ISSN 2526-0774

HomaPublica REVISTA INTERNACIONAL DE DERECHOS HUMANOS Y EMPRESAS

Vol. VIII | Nº. 02 | Ago - Dez 2024

Recebido: 22.01.2025 | Aceito: 22.01.2024 | Publicado: 12.02.2025

10 years of the International Treaty on Business and Human Rights negotiation: the importance and challenges of regulating the transnational character of business[1]

10 anos de negociação do Tratado Internacional sobre Empresas e Direitos Humanos: a importância e os desafios de regulamentar o caráter transnacional das empresas

10 años de negociación del Tratado Internacional sobre Empresas y Derechos Humanos: la importancia y los retos de regular el carácter transnacional de las empresas

Manoela Carneiro Roland

Universidade Federal de Juiz de Fora | Juiz de Fora, Minas Gerais, Brasil | ORCID-ID 0000-0001-5168-2230

1. Introduction

In the last 40 years, the influence of transnational corporations in the most varied spheres (economic, political, cultural, etc.) has contributed to the construction of an international panorama in which transnationals have more bargaining power than many States (Zubizarreta, Ramiro, 2016).

The political power of transnationals is evidenced both in the countries where they establish their headquarters and in the countries that receive their value chain. The dismantling of social rights and the lobbying of financial institutions are some of the practices that contribute to the rapprochement between the public and the private sector, which usually favors business interests (Zubizarreta, Ramiro, 2016).

Moreover, the rights of transnationals are protected by a global legal system of mandatory investments, while the duties of these corporations do not have a normative regulation capable of mitigating the impacts of their activities - soft law approaches are too insufficient for that (Zubizarreta, Ramiro, 2016). There is thus an imbalance between guaranteeing the rights of transnational corporations and guaranteeing the human rights of the populations affected by them.

International arbitral tribunals play a central role in the consolidation of the lex mercatoria. While international human rights law faces difficulties in enforcing its effectiveness, the World Trade Organization (WTO), on the other hand, has an efficient dispute settlement system, as well as arbitration mechanisms provided for in trade and investment treaties. Moreover, WTO sanctions are

[1] This article was written for the Transnational Institute (TNI) (https://www.tni.org/en) as a product of research on the 10th anniversary of Resolution 26/9 (A/HRC/RES/26/9) for the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, submitted in December 2024.

hardly breached when they lead to the fear of an international economic blockade (Zubizarreta; Ramiro, 2016).

Another aspect that contributes to the gap between the protection of human rights and the international protection of transnationals concerns the new generation of highly qualified lawyers who, having access to countless channels of power and decision-making, prioritize political lobbying to the detriment of professional ethics (Zubizarreta, Ramiro, 2016). This also highlights the ineffectiveness of access to justice for populations affected by transnational corporations' violations - after all, those affected do not have easy access to highly specialized legal assistance.

Another important point is related to the fact that international human rights law currently applies to transnational corporations only through the actions of States. This means that the liability of these corporations for human rights violations depends on national legislation, so that they will be subject only to the national legislation of the country where their headquarters are established (Zubizarreta, Ramiro, 2016).

Based on this diagnosis, this paper looks back at the process of negotiating the International Treaty on Business and Human Rights, which emblematically reached its tenth year with the adoption of Resolution 26/9 of the United Nations Human Rights Council in 2014.

In this sense, we focus on the central point, still under discussion, which concerns the need to concentrate the scope of the international instrument on transnational corporations (TNCs), but, on the other hand, to understand that the meaning attributed to these entities is more eminently related to the nature of the transnational activity, in fact, its transnational character, the definition of which must be improved, and not to the legal nature of the corporations.

We argue that the choice of proposals on the subject for the International Treaty should follow the logic adopted in internationally recognized spaces for defending human rights, as the Human Rights Council should be, and not for safeguarding business interests. In this way, the negotiation process should respond to the demands of those affected, who continue to have their rights violated, without an adequate international response.

2. Treaty Negotiation

The approval of Resolution 26/9[2] by the United Nations Human Rights Council in 2014 led to creation of The Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business with respect to Human Rights (OEIGWG), under the chairmanship of Ecuador, with the aim of initiating negotiations on a binding international instrument that would regulate the activities of transnational corporations with respect to human rights. The negotiation of the Treaty will reach its tenth session between December 16 and 20, 2024, breaking away from the routine of holding the rounds at the end of October. As will be mentioned later, this change is yet another decision by Ecuador that does not express a strong inclination in favor of the numerous and active presence of civil society, social movements and affected groups. December, just before Christmas,

[2] Resolution A/HRC/RES/26/9: Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights: Adopted by the United Nations Human Rights Council on June 26, 2014. Available at: http://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/55/PDF/G1408255.pdf?Element.

makes it difficult for these actors to be present in Geneva, especially those from the Global South, where most of the human rights violations committed by corporations take place.

Harris Gleckman (2016) gives an interesting account of the gradual shaping of this so called " International Business and Human Rights Agenda". According to the author, from the end of World War II until the mid-1960s, transnational corporations virtually ignored the UN system. For them, governments did not see the private sector as relevant to global governance, and corporations, unlike non-governmental organizations, were not even mentioned in the text of the UN Charter. The change came precisely after the involvement of ITT, one of the largest Chilean investors in the mining sector, in the coup d'état that removed President Salvador Allende from power and assassinated him.

According to Gleckman (2016), after this event, the G77 would have begged the UN Secretary General to create a program focused on transnational corporations. The project would have been supported by States driven by the expectation of establishing a Code of Conduct for transnationals that could raise the level of the "rules of the game" in developing countries. Corporate executives, on the other hand, believed that the United Nations could play an important role in dampening the anti-TNC spirit that was growing in the same region.

