established hierarchy stating that commercial or investment contracts, agreements or treaties should be subject to respect for

⁴⁴ See APARICIO GONZÁLEZ, M. L. "El Gobierno corporativo: Entre el Derecho y la ética empresarial», *Revista de Derecho Mercantil*, no 257 (July-Sept 2005) (P. 1131-1145).

human rights, guaranteeing that they take priority and are fully enforceable both nationally and internationally. Invoking article 53 of the Vienna Convention, which deems void any treaty contravening an imperative rule of international law, such as human rights, would be a good starting point for this interpretation. This would transform respect for human rights into a supra-conventional obligation, applicable in all private and public legal instruments, as the main principles and sources of further International Law developments.

This supra-conventional principle of respect of human rights would also apply to the regulation of the operations and powers economic and financial institutions such as the International Monetary Fund or the World Bank, essential for the workings of economic globalization and making them subject to international institutions of human rights protection, such as the European Court of Human Rights, Inter-American Court of Human Rights, UN High Commissioner for Human Rights or the UN Commission on Human Rights.

This new position of human rights as a prevalent principle of international regulation will have numerous consequences. For example, so-called “deregulation” instruments such as bilateral investment treaties (BITs) could not be used to avoid obligations imposed by international human rights law, that both national and international legal orders impose on states and individuals,⁴⁵ and integrating these obligations into national constitutional frameworks and human rights law systems would be ensured in all countries.

Thus, the power of the Guiding Principles and the “protect, respect and remedy” framework promoted by the United Nations will have achieved its objectives as instruments for the transformation of international human rights law, accelerating the debate concerning legal instruments for governance of globalization and the role of human rights in the management of globalized relations.

6. FINAL CONCLUSIONS: THE CONVERGENCE OF SYSTEMS AS RULES FOR COMPLEX GLOBALIZATION

The current international economic system is supported by the coexistence of these two models for regulations, and therefore, it is increasingly and openly recognized that we need both to regulate globalized environments. That converging traditional national systems for human rights protection the recommendations, plans, guiding principles and public incentives that promote soft forms of self-regulation and the internal implementation of good practices respectful of human rights, that extend beyond the limits of the legal enforcement.

Good practices and a culture of compliance are assumed vis-a-vis third parties and are seen as complementary in achieving the public and private goals of states, citizens, NGOs and companies in their human rights commitments. They initially take the form of

⁴⁵ It should be noted that most internationalization of business during the 20th century was conducted within the framework of BIT that by-pass national laws guaranteeing third-party investments in high-risk countries. All of them represent an anti-guarantee international trade model, certainly not focused on the defense of human rights, as an instrument of economic and social development.

recommendations or good practices but are transformed into full legal obligations when included in contract clauses that parties have the obligation to perform.

Both the rules created by hard law, as those created by soft law are of interest to multinationals due to their capacity to make business sustainable. And it is precisely this aspect that has served as an incentive to change. Respect for human rights brings measurable economic and commercial value but it continues to be based on international consensus concerning the essential protective actions to be taken to protect vulnerable communities and people.

That is why, from a legal standpoint, the governance of globalization is complex, and it will be equally necessary to use different levels of binding force or enforcement when enacting norms or rules to ensure coexistence among people, states, companies or institutions.

Legal certainty will be achieved when we are able to integrate all of these instruments into regulations applicable to personal, commercial, financial and social relations. This is the essential premise that differentiates the “human rights in the company” movement any of the previous approaches found in mechanisms of international law. As the Spanish state Plan underscores in its preamble and as established its regulatory framework, “these guiding principles, which are in force in international law, have been set forth for all states and for all companies, transnational or otherwise, regardless of their size, sector, location (whether in Spain or abroad), ownership, or structure”.

From a practical perspective we must take advantage of soft law’s capacity to generate homogeneous patterns and standards of respect for human rights, through international commercial networks created among companies, although this calls into question international court’s exclusive jurisdiction to define the content of rights. We must also admit the advantage of international treaties to ensure respect for human rights in a globalized world, and to manage new international relations in which multinational companies and international corporations assume an essential role. Because, the protection that citizens cannot only be provided against actions of the state, but also against companies that interact with them and that decisively condition their economic development. The means for achieving this may be mixed; this is not an essential matter. The point is how to enjoy fundamental rights even when there’s no executive power to enforce them. The network of relationships between individuals, natural and legal persons, is more powerful in situations affecting the rights of the person, than the relationship between citizens and the state and requires different instruments from those regulating relationships between individuals and states.

Treaties, i.e., hard law, are essential for establishing a framework of reference: the definition of human rights and its essential content, and international instruments of control and supervision, whether they be international courts or arbitration and mediation boards that ensure the contractual liability of the parties in the event of non-compliance and access to systems of redress and remedy, such as procedural principles and guarantees that ensure the equality of arms and parties’ right to defend their legitimate interests.

For everything else, self-imposed obligations to respect human rights can overcome national laws that are limited in scope either due to the weakness of the state that passed those laws, for lack of means of enforcing them, due to corruption or political inaction, or other factors, even when the legislation itself renders respect for human rights impossible. Responsibility assumed voluntarily by a company transcends its specific legal obligations and shields it from changing or unfair legislation.

In any case, the utility of companies' soft law regulations has to be seriously considered as a new and effective way to govern international relations nowadays, where states, companies and people can coexist, if they are based on the respect of human rights. The stimulating idea is that this new binding order comes from private institutions and is born by the action of private persons and not by the activity of Public Legislative forces. It is the agreement between individuals, even when these individuals are multinational companies, which allows the creation of social networks that function in the respect of human rights, based on the contractual obligations assumed between them, over and above the deficiencies of the states in order to regulate these relations effectively, or even above the lack of implementation of the rule of law.

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Received: January 1st 2020

Accepted: March 3rd 2020