A panel of experts, with the participation of senior executives of transnational corporations, recommended the creation of the Commission on Transnational Corporations, which had its own permanent secretariat, the United Nations Center on Transnational Corporations (UNCTC). This initiative, however, was not unanimous even for the trade union sector, as it placed its agenda in a dimension between States and the United Nations, which could be threatening, as well as lacking in transparency. The Commission and its Secretariat, according to Gleckman , would have three main tasks: 1. to formulate a Code of Conduct; 2. to encourage foreign direct investment, minimizing its risks; 3. to assist developing countries in their negotiations with transnational corporations.

There was much opposition to the Commission's work, including from the Organization for Economic Cooperation and Development (OECD) itself. And this is an important period, as it records, when the whole process called "corporate capture" of the Organization could be identified, including its specialized agencies, programs and funds. In the end, the then UN Secretary General Boutros-Boutros Ghali closed the Center, transferring some of its functions to UNCTAD. It is in this context that the then first Draft, or Draft Code of Conduct for Transnational Corporations, was approved in 1982, which does not bring substantial elements for the regulation of the transnational activity of transnational corporations themselves, such as direct obligations, extraterritoriality mechanisms, or well-defined sanctions, only vague and voluntary recommendations.

This phase is very important because it brings together the discussion of two historically recognized documents, but diametrically opposed in terms of the objectives to be achieved and their capacity to impose limits on the activities of transnational corporations, the first being approved and widely accepted, and the second rejected: the Global Compact (1999), and the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003), the aforementioned "Norms". The Commission on Human Rights, the future Council, did not accept them in 2004 and affirmed that they were not legal, as a result of strong pressure from the International Chamber of Commerce and other business sector representatives.

In fact, the rejection of the "Norms" is not surprising, since they present a longer list of rights to be protected in the conduct of business, the language of "shall", instead of "should", when referring to business conduct, opening the possibility of an interpretation that definitively assigns direct obligations to corporations, in addition to the express mention of the Human Rights Universal Declaration (1948) and the provision for more effective mechanisms for its implementation.

The Global Compact, launched in the midst of the World Economic Forum in 1999, today brings together 10 generic principles of voluntary adherence, distributed in four areas: human rights, labor, environment and anti-corruption, lacking clear obligations, monitoring or sanctioning mechanisms. It is important to mention that the Pact counted on the contribution of Harvard professor John Ruggie in its drafting team, who will play a fundamental role in shaping what currently constitutes the normative current on business and human rights, and this will be discussed below.

The nomination of Prof. John Ruggie as Special Representative for Business and Human Rights at the United Nations for two terms, from 2005 to 2011, after the adoption of Resolution 2005/69 brought to the scene, explicitly, the famous commitment of corporations to "good practices", requiring from the professor the elaboration of generic and voluntary provisions, clarifications, the development of methodologies to achieve, with a greater level of detail, a reconciliation between the "market logic" or business interests and a certain commitment to human rights. However, such a commitment must not jeopardize the profitability of the business. Thus, corporations, in the performance of their role as "development agents", would inevitably generate risks or cause negative impacts and it would be necessary to seek mechanisms to prevent them, or at least mitigate them. This means that transnational corporations are considered fundamental guarantors of development, mainly under the discourse that propagandize the importance of attracting foreign direct investment, especially in the Global South. On the other hand, they now have a kind of "license" to violate human rights.

Prof. John Ruggie's legacy contributed to the implementation of the so-called "principled pragmatism", i.e the presumption of commitment to human rights by all stakeholders, a multistakeholder methodology that was widely disseminated, and, at the same time, the recognition that these rights would not always be observed, therefore, priority should be given to actions or standards that would be more likely to produce good results according to business interests. Following this orientation, at the end of the first term of his mandate, in 2008, Prof. John Ruggie presented his famous framework or guiding paradigm: "protect, respect and remedy".

At the end of his second term in 2011, John Ruggie details his paradigm by presenting the 31 Guiding Principles on Business and Human Rights[3]. The document was adopted by consensus at the UN Human Rights Council, and this is one of the greatest narrative strengths it presents, despite many scholars and members of civil society questioning it. The Council has a practice of deciding by Consensus, and at the same time there was no broad debate or lengthy consultation process with due publicity, transparency and representativeness. The Guiding Principles constitute a project

[3] Available at: https://site-antigo.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf.

programmed to obtain great adherence and easy acceptance by corporations[4], since it does not include mandatory guidelines, innovative mechanisms of extraterritoriality or the provision of effective sanctions for human rights violations. Following the adoption of the Guiding Principles, the Working Group on Business and Human Rights was created with the aim of encouraging States to internalize its precepts through National Action Plans (NAPs).

Thus, at the moment, we have three main processes underway with regard to the regulation of business activity in the field of human rights: the official push by the United Nations and various private actors[5], with a large budget, to draw up National Action Plans (NAPs)[6] based on the Guiding Principles, together with the new Due Diligence Laws and the negotiation of the International Treaty on Business and Human Rights, which contains mandatory provisions and, in the case of the latter, has been the subject of several boycott attempts since it began to be negotiated.

The main objective of reviewing this history of the "International Business and Human Rights Agenda" is to show that the process of regulation of business activity by the United Nations in relation to human rights has led to the consolidation of a "framework of exception" favorable to corporations which, in the end, guaranteed them the privilege of not being subordinated to the paradigms already consolidated in the international sphere of International Human Rights Law. On the contrary, a series of weakly normative rulings, with language that even denies the attribution of direct human rights obligations to corporations, which are considered not to be violators, but merely causes of negative impacts that are "inevitable" to Global South countries, especially those in search of development. The corporations can even self-manage their conduct, self-monitoring, taking the lead even in an extreme situation such as the occurrence of human rights violations.

It is therefore possible to conclude that this is not really a "Human Rights Agenda". This is the fundamental dispute that underlies the central aspects of the Treaty negotiation, and it couldn't be any different in the case of the discussions around the scope of the international instrument and the meaning of "transnational corporations", or those with a "transnational character", which is the subject of this paper.

When analyzing the negotiating sessions of the International Treaty, one can identify specific moments and arguments with the common goal of creating obstacles to its progress. In the

[4] In September 2013, the "consensus" around the Guiding Principles was fragile. During the 24th Session of the Human Rights Council, several countries joined together to draft a statement. The same was done on behalf of a group of African countries, and a group of Arab countries, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador. These nations made it clear that without seeking a legally binding framework, the endorsement of the Guiding Principles by States in 2011 would be only a "first step, without further consequences", and that soft law or voluntary mechanisms, such as the Ruggie Principles, were not sufficient to ensure redress and due protection for victims of human rights violations by corporations, mainly transnational corporations, and therefore were not effective, for example, they did not fill the existing legal vacuum regarding extraterritorial corporate accountability mechanisms.

[5] In addition to independent public and private sources of funding, we can mention the CERALC project, which has been running since 2015. According to its official website, the Responsible Business Conduct in Latin America and the Caribbean (CERALC) project is implemented by the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN). It is also implemented by the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and the Office of the United Nations High Commissioner for Human Rights (OHCHR). The aim of the project is to promote smart, sustainable and inclusive growth in the EU, Latin America and the Caribbean by supporting responsible business behavior practices in accordance with UN, ILO and OECD instruments.

[6] On the Homa website (homacdhe.com), you can access two studies on National Action Plans, one European and the other Latin American: : http://homacdhe.com/index.php/pt/documentos/.

first three initial sessions, from 2015 to the end of 2017, when the negotiation process itself was still being discussed, the mandate of Resolution 26/9 was challenged with the argument that another Human Rights Council Resolution needed to be approved. To this end, attempts were orchestrated to delegitimize Ecuador's leadership and block its access to funding for the sessions, for example. Thanks to the protagonism of non-governmental organizations and social movements that follow the Treaty, these attempts failed and it was kept under discussion.

The need for a new Resolution has always been on the agenda, as was seen during the ninth and most recent negotiating session at the end of October 2023, but from the fourth session onwards, in 2018, the disputes were more about the content of the future Treaty. The countries of the global North began to use the argument of the strength of the consensus represented by the Guiding Principles, which ultimately pointed to a resistance to the possibility of binding human rights standards also being attributed to corporations, as well as the specific nature of the language of the Guiding Principles, which should be preserved in the text of a future international instrument. In other words, the Principles were opposed to the demands of some states and civil society organizations. At the same time, the European Union and the OECD have always supported various calls for proposals with generous funding for public actors and national civil society organizations to engage in the elaboration of National Action Plans, and to stop betting so much on the international treaty. One of the well-known forms of corporate capture of this Agenda.

The maintenance of the state of systemic impunity from which transnational corporations benefit, coupled with the multiplication of serious cases of human rights violations committed by them, even in the case of corporations from countries that already had National Action Plans[7], such as the socio-technical disaster[8] in the Doce River Basin in Brazil in 2015, combined with the strong and qualified advocacy of organized civil society on the issue, ended up weakening the discourse in favour of voluntary standards.

This brings us to a key point in the discussion. The defense of voluntary standards to regulate companies, especially transnational ones, in relation to human rights has diminished, but not the defense of the Guiding Principles as a fundamental paradigm to be followed, whether at an international or national level. Now, the dynamics of the combination of a “menu” of voluntary and binding rules is being conveyed, a smartmix, more palatable to corporations and favorable to the preservation of the “peculiarities” of business activity and its economic interests.

As a consequence, we have witnessed the intensification of Due Diligence Laws approvals, focused on monitoring value chains and supported by Principles 17 to 21 of the Guiding Principles. One highlight is the drafting of the new European Directive on Corporate Sustainability (Corporate Sustainability Due Diligence Directive), establishing rules that would oblige corporations to prevent,

[7] The case of the German Due Diligence Act (LKSG), which came into force in January 2023, and on which Homa prepared a study at the invitation of the German Embassy (https://periodicos.ufjf.br/index.php/HOMA/article/view/41808/26210), for example, one of the facts that helped to draw it up was a survey carried out by the German government itself, which found that only around 16% of companies with more than 500 employees complied with the German National Action Plan.

[8] Zhouri, Oliveira, Zucarelli and Vasconcelos (2018, p.40) use the term sociotechnical, rather than technological, to “emphasize a process that was triggered beyond a purely technical malfunction or error, thus referring to failures in environmental governance, which produced new patterns of vulnerability that, in fact, exposed the population to risk”.

mitigate or cease "adverse impacts" of their activities within global value chains that could impact the environment and human rights.

As will be discussed in the next topic, due to the hegemony of an agenda that is based eminently on norms with little human rights density, as has been shown so far, supported by a so-called "shared" or "consensual" language, which constrains social movements, civil society organizations, human rights defenders, and especially those affected by human rights violations caused by corporations, the struggle for the desired progress towards better prevention and regulation of corporations in terms of human rights comes up against the primary need to transform the negotiating arena of the Human Rights Council into a space that truly reverberates these fundamentals. Thus, the best definition of transnational corporations, or corporations with a transnational character, which is the subject of this article, will be the one that serves human rights protection.

3. Transnational corporations: a key concept

In order to better understand the disputes surrounding the object of the Treaty, its "scope" which leads to the questioning of the meaning of the term "transnational corporations or corporations with a transnational character", it is necessary to revisit the mandate given to the Intergovernmental Working Group by Resolution 26/9, especially with regard to its provisions on the legitimacy of the Group itself and its duration. These two aspects were used as subterfuges in attempts to block the progress of the negotiation of the international instrument by some countries, especially those with the headquarters of transnational companies, such as the United States and the European Union, as well as other direct representatives of corporate interests, such as the International Organization of Employers.

Res 26/9 was adopted with 20 votes in favor, 14 against and 13 abstentions[9]. And point 3, which deals with the sequence of sessions, reads as follows:

> "3. Further decides that the Chairperson-Rapporteur of the open-ended intergovernmental working group shall prepare the elements for a draft international legally binding instrument in order to undertake substantive negotiations on the subject at the beginning of the third session of the working group, taking into account the deliberations of its first two sessions."

The text points to the need for Ecuador, as chair of the Working Group, to present a text of "Elements" at the end of the third session, after three years of discussions and Regional Consultations, to serve as a more substantial basis for the effective elaboration of a first Draft that would start the negotiations proper.

[9] According to the text of the Resolution itself: "Votes in favor: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, Federación de Rusia, Philippines, India, Indonesia, Kazajstán, Kenya, Marruecos, Namibia, Pakistán, Sudáfrica, Venezuela (República Bolivariana de), Viet Nam. Votes against: Germany, Austria, United States of America, Estonia, Former Yugoslav Republic of Macedonia, France, Ireland, Italy, Japan, Montenegro, United Kingdom of Great Britain and Northern Ireland, Czech Republic, Republic of Korea, Romania. Abstentions: Saudi Arabia, Argentina, Botswana, Brazil, Chile, Costa Rica, United Arab Emirates, Gabon, Kuwait, Maldives, Mexico, Peru, Sierra Leona.

Another relevant issue, which also appears in the text of the Resolution, concerns the object to be negotiated, that is, the so-called "scope" of the future international treaty. Resolution 26/9 makes it clear that it aims at the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights". Its footnote[10] clarifies that, the term "other business" refers to all corporations whose operational activities are transnational in nature and does not apply to local companies registered under the relevant national legislation".

It is clear, therefore, that what is at stake is the drafting of a legally binding international instrument that regulates so-called "corporations with transnational character activities" in relation to human rights, and not all business. Herein lies the essential point of discussion of this work and from which some conclusions could already be drawn, such as:

1. The text of Resolution 26/9/2014 in its footnote is clear that the international instrument should not be aimed at "all business";

2.A review of the different stages of the so called "International Business and Human Rights Agenda" shows that the main motivation behind the incorporation of this theme by different bodies of the Organization was the debate on the need to better understand the way transnational corporations operate, to identify and conceptualize them, in order to better regulate them, so that violations or "negative impacts" arising from their actions in relation to human rights could be avoided, or at the very least mitigated, inhibiting the state of chronic impunity that was repeatedly denounced as beneficial to such economic entities;

3. The previous point brings us back to the fundamentals of interpreting international treaties, described in article 32 of the Vienna Convention on the Law of Treaties, 1969, and widely discussed by internationalist authors, as well as recognized by the International Court of Justice itself, when it argues that when there is doubt about the wording of international treaty provisions, recourse should be had to the texts of the negotiations, especially their various preparatory instruments, in order to reveal the will of the actors involved in the negotiation process at the time it began. And there is no doubt that the negotiation takes place with regard to transnational corporations, or those that conduct activities of a transnational character," according to the footnote to Resolution 26/9.

The major factor causing turbulence regarding this specific issue would be the attachment to the Guiding Principles on Business and Human Rights and their consensual adoption, which is now defended as a "shared language" and almost insurmountable, especially by organizations defending business interests and the countries that own the headquarters of transnational corporations, which claim that the content of the Principles should be practically replicated in the text of the Treaty, inhibiting any advances or innovations, even when they are favorable to guaranteeing human rights. You see, such a maneuver makes no sense at all, not least because the approval of Resolution 26/9 in 2014 was achieved precisely because of the diagnosis of the Principles insufficiency, thus

[10] Footnote 1 of the Human Rights Council Resolution "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", A/HRC/RES/26/9 (24 June 2014), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

inaugurating an autonomous process, conducted by a new Open-ended Intergovernmental Working Group[11] ;

4 It is essential to point out that the Human Rights Council, created in 2006 and maintained in the hope that it will one day become an autonomous body, is of relevant political and programmatic importance within the Organization, forming part of the so-called "Global System". In other words, it is more important than the old Committee, since it is now linked to the United Nations General Assembly and has other instruments for monitoring human rights violations by member states. Thus, as it is a human rights body, it must follow, as its primary foundation, the logic and precedents that exist internationally, regarding the defense of such rights. In other words, in the event of doubts about the provisions to be used or the interpretations adopted, those most favorable to human rights, and therefore to those affected by such violations, must always prevail.

Despite the clarity of the footnote and the other arguments presented above, the European Union tried to block the continuation of the negotiations on several occasions during the first sessions, claiming that either the scope of the treaty would be changed to "all business", or the text could not be negotiated effectively.

The pressure was so strong that, in 2019, Draft 1, presented by the Ecuadorian presidency, changes the scope of the Treaty, including not only transnational corporations but "all business", which constitutes a flagrant breach of Res 26/9.

And why could broadening the scope of the international instrument weaken it? There have already been warnings about the negative effects of broadening the scope of the Treaty, which could cost more negotiating time and even jeopardize its approval (Correa, C.M, 2016). On the other hand, there would be the risk of producing a more generic text, which could also lead to less in-depth definition of key aspects regarding the logic of transnational corporations activities, which needs further study and regulation. In addition to flagrantly disregarding the provisions of Resolution 26/9, as already explained.

In fact, following the presentation of Draft1 in 2019, and the extension of the scope of the Treaty to "all business", there has been a growing tendency to deepen a so-called "state-centric" logic, i.e. there has been a lack of detail on extraterritorial resources or mechanisms, in addition to the non-attribution of human rights direct obligations to transnational corporations, and, above all, there has been a greater reliance on the capacity of states to regulate companies. A certain "nationalization" of the proposals for the future Treaty, including the removal, also in Draft 1, of the expression "value chain" from the definition of corporate activities that are established across national borders.

[11] It is interesting to mention an attempt by the United States to boycott the treaty negotiation process during the third negotiating session. Absent from the discussions in room XX of the Human Rights Council, they appeared almost at the end of the session, claiming a biased interpretation of Resolution 26/9 regarding the duration of the Working Group's mandate. They argued that it should only last until the first three sessions. It was therefore necessary to adopt a new Resolution. The Secretariat of the Human Rights Council was consulted and attested that the term "Open-Ended" referred precisely to the possibility of maintaining the mandate of the Working Group until the conclusion of its objective, that is, through the conclusion of the negotiation of the Treaty. This is an example of how the interpretation of terms and provisions are manipulated and used politically in order to undermine or weaken the drafting of the international instrument.

Those are part of a set of obstacles that would distance the text of the Treaty from its initial objective, and consequently jeopardize efforts to clarify the real pattern of transnational corporations, primarily in territories of the Global South, which intrinsically includes a repeated dynamic of human rights violations. One aspect that has made the negotiations even more difficult has unfortunately been the conduct of the presidency. Ecuador has failed to be transparent about the criteria for adopting proposals for the text; it has underestimated the contributions of the majority of civil society organizations; it has presented its own Chair's Draft project, which has caused too much turmoil in the last negotiating session and has been the target of severe criticism that has almost prevented the ninth session from going ahead, and now it has even changed the date of the tenth round, moving it to December, making it impossible for many organizations, especially from the global South, to attend.

As you can see, it's a challenging process, which is facing a lot of resistance from the economic and political power of the states that are home to transnational corporations and their business representatives. One fact that cannot be ignored is that various states from the Global South, social movements, civil society organizations, representatives of those affected, have actively participated in the process up to now, with proposals defended by various experts on the subject, internationalists, consultants, who make the viability and historical sense of their demands very clear. For the most part, these positions represent significant advances in the protection of human rights in the conduct of business, especially transnational corporations. And, in a space for the defense of human rights, in the face of the advance of more protective frameworks, these must always prevail.

But how could we conceptualize transnational corporations? Although it is clear that the mandate of the Resolution 26/9 should not cover the attempt to regulate “all business”, how best to define its true object? As already mentioned, from the wording of the footnote to Resolution 26/9 of 2014, it is a question of understanding the “transnational nature of business activity”, which must be regulated in terms of human rights. Regardless of the nature of its registration in the legal system where it was created, even if it is registered as a “national corporation”. We will try to describe below some of the central aspects of this economic activity that is becoming transnationalized.

4. The transnational character

Tchenna Maso, in her doctoral thesis entitled “A arquitetura da impunidade das empresas transnacionais de mineração no Brasil: expropriação, dependência e violação dos direitos humanos”, defended at the Federal University of Paraná (UFPR) this year, cites Isa (2011); Teitelbaum (2012); Dowbor (2017); Verger (2003); Ornelas (2017); Whitmore and Barbesgaard (2022) and Bakan (2020), among others, in order to demonstrate the strategy of productive organization adopted by Transnational Corporations (TNCs) that assume this transnational character, made possible by advances in the global technological and financial architecture, with the aim of obtaining greater competitiveness, as well as a great concentration of economic and political power, associated with

the benefit of lowering, or not applying, standards, both national and international, for the protection of human rights.

Isa (2011), for example, points out that transnational corporations are one of the main economic agents, both in terms of the volume of their activities and their influence on different aspects of economic and social life. The process of globalization would have been an enabling element in achieving this dominance of world development, achieving an unprecedented level of global integration.

Teitelbaum (2012) highlights the period in the second half of the 20th century, transformed by the technological revolution, when financial capitalism took on a hegemonic role, and the ETNs became "the basic structure of the global economic and financial system and replaced the 'free' market as the method of organizing international trade". In turn, Dowbor (2017) points to competition as the driving force behind the concentration of capital, stating that for decades the ETNs continued to constantly compete for markets, until production chains became concentrated in the hands of a few corporations.

This strategy of "uniting" or "working together", as Dowbor (2017) points out, favors the generation of great economic, political and cultural power, the limits of which, on the current scale, are still unknown to us. However, although ETNs have increasingly concentrated company structures, mergers do not imply that they become larger, but rather that the union allows them to decentralize activities, such as outsourcing labour, infrastructure and the organization of production itself in global value chains. As a rule, according to Verger (2003), the tendency towards monopoly in many cases allows corporations to outsource production activities and focus on marketing and distributing dividends to shareholders.

Finally, Ornelas (2017) attests that the "transnationalized" organization of the ETN is a competitive advantage that allows for diversity in production allocation. This consists of setting up several subsidiaries and subcontractors along the global value chain to reduce production costs, especially in the Global South, where it will also seek to benefit from regulatory inequalities.

In fact, the initial stage of the production or value chain is the stage where the merchandise has the least added value, which generally implies less economic capacity and less power to influence the other links. The agents involved in the initial stages are usually subject to pressure from those closer to the top of the chain, where the goods have already undergone processes of transformation and added value (Giovanaz, D. de Pinho, M.H, Casara, M, 2024).

Leading companies are those that control the flow of capital or the final marketing of goods, with the ability to direct or condition the actions of the lower links in order to meet their needs. Although each economic sector has its own unique dynamics, interdependence and unequal power between the links are common characteristics of all production or value chains[12]. The actors at the top condition, to a greater or lesser degree, the values paid to the others (Giovanaz, D. de Pinho, M.H, Casara, M, 2024).

[12] The terminology "production chains" refers to all the stages and entities that contribute to the production of goods, products or services, while the term "value chain" can be considered broader in comparison, because it encompasses any stage of economic activity that can contribute to attributing "value" to the final product, good or service.

It should be noted, according to Sarti and Hiratuka (2010), that the decentralization of production chains almost always occurs in a hierarchical and selective way: the largest share of added value tends to remain at the headquarters of the leading companies. In general, only the production stages closest to the bottom of the chain are outsourced, reinforcing inequalities between countries.

However, as Dowbor (2017) points out, the corporate network is so pulverized that we are unable to identify the concentration of power, which is precisely concealed in what Tchenna Maso (2024) rightly identifies as the "corporate veil of global value chains", which, in order to be identified and allow for potential accountability in the event of human rights violations, requires access to information that is generally the property of the corporations themselves. Although the ETNs defend the transparency associated with their actions, this leaves out, as Maso (2024) mentions, the profits they make, the state subsidies they receive, stock exchange trading and other essential data.

Drawing on Verger (2003), Maso (2024) sheds light on the strategies adopted by corporations to maintain power, such as: the technological strategies used to increase production and the accumulation of knowledge; the appropriation of innovations through patents, through which knowledge is captured, purchased and reinvented, protected by the Agreement on the Aspects of Property Rights; flexibility in the choice of production models, in the forms of contracting, in the diversification of sectors; many corporations operate in completely different sectors; the practice of tax evasion, bribery and corruption; investments in advertising to promote the brand and its sustainability; the organization of the business activities.

An aggravating factor that hinders attempts to hold these actors accountable, immersed in this "transnational character", is the huge number of shareholders/"owners", which are generally investment funds made up of another immeasurable number of "owners". Maso (2024) cites the example of three investment funds, Blackrock, State Street and Vanguart Group, which control 22 trillion in assets, slightly less than the 24 trillion that represents the US GDP, and more than the Chinese GDP of 17.73 trillion.

Added to this scenario is the fact that financial actors, such as investment companies and development banks, have become important players in the production of minerals or other commodities, creating a market for speculating on reserves and deposits, especially in the race for minerals in the energy transition. These financial organizations are not transparent and make it difficult to monitor flows and account for financial transactions that violate human rights. Some high-tech companies collect information on mineral reserves, raw materials in general and communities, ensuring a competitive advantage over competitors. In short, as Maso (2024) rightly states, the concentration of corporate control over mineral production, for example, financial speculation, supported by the state, undermines the exercise of community rights, resulting in the creation of new problems, new human rights violations.

Bakan (2020) helps to portray the reconfiguration of corporate power and to re-dimension it today as another model of corporation. The author identifies a new movement by corporations, in which they use their reputation and position in the local and international power structure to "convince" the world that they are the benefactors, the aforementioned "agents and guarantors of development". The key to the issue, as Maso (2004) illustrates, is that by occupying the social

position of guardians, transnational companies, or those with this "transnational character" do not need to be controlled, i.e. inspected, regulated and, ideally, held accountable.

In his comments on the "Elements" document, Olivier De Schutter (2017) had already highlighted the importance of giving this interpretation to the scope of the future international instrument. In other words, it is a question of regulating the corporations whose operations are transnational, regardless of their legal registration.

So, as De Schutter states (2017) the scope of the future Treaty is rightly more based on the transnational nature of the activity than on the nature of the corporation itself:

> "in other terms, it is to the extent that the corporation develops its economic activities across different national jurisdictions (by one company buying shares in other companies, domiciled in other countries, by licensing of franchisee agreements, or by contracting with suppliers or sub-contractors located in other jurisdictions) that the future TBHR shall be of relevance to those activities".

De Schutter (2017) goes on to say that this is a constructive approach, which in fact acknowledges that, from the legal point of view, the distinction between transnational corporations and other business enterprises does not pass scrutiny: "TNCs are simple networks of distinct companies (each of which is domiciled in a national jurisdiction), more or less tightly connected to one another by investment or contractual links, and that follow a global strategy under a more or less integrated leadership structure".

Thus, with regard to the negotiation of the Treaty objectively, it is important to adopt the proposals that best reflect the transnational nature of the operations, enabling a wider range of monitoring for the prevention of human rights violations, and possible attribution of responsibilities to those with the greatest capacity to provide fair and full reparation to those affected.

Here are some examples of contributions to Draft 4 that could reflect this logic. Regarding "definitions" part, Article 1 of the text, in its paragraph 4, related to "Business activities" (1.4), we present a specific suggestion. We have defended at every session the need to provide for joint and several liability along the value chain, along with maintaining the scope of Resolution 26/9 and therefore the scope of the Treaty. On this basis, we could support the proposal endorsed by Côte d'Ivoire (on behalf of the African Group), Ghana, South Africa, Egypt, Colombia, Cameroon, Malawi, Bolivia and Honduras, which restricts its definition to the activities of Transnational Corporations, regardless of their nature and including financial institutions, and describes the extent of the value chain. They propose:

> "1.4 "Business activities" means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by transnational corporations and other business enterprises of transnational character, which can be private, public or mix, including financial institutions and investment funds or joint ventures. This includes activities undertaken by electronic means. (Côte d'Ivoire (on behalf of African Group), Ghana, South Africa, Egypt, Colombia, Cameroon, Malawi, Bolivia, Honduras)".

In addition, the following paragraph deals with "Business Relationship" (1.6) which should include the whole value chain as mentioned before and the same parameters already set on the previous definition. In this regard, Brazil's proposal can be seen as complementary:

> "1.6 "Business relationship" refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, and that of financial institutions or any other structure or relationship, including throughout their value chains, as provided under the domestic law of the State, including activities undertaken by electronic means. (Brazil)".

Therefore, there is no doubt or space for divergent interpretations as we should focus on regulating transnational corporations. Regarding the reach of all TNCs and its accountability when the violation occurs inside their global value chain, the scope of the treaty should be clear and include financial institutions and their subsidiaries, branches, subcontractors or suppliers.

Based on that, we could endorse the proposal made by Ghana, South Africa and Egypt which includes their value chain and it is precise about the reach of transnational corporations instead of all business:

> "3.1 This (Legally Binding Instrument) shall apply to transnational corporations and other business enterprises of a transnational character including across their value chains of a transnational character. (Ghana, South Africa, Egypt)".

In short, the rationale is always to adopt the proposal with the greatest potential to protect those affected, recognizing the grey and still imponderable areas of corporate strategies to evade national and international human rights regulatory frameworks.

5. Conclusion

We note that the road to holding corporations, especially transnational corporations, accountable for human rights violations is long and fraught with obstacles. To a large extent, there is enormous resistance to the binding attribution of human rights guidelines to business activity. Several efforts have been undertaken, with the fundamental participation of civil society organizations, social movements, academic centers and representatives of those affected.

The strengthening of new actors on the international stage - such as TNCs - demands a creative approach capable of protecting human rights in the face of the growing degree of interference by capital in international relations. From this new approach, it is understood that TNCs are subjects of rights and duties, liable to international accountability for human rights violations. This responsibility derives from the very moral foundation of human rights which, by virtue of existing treaties on the subject, oblige states and third parties to respect these rights. The asymmetry between transnational capital and civil society creates a scenario that makes the second party vulnerable and therefore requires the consolidation of binding human rights standards for TNCs.

And in order to fulfill its objective as a human rights treaty that truly addresses the regulatory gaps of these economic actors, who are often more powerful than the states themselves, and who benefit from a framework of structural impunity in relation to human rights violations, it is essential to adopt the contributions that best dialogue with the objectives established with the approval of Resolution 26/9. In other words, unraveling the nature of transnational character, regulating it, escaping formal legal traps, such as just the designation of a legal register, in order to deal with the complexity of what is happening and affecting, especially territories in the Global South, without a prevention and accountability capacity to match, for more than 40 years, as denounced by the then president of Chile, Salvador Allende.

REFERÊNCIAS BIBLIOGRÁFICAS | REFERENCES | REFERENCIAS

BAKAN, Joel. The new corporation: how good corporations are bad for democracy. 2020.

CORREA, Carlos M. Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights. South Centre Policy Brief, Genebra, n. 28, p.1-5, 2016.

DE SCHUTTER, Oliver. Towards a New Treaty on Business and Human Rights. Business and Human Rights Journal, v. 1, n. 1, p. 41 – 67, 2015.

DE SCHUTTER, Olivier. The Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights: A Comment. 2017. Avaiable at: :https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/OlivierDeSchutterSubject3.pdf.

DEVA, S. Corporate human rights violations: A case for extraterritorial regulation. Handbook of the Philosophical Foundation of Business Ethics. New York, 2012.

DIEZ DE VELASCO, Manuel. Instituciones de Derecho Internacional Público. 11. ed. Madrid: Tecnos, 1997.

DOWBOR, Ladislau. A era do capital improdutivo: por que oito famílias têm mais riqueza do que a metade da população do mundo? São Paulo: Autonomia Literária, 2017.

GIOVANAZ, D.DE PINHO, M. H. MARQUES, C. Investigação de cadeias produtivas. Como responsabilizar empresas que se beneficiam de violações de direitos humanos. Florianópolis: Editora Construtores de Memórias, 2024.

GLECKMAN, Harris. Multi-stalkeholder governance: a corporate push for a new form of global governance. Amsterdã: Transnational Institute, 2016.

GUAMÁN, A. MORENO, G. El fin de la impunidad. La lucha por un instrumento vinculante sobre empresas transnacionales y derechos humanos. Ulzama: Icaria editorial, 2017.

HOMA – CENTRO DE DIREITOS HUMANOS E EMPRESAS. O Brasil precisa de uma lei marco de direitos humanos e empresas. São Paulo: Friedrich Ebert Stiftung, 2021.

HOMA – CENTRO DE DIREITOS HUMANOS E EMPRESAS. Outros instrumentos normativos de devida diligência. Homa, 20 de dezembro de 2022. Disponível em: https://homacdhe.com/index.php/2022/12/20/outros-instrumentos-normativos-de-devida diligencia/.

HOMA – CENTRO DE DIREITOS HUMANOS E EMPRESAS. Planos Nacionais de Ação sobre direitos humanos e empresas: contribuições para a realidade brasileira. 2016. Disponível em:

https://homacdhe.com/wp-content/uploads/2016/01/Perspectivas-Gerais sobre-os-Planos-Nacionais-de-Ac%CC%A7a%CC%83o-sobre-Empresas-e-Direitos Humanos.pdf.
https://homacdhe.com/index.php/2022/12/20/outros-instrumentos-normativos de-devida-diligencia/.

ICJ, International Commission of Jurists. Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises. Genebra, 2016.

ISA, F. Gómez.F. Empresas transnacionales y derechos humanos: desarrollos recientes. Lan Harremanak - Revista De Relaciones Laborales, 2011 https://doi.org/10.1387/lan harremanak.4470.

MASO, F. T. A arquitetura da impunidade das empresas transnacionais de mineração no Brasil: expropriação, dependência e violação dos direitos humanos. (Tese de Doutorado. (PHD thesis.) Programa de Pós-Graduação em Direito da UFPR. Curitiba, 2024.

ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Genebra: Nações Unidas, 2003. Avaiable at: <http://hrlibrary.umn.edu/links/res2003-16.html>.

ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS Resolução A/HRC/RES/8/7 do Conselho de Direitos Humanos. Genebra: Nações Unidas, 2008. Avaiable at: <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf>.

_ ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS _____. Guiding Principles on Business and Human Rights: implementing the United Nations 'Protect, Respect and Remedy' framework. Nova Iorque e Genebra: Nações Unidas, 2011.

_ ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS _____. Resolução A/HRC/17/31 do Conselho de Direitos Humanos das Nações Unidas. Genebra: Nações Unidas, 2011a. Avaiable at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf>.

_ ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS _ Resolução A/HRC/RES/17/4 do Conselho de Direitos Humanos das Nações Unidas. Genebra: Nações Unidas, 2011b Avaiable at : <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4> . Acesso em: 4 Abr. 2017.

____ ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS __.Resolução A/HRC/20/29 do Conselho de Direitos Humanos das Nações Unidas. Genebra, 2012. Avaiable at: <http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29_en.pdf>.

____ ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Resolução A/HRC/RES/26/9 do Conselho de Direitos Humanos das Nações Unidas. Genebra: Nações Unidas, 2014. Avaiable at: <https://www.ihrb.org/pdf/G1408252.pdf>.

_____ ONU, ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Resolução A/HRC/RES/26/22 do Conselho de Direitos Humanos das Nações Unidas. Genebra: Nações Unidas, 2014a. Avaiable at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/083/82/PDF/G1408382.pdf?OpenElement>.

ORNELAS, Raúl. Towards a Political Economy of Competition: Transnational Companies. Prob. Des, Ciudad de México , v. 48, n. 189, p. 9-32, jun. 2017 . Disponible en . accedido en 30 mayo 2023.

ROLAND, M. C., ARAGÃO, D. M., ANGELUCCI, P. D., Neto, A. A., GALIL G. C. & LELIS, R. C.. Desafios e perspectivas para a construção de um instrumento jurídico vinculante em direitos humanos e empresas. REVISTA DIREITO GV | SÃO PAULO, 14 (2), p. 393-417, 2018.

ROLAND, Manoela C; FARIA JR., Luiz Carlos S; JÚLIO, Kaliandra Casatti; CASTRO, João Luís lobo Monteiro de. Planos Nacionais de Ação sobre Empresas e Direitos Humanos na América

Latina: Análises sobre Colômbia, México e Chile. In: Cadernos de Pesquisa Homa, vol 1, n.4, 2018b

ROLAND, Manoela C;. Supply chains and the impacts on the discussions on Human Rights and Business.In: Cadernos de Pesquisa Homa N.5, Vol. 2018c .Avaiable at: http://homacdhe.com/wpcontent/uploads/2018/10/Cadernos-de-pesquisa-Homa-Cadeias-de-Valor-EN.pdf.

ROLAND, M. C., SOARES, A. O., BREGA, G. R., BRAGA, L. D., CARVALHO, M. F. C. G. & ROCHA, R. P. Draft One Analysis. (2019). Cadernos de Pesquisa Homa, 2 (8). Available at: http://homacdhe.com/wp-content/uploads/2020/01/An%C3%A1lise-do-Draft-One-EN.pdf.

SARTI, F. HIRATUKA, C. Perspectivas de investimento na indústria. Rio de Janeiro: Synergia: UFRJ, Instituto de Economia; Campinas: UNICAMP, Instituto de Economia, 2010.

TEITELBAUM, A. Empresa Transnacional. In: Diccionario Critico de las empresas transnacionales. Madrid: OMAL, Observatorio de Multinacionales en la America Latina, 2012.

VERGER, Antoni. El sutil poder de las transnacionales: lógica, funcionamento e impacto de las grandes empresas en un mundo globalizado. Barcelona: Icaria, 2003.

WHITMORE, Andy; BARBESGAARD, Mads. Smoke and minerals: how the mining industry plans to profit the energy transition. Amsterdã/Londres: TNI/London Mining Network, junho de 2022.

WÜNSCH, Marina Sanches. Empresas transnacionais e direitos humanos: desafios jurídicos e sociais a partir do direito internacional. Tese. Programa de Pós-graduação em Estudos Estratégicos Internacional da Faculdade de Ciências Econômicas da UFRGS, Porto Alegre, 2019.

ZHOURI, A., & OLIVEIRA, R. O desastre do Rio Doce: entre as políticas de reparação e a gestão das afetações. Mineração: violências e resistências: um campo aberto à produção de conhecimento no Brasil., 1, 28–64. Marabá, PA: Editorial iGuana; BA.2018.

ZUBIZARRETA, J.H. El tratado internacional de los pueblos para el control de las empresas transnacionales. Una análisis desde la sociologia jurídica. Madrid: Paz con Dignidad y OMAL, 2017.

ZUBIZARRETA, J. H; RAMIRO, P. Against the 'Lex Mercatoria': proposals and alternatives for controlling transnational corporations. Madrid: OMAL, 2016.

Manoela Carneiro Roland
Pós doutora em Direito Internacional pela UERJ, Professora na Universidade Federal de Juiz de Fora

http://lattes.cnpq.br/9201858582291121

E-mail manoelaroland@gmail.com

Instagram & Twitter | @HomaPublicaDHE

periodicos.ufjf.br/index.php/homa/